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for Champion. Hon. Kamuket
July 2021 afternoon.
A.M.M.M

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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT- FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

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

(Legal Notice No. 54 of 2021)

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 01 JUL 2021	DAY: THURSDAY
TABLED BY:	CHAIR, SELECT COMMITTEE ON DELEGATED LEGISLATION HON. WILLIAM KAMUKET, MP
CLERK-AT THE TABLE:	Ahmed Khadhi

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



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ABBREVIATIONS

EFAB	Equalisation Fund Advisory Board
L.N.	Legal Notice
PFM	Public Finance Management
SI	Statutory Instrument
SO	Standing Order

CHAIRPERSON'S FOREWORD

The Public Finance Management (Equalisation Fund Administration) Regulations, 2021 were made by the Hon. (Amb) Ukur Yattani, EGH, Cabinet Secretary of the National Treasury & Planning, pursuant to section 205 (1) of the Public Finance Management Act, 2012 which empowers the Cabinet Secretary to make Regulations. These Regulations require Parliament's approval before they take effect.

The Regulations were published in the Kenya Gazette on 29th April, 2021, vide Legal Notice No. 54 of 2021, submitted to the Clerk of the National Assembly on 4th May, 2021 and subsequently laid in the House on 11th May, 2021.

The Regulations mainly seek to provide guidance on the administration and management of the Equalisation Fund whose operations were halted by a court order on 5th November, 2019 following Petition No. 292 of 2016. The court order disbanded the Equalisation Fund Advisory Board (EFAB) and any further expenditure from Equalisation Fund.

These Regulations will ensure that stalled projects are completed and new ones initiated as envisaged by Article 204 of the Constitution in order to bring the quality of those areas to the level generally enjoyed by the rest of the nation, so far as possible.

In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held consultations with Hon. (Amb.) Ukur Yattani, EGH, the Cabinet Secretary for the National Treasury & Planning on 27th May, 2021 in Mombasa to deliberate on this matter.

Having examined the Regulations against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*), the Public Finance Management Act (*No. 18 of 2012*) and the Statutory Instruments Act (*No. 23 of 2013*), the Committee was satisfied that the Regulations were submitted to the National Assembly within the statutory timelines stipulated in section 11 of the Statutory Instruments Act, 2013.

The Committee was also satisfied with the extent of public participation undertaken as required by Articles 10 and 118 of the Constitution and sections 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210.

With the foregoing, therefore, the Committee approved the Regulations in accordance with Standing Order 210 (4) (a) and section 205 (1) of the Public Finance Management Act (*No. 18 of 2012*) which requires the approval of the National Assembly.

In conclusion, I wish to thank the Speaker and the Office of the Clerk of the National Assembly most sincerely 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 section 205(1) of the Public Finance Management Act (*No. 18 of 2012*) and Standing Order No.199, it is my pleasure and duty to present to the House, the Committee's **Report on the Consideration of the Public Finance Management (Equalisation Fund Administration) Regulations, 2021 (L.N. No. 54 of 2021)**

HON. WILLIAM KASSAIT KAMKET, M.P.

Committee on Delegated Legislation: Report on the Consideration of the Public Finance Management (Equalisation Fund Administration) Regulations, 2021 (Legal Notice No. 54 of 2021)

1.0 PREFACE

1.0 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 accordance 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.

1.1 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. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

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

Nominated

Jubilee Party

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

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

Funyula Constituency

Orange Democratic Movement

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

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

Tharaka Constituency

Democratic Party

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

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. Edith Nyenze, M.P.
Kitui West Constituency
Wiper Democratic Movement – Kenya

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

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

1.2 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Ms. Cherotich Maritim
Senior Clerk Assistant (Team Leader)

Mr. Mohamed Jimale
Clerk Assistant II

Mr. Wilson Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Noelle Chelagat
Media Relations Officer II

Mr. Anthony Wamae
Assistant Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Ms. Mary Otieno
Office Superintendent

2.0 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (EQUALISATION FUND ADMINISTRATION) REGULATIONS, 2021

2.0 Introduction

5. The Public Finance Management (Equalisation Fund Administration) Regulations, 2021, were made by the Hon. (Amb) Ukur Yattani, EGH, Cabinet Secretary of the National Treasury & Planning, pursuant to section 205 (1) of the Public Finance Management Act, 2012 which empowers the Cabinet Secretary to make Regulations establishing public Funds.
6. The Regulations were published in the Kenya Gazette on 29th April, 2021, vide Legal Notice No. 54 of 2021, submitted to the Clerk of the National Assembly on 4th May, 2021 and subsequently laid in the House on 11th May, 2021.

2.1 Legislative Context

7. The Equalisation Fund was established under Article 204 (1) of the Constitution which requires that one half per cent (0.5%) of all the revenue collected by the national government each year, calculated on the basis of the most recent audited revenues, as approved by the National Assembly, to be paid into the Fund. As a pre-condition to the utilization of the Equalisation Fund, Article 216(4) of the Constitution requires the Commission on Revenue Allocation to determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas.
8. Article 204 further provides that the National Government shall use the Equalisation Fund to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those areas to the level generally enjoyed by the rest of the nation, so far as possible.

2.2 Purpose of the Regulations

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

2.3 Overview of the Regulations

10. **Regulation 4** provides for the establishment of the **Equalisation Fund Advisory Board** comprising of –
 - a) the Chairperson who shall be appointed by the Cabinet Secretary;
 - b) the Principal Secretary to the National Treasury or his representative designated in writing;

- c) the Principal Secretary responsible for matters relating to devolution or his or her representative designated in writing;
 - d) one person from a pastoralist community nominated by the National Assembly;
 - e) one person nominated by the Senate;
 - f) one person nominated by the Council of Governors drawn from the areas defined as marginalised;
 - g) the Chief Executive Officer who shall be the secretary to the Board; and
 - h) three other persons nominated from organizations working in Equalisation fund beneficiary counties and special interest group, appointed by the Cabinet Secretary.
11. Regulations 5, 6,7 and 8 stipulates the qualification requirements of the Board Members, tenure of office, vacation of office and functions of the Board, respectively.
 12. Regulation 10 provides for expenses of the Board. Expenses are capped at three per cent (3%) of the annual approved Equalisation Fund allocation.
 13. Regulations 14, 16 and 18 establish the County Technical Committee, the Sub-County Technical Committee and the Project Identification and Implementation Committee, respectively;
 14. The Chief Executive Officer who is the head of the secretariat is established under Regulation 21. The officer will be appointed by the Cabinet Secretary.
 15. Any unutilised balances in the Equalisation Fund shall not lapse at the end of the financial year but shall be retained and used for the purposes for which the Equalisation Fund was established. (Regulation 30)
 16. Regulation 31 provides for the Winding up of the Fund.

2.4 Conferring with the Regulation Making Authority

17. In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held consultations with Hon. (Amb.) Ukur Yattani, EGH, the Cabinet Secretary for the National Treasury & Planning on 27th May, 2021 in Mombasa to deliberate on this matter.
18. The Cabinet Secretary informed the Committee that the Equalisation Fund was initially administered through the defunct Equalisation Fund Advisory Board (EFAB) as provided for in section 4.1 of Gazette Notice No 1711 dated 13th March, 2015. However, on 5th November 2019, the High Court declared the Equalisation Fund Guidelines unconstitutional, null and void, following Petition No. 292 of 2016. This in effect disbanded Equalisation Fund Advisory Board and any further expenditure from Equalisation Fund.
19. The National Treasury was directed to develop a statutory instrument on the administration of the Equalisation Fund and it is on this basis that PFM (Equalisation Fund Administration) Regulations, 2021 were developed and have since been approved by Cabinet, published and awaiting Parliamentary approval.

2.4.1 Disbursements from the Equalisation Fund

20. The disbursements so far made are based on the First Policy on marginalization which identified fourteen (14) Counties as marginalized areas. The Policy also recommended the criteria for sharing revenue among the 14 marginalized Counties and had a time horizon of three financial years, i.e., 2014/15, 2015/16 and 2016/17.

21. The Equalisation Fund entitlement since promulgation of the Constitution 2010 is as shown in Table 1 below: -

Table 1: Equalisation Fund entitlement and allocation since inception

S/No.	Financial Year	Most recent audited revenues approved by the National Assembly		Equalisation Fund Allocation (Kshs.)	Equalisation Fund Entitlement (0.5% of most recent audited and approved revenues) (Kshs.)
		Base Year for most recent audited revenues approved by National Assembly	Audited and approved revenues by National Assembly (Kshs.)		
		(a)	(b)		
1	2011/12	2008/2009	468,151,970,000	0	2,340,759,850
2	2012/13	2009/2010	529,300,000,000	0	2,646,500,000
3	2013/14	2010/2010	529,300,000,000	0	2,646,500,000
4	2014/15	2012/2013	776,900,000,000	400,000,000	3,884,500,000
5	2015/16	2012/2013	776,900,000,000	6,000,000,000	3,884,500,000
6	2016/17	2013/2014	935,600,000,000	6,000,000,000	4,678,000,000
7	2017/18	2013/2014	935,600,000,000	0.0	4,678,000,000.00
8	2018/19	2013/2014	935,600,000,000.00	0.0	4,678,000,000
9	2019/20	2014/2015	1,038,035,000,000.00	0.0	5,190,175,000.00
Total amount due to Equalisation Fund			15,345,786,970	12,400,000,000	34,626,934,850

Notes

1. There was no allocation in the first three FYs i.e., 2011/12, 2012/13 and 2013/14 since the First Policy identifying the marginalized areas had not been put in place by the Commission on Revenue Allocation.
2. The total funds appropriated are **Ksh.12.4 billion** in the Equalisation Fund Appropriation Act, 2017 and the balances on the same in the Equalisation Fund Appropriation Act, 2018 for that financial year .

22. Based on the two appropriations, the National Treasury had at 31st May, 2021 disbursed a total of **Ksh.10,346,573,051** to Ministries, State Departments and Agencies implementing the identified projects in the 14 marginalized Counties.

2.4.2 Status of Implementation of Projects in 14 Counties (First Policy)

23. Projects identified for funding from the Equalisation Fund in the 14 Counties and based on the First Policy on marginalization were to be financed from entitlements to the Equalisation Fund of the financial years 2014/15, 2015/16 & 2016/17 and as appropriated in Equalisation Appropriation Act, 2017 and Equalisation Appropriation Act, 2018 to their completion. As such, projects were only identified once based on the First Policy in the FY 2016 and the same have been under implementation since then.

24. New projects will only be identified based on the Second Policy on marginalization and once the PFM (Equalisation Fund Administration) Regulations 2021 are approved by Parliament. Thirty-four (34) Counties are envisaged to be funded in the Second Policy.

2.4.3 Status of all the Equalisation Fund Projects to date

Implementing MDA	No. of Projects	Tendering/ Awarded	Stalled/Not started	Inception	< 50%	50%-75%	76%-99%	100% (completed)
Ministry of Health	84	11	2	0	7	19	35	10
State Department for Infrastructure; through KeRRA	84	7	8	0	8	22	12	27
State Department for Irrigation	24	0	0	0	0	1	2	21
Ministry Water and Sanitation	128	0	6	0	30	20	35	37
State Department for Technical and Vocational Training	2	0	0	0	1	1	0	0
State Department of Early Learning Basic Education	10	0	0	10	0	0	0	0
Ministry of Energy	20	0	3	0	0	0	0	17
TOTAL	352	18	19	10	46	63	84	112

2.4.4 Second Policy Beneficiaries – 34 Counties

25. The beneficiaries of the Second Policy Equalisation Funds are as follows –

No.	County	Constituencies
1.	Baringo	Baringo North, Baringo South, Mogotio, Tiaty
2.	Bomet	Chepalungu
3.	Bungoma	Mt Elgon
4.	Busia	Budalangi, Teso North
5.	Elgeyo Marakwet	Keiyo South, Marakwet East, Marakwet West
6.	Garissa	Balambala, Dadaab, Fafi, Garissa Township, Ijara, Lagdera
7.	Homa Bay	Homa Bay Town, Ndhiwa, Suba North, Suba South
8.	Isiolo	Isiolo North, Isiolo South
9.	Kajiado	Kajiado Central, Kajiado South, Kajiado West
10.	Kericho	Bureti, Kipkelion West, Sigowet/Soin
11.	Kilifi	Ganze, Kaloleni, Kilifi North, Magarini, Malindi, Rabai
12.	Kisumu	Muhoroni, Nyando
13.	Kitui	Kitui East, Kitui South, Mwingi Central, Mwingi North
14.	Kwale	Kinango, Lunga Lunga, Matuga, Msambweni
15.	Laikipia	Laikipia North, Laikipia West
16.	Lamu	Lamu East, Lamu West
17.	Machakos	Masinga
18.	Mandera	Banissa, Lafey, Mandera East, Mandera North, Mandera South, Mandera West
19.	Marsabit	Laisamis, Moyale, North Horr, Saku
20.	Meru	Igembe South, South Imenti, Tigania East
21.	Migori	Kuria West, Nyatike, Suna West, Uriri
22.	Muranga	Gatanga
23.	Nakuru	Rongai
24.	Nandi	Nandi Hills, Tinderet
25.	Narok	Emurua Dikirr, Kilgoris, Narok East, Narok North, Narok South, Narok West

26.	Samburu	Samburu East, Samburu North, Samburu West
27.	Siaya	Bondo, Gem, Rarieda
28.	Taita Taveta	Taveta, Voi
29.	Tana River	Bura, Galole, Garsen
30.	Tharaka Nithi	Maara, Tharaka
31.	Trans Nzoia	Endebess
32.	Turkana	Loima, Turkana Central, Turkana East, Turkana North, Turkana South, Turkana West
33.	Wajir	Eldas, Tarbaj, Wajir East, Wajir North, Wajir South, Wajir West
34.	West Pokot	Kacheliba, Kapenguria, Pokot South, Sigor

2.5 Committee's Concerns

35. The Committee raised the following concerns with the Cabinet Secretary, National Treasury –
- i. THAT, approval of the Regulations will ensure the implementation of the Equalisation Fund as envisioned in Article 204 of the Constitution of Kenya, 2010.
 - ii. THAT, the approval and operationalisation of the Regulations will ensure the **completion of 352 projects spread across the fourteen (14) marginalized Counties identified in the First Policy and payment of pending bills of approximately Kshs. 1.2 billion which have been outstanding since 2019.**
 - iii. THAT, there is need for the Commission of Revenue Allocation to further review the Policy and Criteria for Sharing Revenue among Marginalised Areas to allow for marginalised areas which were left out of the First and Second Policies to benefit from the Fund.
 - iv. THAT, approval of the Regulations will ensure implementation of the Kshs. 6.8billion allocated to the Equalisation Fund for the FY 2021/2022.
 - v. THAT, Article 204 (6) of the Constitution of Kenya gives the Equalisation Fund a lifespan of twenty (20) years, subject to Parliament enacting legislation to extend its operationalization by a maximum of six (6) years. This implies that the Fund has only 9 years before it lapses, and it is therefore imperative that the Fund is operationalized without further delay.
 - vi. THAT, the current model is bureaucratic and may result in project delays. The Cabinet Secretary informed the Committee that it was not possible to manage the Fund through the CDF-model since it was challenged by the Petitioners in Petition No. 292 of 2016.

3.0 COMMITTEE OBSERVATIONS

36. Having examined the Public Finance Management (Equalisation Fund Administration) Regulations, 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap. 2), the Public Finance Management Act (No 18 of 2012) and the Statutory Instruments Act (No 23 of 2013), the Committee made the following observations –

3.1 Statutory Timelines

1) **THAT**, the Regulations were published in the Kenya Gazette on 29th April, 2021, vide Legal Notice No. 54 of 2021, submitted to the Clerk of the National Assembly on 4th May, 2021 and subsequently laid in the House on 11th May, 2021.

3.2 Public Participation

2) **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.

3) During the scrutiny meeting held between the National Treasury and the Committee, the National Treasury demonstrated that it held extensive consultations with various stakeholders while preparing the Regulations; whose input was considered before finalization of the Regulations. Further that due to the Covid-19 requirements, most of the stakeholders' consultations were undertaken virtually.

4) The National Treasury also attached an Explanatory Memorandum with a schedule of persons with whom it consulted during their public participation exercises.

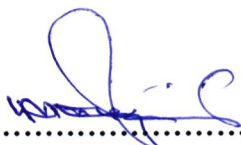
3.3 Regulatory Impact Statement

5) 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.

4.0 COMMITTEE RECOMMENDATION

37. Having examined the Public Finance Management (Equalisation Fund Administration) Regulations, 2021 (*Legal Notice No. 54 of 2021*) in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*), the Public Finance Management Act (*No 18 of 2012*) and the Statutory Instruments Act (*No 23 of 2013*), **the Committee recommends that the House approves the said statutory instrument in accordance with section 205 (1) of the Public Finance Management Act (*No. 18 of 2012*).**

Signed.....



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

Date.....

23rd June, 2021

ANNEXURES

- 1. Adoption Schedule**
- 2. Legal Notice No. 54 of 2021 and the Explanatory Memorandum**
- 3. Committee Minutes**

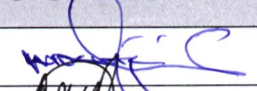

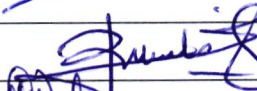


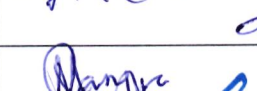
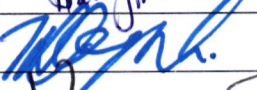
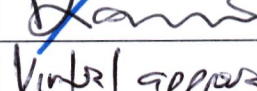
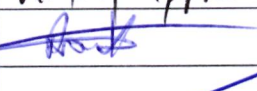
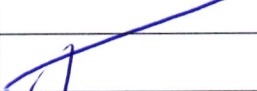
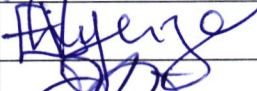
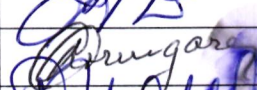

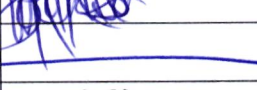
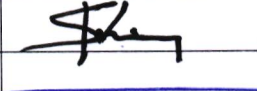



COMMITTEE ON DELEGATED LEGISLATION

ADOPTION SCHEDULE

Report on the Consideration of the Public Finance Management (Equalization Fund Administration) Regulations, 2021 (LN 54 of 2021)

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

DATE: 23/06/2021

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



MINUTES OF THE 29TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD AT 3.00 P.M. ON THURSDAY, 27TH MAY, 2021 IN BAOBAB CONFERENCE ROOM AT THE SERENA BEACH RESORT, MOMBASA

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
3. The Hon. Waihenya Ndirangu, M.P.
4. The Hon. Timothy Wanyonyi, M.P.
5. The Hon. Cecily Mbarire, MGH, M.P.
6. The Hon. Alice Wahome, M.P.
7. The Hon. Daniel Maanzo, M.P.
8. The Hon. Kamoti Mwamkale, M.P.
9. The Hon. Martha Wangari, M.P.
10. The Hon. Robert Mbui, M.P.
11. The Hon. Ronald Tonui, M.P.
12. The Hon. (Dr.) Wilberforce Oundo, M.P.
13. The Hon. Abdi Tepo, M.P.
14. The Hon. Edith Nyenze, M.P.
15. The Hon. George Murugara, M.P.
16. The Hon. Munene Wambugu, M.P.
17. The Hon. Nicholas Tindi Mwale, M.P.
18. The Hon. Robert Gichimu, M.P.
19. The Hon. Sammy Seroney, M.P.

ABSENT WITH APOLOGY

1. The Hon. Patrick Mariru, M.P.
2. The Hon. William Cheptumo, M.P.
3. The Hon. Gideon Mulyungi, M.P.
4. The Hon. Jennifer Shamalla, M.P.

IN-ATTENDANCE

National Assembly Secretariat

1. Ms. Susan Maritim - Senior Clerk Assistant
2. Mr. Mohamed Jimale - Clerk Assistant II
3. Mr. Wilson Dima Dima - Principal Legal Counsel
4. Ms. Linnet Otieno - Legal Counsel II
5. Ms. Rahima Manzura - Executive Secretary
6. Mr. Charles Ayari - Superintendent of Electronics (Audio)
7. Mr. Anthony Wamae - Sergeant-at-Arms
8. Mr. Nimrod Ochieng - Audio Records Officer

The National Treasury & Planning

1. Hon. (Amb.) Hon Ukur Yatani, EGH-	Cabinet Secretary
2. Mr. Stanley Kamau	- D/PIPM
3. Mr. Samuel K. Kiptorus	- Senior Deputy Director
4. Mr. Geoffrey Malombe, HSC-	- Senior Deputy Accountant General
5. Ms. Jacqueline Muindi	- Deputy Chief State Counsel
6. Mr. Guyo Boru	- Head of Equalization Fund
7. Ms. Rose Apunda	- Economist
8. Ms. Mary Munyingi	- Senior Policy Analyst, PIM Unit
9. Mr. David Kipsang	- Senior Economist
10. Mr. Richard Muthiga	- Director of Planning, PIM Unit
11. Ms. Isabella Kogei	- Parliamentary Liaison officer

MIN.NO. /NA/CDL/2021/136

PRAYERS AND PRELIMINARIES

The meeting commenced at three o'clock with the Prayer.

MIN.NO. /NA/CDL/2021/137

CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND ADMINISTRATION) REGULATIONS, 2021 (L.N. 54 OF 2021)

The Chairperson welcomed the delegation from the National Treasury led by the Cabinet Secretary Hon. (Amb.) Hon Ukur Yatani, EGH.

He thereafter informed the Committee that –

Introduction

The Equalization Fund was established under Article 204 (1) of the Constitution which requires that one half per cent (0.5%) of all the revenue collected by the national government each year, calculated on the basis of the most recent audited revenues, as approved by the National Assembly, to be paid into the Fund. As a precondition to the utilization of the Equalization Fund, Article 216(4) of the Constitution requires the Commission on Revenue Allocation to determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas.

Implementation Framework

The Equalization Fund was being administered through the defunct Equalization Fund Advisory Board (EFAB) as provided for in section 4.1 of Gazette Notice No 1711 dated 13th March, 2015. However, on 5th November 2019, the High Court declared the Equalization Fund Guidelines unconstitutional, null and void following Petition No. 292 of 2016. This in effect disbanded Equalization Fund Advisory Board (EFAB) and any further expenditure from Equalization Fund.

The National Treasury was directed to develop a statutory instrument on the administration of the Equalization Fund and it is on this basis that PFM (Equalization Fund) Regulations, 2021 were

developed and have since been approved by Cabinet, published and awaiting National Assembly approval.

Disbursements from the Equalization Fund to date

The disbursements made up to date are based on the First Policy on marginalization which identified 14 Counties as marginalized areas. The policy also recommended the criteria for sharing revenue among the 14 marginalized Counties and had a time horizon of three financial years, i.e., 2014/15, 2015/16 and 2016/17. The Equalization Fund entitlement since promulgation of the Constitution 2010 is as shown in Table 1 below: -

Table 1: Equalization Fund entitlement and allocation since inception of Equalization Fund

S/No.	Financial Year	Most recent audited revenues approved by the National Assembly		Equalization Fund Allocation (Kshs.)	Equalization Fund Entitlement (0.5% of most recent audited and approved revenues) (Kshs.)
		Base Year for most recent audited revenues approved by National Assembly	Audited and approved revenues by National Assembly (Kshs.)		
	(a)	(b)	(c)	(d)	(e)
1	2011/12	2008/2009	468,151,970,000	0	2,340,759,850
2	2012/13	2009/2010	529,300,000,000	0	2,646,500,000
3	2013/14	2010/2010	529,300,000,000	0	2,646,500,000
4	2014/15	2012/2013	776,900,000,000	400,000,000	3,884,500,000
5	2015/16	2012/2013	776,900,000,000	6,000,000,000	3,884,500,000
6	2016/17	2013/2014	935,600,000,000	6,000,000,000	4,678,000,000
7	2017/18	2013/2014	935,600,000,000	0.0	4,678,000,000.00
8	2018/19	2013/2014	935,600,000,000.00	0.0	4,678,000,000
9	2019/20	2014/2015	1,038,035,000,000.00	0.0	5,190,175,000.00
Total amount due to Equalization Fund			15,345,786,970	12,400,000,000	34,626,934,850

Notes

1. There was no allocation in the first three FYs i.e., 2011/12, 2012/13 and 2013/14 since the first policy identifying the marginalized areas had not been put in place by the Commission on Revenue Allocation.
2. The total money appropriated is **Ksh.12.4 billion** in the Equalization Fund Appropriation Act 2017 and the balances on the same in the Equalization Fund Appropriation Act 2018 for the financial year

Based on the two appropriations, the National Treasury has to date disbursed a total of **Ksh.10,346,573,051** to Ministries, State Departments and Agencies implementing the identified projects in the 14 marginalized counties in financial as shown in tables 2, 3 & 4 below: -

Status of implementation of the projects identified in FYs 2016/17, 2017/18 and 2018/19 in the 14 Counties

Projects identified for funding from the Equalization Fund in the 14 Counties and based on the First Policy on marginalization were to be financed from entitlements to the Equalization Fund of the financial years 2014/15, 2015/16 & 2016/17 and as appropriated in Equalization Appropriation Act, 2017 and Equalization Appropriation Act, 2018 to their completion. As such, projects were only identified once based on the First Policy in the FY 2016 and the same have been under implementation since then.

New projects will only be identified based on the Second Policy on marginalization and once the PFM (Equalization Fund) Regulations 2021 are approved by National Assembly.

Status of all the Equalization projects to date

Implementing MDA	No. of Projects	Tendering/ Awarded	Stalled/Not started	Inception	< 50%	50%-75%	76%-99%	100% (completed)
Ministry of Health	84	11	2	0	7	19	35	10
State Department for Infrastructure; through KeRRA	84	7	8	0	8	22	12	27
State Department for Irrigation	24	0	0	0	0	1	2	21
Ministry Water and Sanitation	128	0	6	0	30	20	35	37
State Department for Technical and Vocational Training	2	0	0	0	1	1	0	0
State Department of Early Learning Basic Education	10	0	0	10	0	0	0	0
Ministry of Energy	20	0	3	0	0	0	0	17
TOTAL	352	18	19	10	46	63	84	112

Overview of the Regulations

- 1) Regulation 1: Citation;
- 2) Regulation 2: Interpretation;
- 3) Regulation 3: Purpose of the Regulations;
- 4) **Regulation 4: Establishment of the Equalization Fund Advisory Board** which shall comprise of –

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

- 5) Regulation 5: Qualification requirements of the Board Members;
- 6) Regulation 6: Tenure of Office;
- 7) Regulation 7: Vacation of Office;
- 8) Regulation 8: Function of the Board;
- 9) Regulation 9: Establishment of Committees;
- 10) Regulation 10: Expenses of the Board (*Board expenses not to exceed 3% of the annual approved Equalization Fund allocation*);
- 11) Regulation 11; Meetings of the Board;
- 12) Regulation 12: Minutes;
- 13) Regulation 13: Disclosure of interest;
- 14) Regulation 14 and 15: Establishment and Functions of County Technical Committee;
- 15) Regulation 16 and 17: Establishment and Functions of Sub-County Technical Committee;
- 16) Regulation 18 and 19: Establishment and Functions of the Project Identification and Implementation Committee;
- 17) Regulation 20: Functions of the County Executive Committee Member for Finance;
- 18) Regulation 21: Chief Executive Officer;
- 19) Regulation 22: Establishment and Functions of the Secretariat;
- 20) Regulation 23: Approval of Workplan;
- 21) Regulation 24: Utilization of funds and preparation of workplans;
- 22) Regulation 25: Criteria for identification of projects;
- 23) Regulation 26: Submission of workplan to the Board;
- 24) Regulation 27: Disbursements;
- 25) Regulation 28: Report by the County Executive Committee Member for Finance;
- 26) Regulation 29: Submission of Work Plan to the Board;

27) Regulation 30 - Withdrawals from the Fund: Any unutilised balances in the Equalisation Fund shall not lapse at the end of the Financial year, but shall be retained for use for the purposes for which the Equalisation Fund was established; and

28) Regulation 31: Winding up of the Fund

Purpose of the Regulations

The Regulations seek to –

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

Plenary Discussions

Members raised the following concerns –

- 1) Members from some of the marginalised areas recorded objections on being left out of the First and Second Policies by the Commission on Revenue Allocation.
- 2) Stalled projects from the initial funding of the Equalization Fund will be completed upon approval of the Regulations and subsequent disbursement of Funds.
- 3) The Cabinet Secretary informed the Committee that it was not possible to manage the Fund through the CDF-model since it was challenged by the Petitioners in Petition No. 292 of 2016. Members averred that the current model is bureaucratic and may result in project delays.
- 4) The Committee took issue with the Cabinet Secretary for not subjecting the Regulations for pre-publication scrutiny.

Committee Observations

The Committee made the following observations –

1) Statutory Timelines

The Regulations were published in the gazette on 29th April, 2021, vide Legal Notice No. 54 of 2021, submitted to the Clerk of the National Assembly on 4th May, 2021 and laid in the House on 11th May, 2021 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act.

2) Consultation / Public participation

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.

During the scrutiny meeting held between the National Treasury and the Committee, the National Treasury indicated demonstrated that it held extensive consultations with various stakeholders while preparing the Regulations; whose input was considered before finalization of the Regulations. Further that due to the Covid 19 requirements, most of the stakeholders' consultations were undertaken virtually.

The National Treasury also attached an Explanatory Memorandum with a schedule of persons with whom it consulted during their public participation exercises.

Committee Resolution

Having examined the Public Finance Management (Equalization Fund Administration) Regulations, 2021 in line with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap 2), the Public Finance Act (No 18 of 2012), and the Statutory Instruments Act (No 23 of 2013), the Committee resolved to **approve** them as proposed by Hon. Abdi Tepo, M.P. and seconded by Hon. George Murugara, M.P.

The Regulations require an affirmative resolution of the National Assembly before they can become operational.


MIN.NO. /NA/CDL/2021/138 ADJOURNMENT

There being no other business, the meeting was adjourned at 5.00 p.m. until Friday, 28th May, 2021 at 10.00 a.m. in the same venue.

Signed:.....

Date.....

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

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 01 JUL 2021	
DAY: <input type="text"/>	
TABLED BY:	<input type="text"/>
CLERK AT THE TABLE:	<input type="text"/>

(Legislative Supplement No. 29)

LEGAL NOTICE NO. 54

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

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

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

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

Citation.

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

Interpretation.

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

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

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

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

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

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

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

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

No.16 of 2011.

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

“unutilized balance” means any —

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

3. The purpose of these Regulations is to —

Purpose of these Regulations.

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

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

Establishment of the Board.

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

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

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

Qualification
requirement of
members.

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

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

Tenure of office.

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

Vacation of
office.

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

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

Functions of the
Board.

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

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

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

Establishment of committees.

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

Expenses of the Board.

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

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

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

Meetings of the Board.

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

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

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

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

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

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

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

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

Minutes.

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

Disclosure of interest.

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

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

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

Establishment of county technical committee.

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

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

Functions of the county technical committee.

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

Establishment of sub-county technical committee.

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

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

Functions of the sub-county technical committee.

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

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

Establishment of Project Identification and Implementation Committee.

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

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

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

Functions of Project Identification and Implementation Committee.

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

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

Functions of the County Executive Committee Member for finance.

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

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

Chief Executive Officer

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

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

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

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

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

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

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

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

Criteria for identification of projects.

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

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

Submission of workplan to the Board.

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

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

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

Quarterly reports on projects and disbursements.

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

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

Report by the County Executive Committee Member for finance.

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

No. 33 of 2015.

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

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

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

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

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

Submission of workplan to the Board.

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

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

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

Withdrawals from the Fund.

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

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

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

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

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

Winding up of the Fund.

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

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

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

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

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

Dated the 23rd April, 2021.

UKUR YATANI,
Cabinet Secretary,
The National Treasury.

EXPLANATORY MEMORANDUM

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

PART I

Name of the Statutory Instrument; Public Finance Management (Equalization Fund Administration) Regulations 2021.

Name of the Parent Act: Public Finance Management Act, 2012.

Enacted Pursuant to; Section 205 of the Public Finance Management Act, 2012.

Name of the Ministry/Department: The National Treasury and Planning.

Gazetted on;

PART II

1. THE PURPOSE OF THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATION, 2021

The purpose of these regulations is to:

- (i) to specify the sources, object and purpose of the Fund;
- (ii) to provide guidance on the administration and management of the Fund;
- (iii) to establish an Equalization Fund Board to advise the Cabinet Secretary on the proper and effective performance of the Fund;
- (iv) to provide for the withdrawals from the Fund; and
- (v) Provide for completion of ongoing projects under the first policy
- (vi) Provide for implementation of new projects under the second policy
- (vii) Provide for extension of Equalisation Fund period
- (viii) provide for winding up of the Fund

2. THE LEGISLATIVE CONTEXT

a. The Constitution

Article 204 of the Constitution establishes the Equalization Fund whose resources shall be applied to marginalized areas as identified through the Marginalization Policy determined by the Commission on Revenue Allocation in accordance with Article 216(4) of the Constitution.

The Constitution under Article 204 has stated that the source of the capital for the Fund shall be half per cent of all revenue collected by the National Government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly. In addition, the Constitution provides that the National Government shall use the Equalization Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

b. Public Finance Management Act, 2012

The provisions of the Constitution are further expounded in the Public Finance Management Act, 2012, herein referred to as the Act. Section 18 of the Public Finance Management Act, 2012 has provided that the National Treasury shall administer the Equalisation Fund in accordance with Article 204 of the Constitution.

The Act has also given powers to the Cabinet Secretary responsible for matters relating to finance to make further regulations on any matter therein. It is in this context that the “The Public Finance Management (Equalization Fund) Regulations, 2012” are made to operationalize the Equalization Fund established under Article 204 of the Constitution by providing mechanism for use of this Fund directly by the national government or indirectly through conditional or unconditional transfers to marginalized counties as identified by the Marginalization Policy determined by the Commission on Revenue Allocation in accordance with Article 216(4) of the Constitution.

In addition, the Regulations are made to provide the management structure of the Fund which is clearly linked with Ministries, State Departments and Agencies as well as marginalized counties.

3. POLICY BACKGROUND

The Constitution assigned the duty to decide on the policy for implementation of the Equalization Fund to the National Government under Article 204 of the Constitution. Further, the Constitution provides that the national government may use the Fund either directly or indirectly through conditional or unconditional grants to marginalized counties. In addition, the Public Finance Management Act, 2012 has assigned the duty to administer the Equalization Fund to the Cabinet Secretary responsible for matters relating to finance.

Accordingly, the National Government decided that the Equalization Fund shall need a robust management structure to ensure the Fund’s objectives are achieved through a transparent and accountable mechanism.

In this regard, the National Treasury prepared the Equalization Fund Guidelines on Management of the Equalization Fund established under Article 204 of the Constitution vide Gazette Notice No. 1711 of 13th March, 2015. These Guidelines established the management structure for the Equalization Fund; were prepared in strict adherence to provisions of the Statutory Instruments Act, 2013; and were approved by Parliament in December, 2015.

The first marginalization policy determined by the Commission on Revenue Allocation in line with Article 216(4) of the Constitution, identified fourteen counties to benefit from the Fund namely: Turkana; Mandera; Wajir; Marsabit; Samburu; West Pokot; Tana River; Narok; Kwale; Garrissa; Kilifi; Taita Taveta; Isiolo; and Lamu.

Towards this end, the Equalization Fund Advisory Board, established under the guidelines, chose to apply the Equalization Fund directly using National Government structures to finance and implement projects identified in the 14 marginalized counties.

However, during the implementation of the Equalization Fund under the first policy on identification of Marginalized areas, the Council of Governors petitioned the High Court vide Petition No. 272 of 2016 listing the Hon. Attorney General, the Cabinet Secretary to the National Treasury and the Controller of Budget as the 1st, 2nd and 3rd respondents', respectively with the Commission on Revenue Allocation and the 14 counties identified as marginalized areas being listed as interested parties. The three-judge bench in its ruling of the High Court Petition No. 272 of 2016 granted the following sought prayers as sought by the petitioner: -

- (i) A declaration be and is hereby issued that equalization Fund being for the benefit of Marginalized Counties can only be disbursed by the national Government through the respective and affected County Governments and in accordance with recommendations made by the Commission on Revenue Allocation as approved by Parliament.*
- (ii) A declaration be and is hereby issued that the Guidelines on administration of Equalisation Fund published on 13th March 2015 in the Kenya Gazette Vol CXVII- No. 26 as gazette Notice No 1711 are accordingly unconstitutional, null and void for violating Articles 1 (4), 2(1), 6, 10, 174, 201, 204 and 216 of the Constitution and section 12 and 18 of the Public Finance Management Act.*
- (iii) An order of certiorari be and is hereby issued to remove and quash the guidelines on administration of equalization fund published on 13th March 2015 in gazette notice no. 1711.*
- (iv) The 2nd respondent shall within six (6) months of the date of this judgment, and in consultation with all relevant stakeholders, prepare an appropriate policy and/or statutory instrument on the administration of the equalization fund that is compliant with the recommendation made by the Commission on Revenue Allocation as approved by Parliament, and the objectives of the Equalisation Fund and devolution as set out in the Constitution and enunciated in the judgment.*

In its ruling, the Hon Court gave among others, the following reasons for granting the above prayers: - that the Equalization Fund Advisory Board had ignored recommendation of CRA on:- i) Composition on the advisory board; ii) Failure to make provisions for representation of counties; iii) Appropriation of funds as conditional grants to marginalized counties; iv) Funds to be spent when County Governments are in place; and v) Management of the Fund to be supported by an Inter-governmental relations department.

Consequently, and in adherence to the directive of the High Court, the National Treasury constituted an Inter-Agency Taskforce comprised of Officers from the National Treasury, the Office of the Attorney General, The National Assembly, the Senate, Parliamentary Budget Office,

Office of the Controller of Budget, the Commission on Revenue Allocation and the Council of Governors to initiate a draft policy and or Statutory Instrument on administration of the Equalization Fund.

The Taskforce has since then come up with the Public Finance Management (Equalization Fund), Regulations 2021 which are in line with directives of the High Court in its ruling.

4. PUBLIC CONSULTATIONS

The National Treasury did not carry out public consultations through public meetings at the counties while preparing these Regulations due to the extra-ordinary nature of Covid-19 pandemic and its enormous local effects, including the directives on social distancing.

However, in finalizing the Public Finance Management (Equalization Fund) Regulations, 2020, and in fulfillment of the Statutory Instruments Act, 2013, the National Treasury sought written comments from key stakeholders by writing letters to target institutions and placement of Public Notices in the mainstream print media as well as the National Treasury Website calling for comments and their input taken into account before finalization of the Regulations. Some of the key stakeholders that comments were sought in writing and through the Public Notices included, the Commission on Revenue Allocation, Controller of Budget, the National Assembly, the Senate, the Council of Governors, Accounting Officers of national and county governments, and the general public.

Different stakeholders had different views especially on the mode of implementation of the Equalization Fund, composition of the Board of the Equalization Fund, Administration and structure of the Secretariat of the Equalisation Fund, Disbursement modalities and expenditure from the Equalisation Fund e.g. as conditional grants and Creation and constitution of oversight committees at the county level. Some held the view that the Fund should be implemented directly by the national government through State Departments while others proposed that it should be implemented indirectly through the conditional grants to marginalized counties, others proposed a three -tier administrative structure that includes a national level Board or Committee, County Technical Committees and Sub County Technical Committees; all comprised of the National and county government representatives. The regulations have incorporated most of these proposals on constitutions of national and county committees with clear and distinct mandate whilst making a deliberate choice to stick to the Constitutional provisions that the Fund can either be used directly by the National Government or as a conditional allocation to the marginalized counties. This will give flexibility to the Fund to ensure maximum impact in terms of bringing the services of the marginalized counties closer to those enjoyed by other areas. The proposal to have CRA and COB sit in the Equalization Fund Board was dropped on grounds of conflict of interest.

5. GUIDANCE

The National Treasury will sensitize stakeholders including Parliament, accounting officers of national and county governments and the general public, on the process of accessing the Equalization Fund resources, the accountability mechanism, the monitoring and evaluation

mechanism and the need to ensure regular reporting to both the Parliament and relevant County Assemblies.

6. IMPACT ASSESSMENT

An impact assessment has not been prepared for this statutory instrument. (Expected impact is, however implied in the Marginalization Policy determined by the Commission on Revenue Allocation).

7. REVIEW OF THE MARGINALIZED COUNTIES.

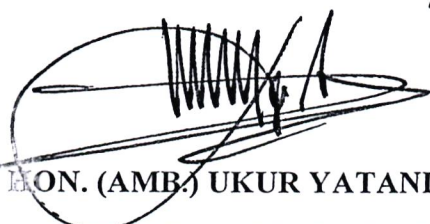
As you are aware, that the first marginalization policy determined by the Commission on Revenue Allocation and approved by parliament shall was in force for a maximum period of three years, CRA has since then reviewed that policy and come up with a second-generation policy for identification of marginalized areas. This second-generation policy, and which awaits approval of Parliament, has pursuant to Article 216(4) of the Constitution identified 1,424 sub locations in 360 wards and 34 counties as marginalized areas. The policy will be in force for seven years from the operationalization of these Regulations and in this respect, a review thereof will be done by the Commission on Revenue Allocation for in line with Article 216(4) of the Constitution.

The National Treasury and planning on its part shall monitor the application of the Equalization Fund resource through Equalization Fund Advisory Board this will be done through quarterly reports sent by Equalization Fund secretariat. In addition, Fund Secretariat at the National Level will also carry out regular monitoring and evaluation of the specific projects funded through the Equalization Fund.

8. NATIONAL TREASURY CONTACT PERSON

The contact person at the National Treasury is the Head of Equalization Fund.

Made on... *6th may*2021



HON. (AMB.) UKUR YATANI, EGH

CABINET SECRETARY/NATIONAL TREASURY AND PLANNING



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PUBLIC NOTICE

**REQUEST FOR COMMENTS ON DRAFT PUBLIC FINANCE
MANAGEMENT (EQUALIZATION FUND) REGULATIONS, BILL 2020
ON TREASURY WEBSITE**

The High Court on 5th November 2019 while ruling on petition No. 272 of 2016 directed the CS, National Treasury to develop a new Equalization Fund Statutory Instrument within six (6) months. This instrument has been finalized.

In compliance with requirements of Statutory Instruments Act No. 23 of 2013 section 8 and in fulfillment of public/stakeholder participation, members of the public are invited to submit their views on the document.

The comments should be forwarded in writing to the undersigned and a soft copy sent to email: samuel.kiptorus@treasury.go.ke within 14 days to enable consideration.

A handwritten signature in black ink, appearing to be 'Ukur Yatani', written over a horizontal line.

**HON. (AMB.) UKUR YATANI, EGH
CABINET SECRETARY, THE NATIONAL TREASURY AND PLANNING**

Dated: 17th August 2020

CABINET SECRETARY
THE NATIONAL TREASURY & PLANNING

668 01 SEP 2020

Tel: 254 (20) 4298900

Email: info@crakenya.org

Website: www.crakenya.org

14 Riverside Drive
Grosvenor Block,
2nd & 3rd Floor
P.O. Box 1310 – 00200
NAIROBI

COMMISSION ON REVENUE ALLOCATION

OUR REF: CRA/1/VOL.8(11)

DATE: 31st August 2020

Hon. (Amb) Ukur Yatani, EGH

Cabinet Secretary

The National Treasury and Planning

Nairobi


Att: Samuel Kiptorus

**RE: Comments on the Draft Public Finance Management
(Equalization Fund) Regulations, Bill 2020**

The Commission on Revenue Allocation has reviewed the draft Public Finance Management (Equalisation Fund) regulations Bill, 2020 and submits the attached comments for your consideration.

The Commission congratulates the National Treasury for spearheading the extensive consultations on the regulations and looks forward to a smooth implementation of all policies identifying marginalised areas.

Yours

Sincerely,


Dr. Jane Kiringai, EGH
CHAIRPERSON

Attachment 01/: PROPOSED AMENDMENTS TO THE PUBLIC FINANCE MANAGEMENT ACT 2012

(EQUALISATION FUND) REGULATIONS 2020

INSTITUTION COMMISSION ON REVENUE ALLOCATION DATE **28th August 2020**

General Comments:

- a) There is need to align these draft regulations with the PFM (National Government) Regulations, 2015 which have provisions on administration of the Equalization Fund.
- b) There is need for clarity as to who is the Fund administrator given this is a national public Fund and the role is already assigned to the Accountant General under regulation 20(1)(i) of the PFM (National Government) Regulations, 2015
- c) The qualifications for Secretary to the Board need to be included for clarity and transparency
- d) The regulations generally have editorial mistakes and need cleaning up

S/No	Regulation No.	Provisions of the Regulations*	Rationale for Amendment Recommendation	Proposed Amendment**
1.	Regulation 1 Citation	Substitute "2019" with "2020" immediately after the word "regulations"	To align with the current year	Substitute years
2.	3.Purpose	Provide for implementation of new projects under the second policy	The Equalisation Fund has a period of 20 years	Provide for implementation of new projects under all subsequent policies
3.	Part II header-	Statement Policy	Edit	Statement of Policy
4.	4 Capital of the Fund	Delete	It's a replica of regulation 5 and the latter is more comprehensive	Delete

S/No	Regulation No.	Provisions of the Regulations*	Rationale for Amendment Recommendation	Proposed Amendment**
5.	Regulations 5 & 6	These two regulations should come after establishment of the Fund i.e. under regulation 7	For coherence. They make provisions for a Fund that is yet to be established.	Re-arrange regulations to come after regulation 7
6.	7.Establishment of the Board	On the Board membership- The membership is also too prescriptive under regulation 7(d) whereby the COG has to appoint from ASAL areas. Not all ASAL areas are marginalised Add a new paragraph after paragraph (g) providing for consideration of special interest groups such as women, youth, PWDs in the membership to enhance inclusivity as per Article 27 of the CoK	For coherence and to align with the Constitution A Board should have an odd number.	Two persons nominated by the Council of Governors drawn from the areas defined as marginalised One person nominated by the Cabinet Secretary to represent a special interest group
7.	9(e)Functions of the Board	Monitor and evaluate the projects implemented by County Governments to determine their impact in addressing the factors contributing to the marginalization of the areas identified in the counties;	The functions of the Board are specific to the Equalisation Fund	Monitor and evaluate the projects implemented by County Governments using Equalisation funds to determine their impact in addressing the factors contributing to the marginalization of the areas identified in the counties;
8.	9(f)Functions of the Board	put in place measures for transparency and accountability in	The functions of the Board are specific to the Equalisation Fund	put in place measures for transparency and accountability in

S/No	Regulation No.	Provisions of the Regulations*	Rationale for Amendment Recommendation	Proposed Amendment**
9.	13 Establishment of County Technical Committee	the implementation of projects by county governments ; Substitute the phrase 'eligible' with ' beneficiary '	For ease of understanding. The term 'eligible' is subjective.	the implementation of Equalisation fund projects by county governments;
10.	16(b) Functions of sub-county technical committee	13)(e) Representatives of implementing sectors	13)(e) should be aligned to Article 204 and the Policy	Each beneficiary county shall establish an all-inclusive committee to be known as County Technical Committee comprising- e) Representatives of sectors with prioritised projects in line with Article 204 and the Policy identifying Marginalised areas
11.	17(c) Establishment of project identification and implementation Units	Evaluate and approve all development proposals from the Project Identification and Implementation Committees; a representative of the women, youth, minorities and persons with disabilities	Approval of projects is done by the county technical committee	Evaluate and prioritise all development proposals from the Project Identification and Implementation Committees; a representative of the women, youth, minorities and persons with disabilities from areas defined by the Commission on Revenue Allocation as marginalized
12.	19(a) Functions of the County Executive Committee member for Finance	consolidate all projects approved by the County Technical Committee and submit to the Secretary of the Board for funding	The Commission on Revenue Allocation is Responsible for regular review of the Policy	consolidate all projects approved by the County Technical Committee and submit to the Secretary of the Board for funding with a copy to the Commission on Revenue Allocation

S/No	Regulation No.	Provisions of the Regulations*	Rationale for Amendment Recommendation	Proposed Amendment**
13.	26(a)Quarterly reports on projects and disbursements	The Board shall, on a quarterly basis, submit a report to the Cabinet Secretary detailing	The Commission on Revenue Allocation is Responsible for regular review of the Policy	The Board shall, on a quarterly basis, submit a report to the Cabinet Secretary with a copy to the Commission on Revenue Allocation
14.	27 (a) Report by the County Executive committee Member for finance	prepare and submit to the Board quarterly reports on the implementation of the projects or programs under the work plan in the format prescribed by the Advisory Board ; and	Delete the word Advisory	prepare and submit to the Board quarterly reports on the implementation of the projects or programs under the work plan in the format prescribed by the Board ; and with a copy to the Commission on Revenue Allocation
15.	29(2)Winding up of the Fund	At least twelve months before the expiry of the period specified under Article 204(6) of the Constitution or in legislation enacted by Parliament pursuant to Article:204(7) of the Constitution the county executive committee members in the respective county governments shall submit to the Advisory Board	Delete the word Advisory, and add, with a copy to the Commission for Revenue Allocation	At least twelve months before the expiry of the period specified under Article 204(6) of the Constitution or in legislation enacted by Parliament pursuant to Article:204(7) of the Constitution the county executive committee members in the respective county governments shall submit to the Board, with a copy to the Commission for Revenue Allocation
16.	29(5)	The Cabinet Secretary shall, submit the final report to the National Assembly and the Senate within fourteen days of the receipt of the initial report	The Commission on Revenue Allocation is Responsible for regular review of the Policy	The Cabinet Secretary shall, submit the final report to the National Assembly and the Senate, with a copy to the Commission on Revenue Allocation within fourteen days of the receipt of the

S/No	Regulation No.	Provisions of the Regulations*	Rationale for Amendment Recommendation	Proposed Amendment**
		under sub-regulation (3) of this Regulation.		initial report under sub-regulation (3) of this Regulation.
17.	Comments on the Schedule:			
18.	1. Tenure of Office	Members of the Board appointed under these regulations shall, subject to the provisions of this Schedule, hold office for a term of three years/ Six years nonrenewable, on such terms and conditions as may be specified in the instrument of appointment but shall be eligible for re-appointment for a further term of three years.	Provide for a fixed term: Delete three years and renewable	Members of the Board appointed under these regulations shall, subject to the provisions of this Schedule, hold office for a term of Six years nonrenewable.
19.	3(5) Meetings of the Board	Unless a unanimous decision is reached a decision on any matter before the Board shall be reached by consensus.	If the Board fails to make a unanimous decision, then they have to vote Delete consensus and replace with voting	Unless a unanimous decision is reached a decision on any matter before the Board shall be reached by voting.

*Provide text on exact wording of the provision in the regulations paragraph or sub paragraph

** provide the exact wording of how the proposed amendment to the regulations paragraph or sub paragraph is proposed to read.

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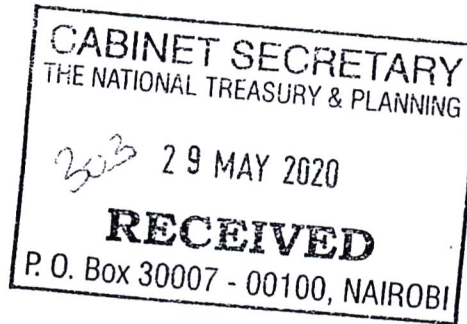
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Grosvenor block
2nd Floor
P.O. Box 1310 – 00200
NAIROBI

COMMISSION ON REVENUE ALLOCATION

OUR REF: CRA/1/ Vol.8 (9)

DATE: 29th May 2020

Hon. Amb. Ukur Yatani
Cabinet Secretary
The National Treasury
Treasury Building
NAIROBI



Dear Hon. Yatani,

RE: Commission Recommendations on Equalisation Fund Administration and Management

This submission by the Commission is a response to matters raised during the Inter-Agency consultative meeting of 21st May 2020. The Meeting convened by the National Treasury Cabinet Secretary focused on the new instrument on the administration and management of the Equalisation Fund. In developing these recommendations, the Commission has been guided by the following:

- i. That the policy determined by the CRA under Article 216(4) identifies who is marginalised and the Criteria for sharing revenue from the Equalisation Fund among the marginalised areas;
- ii. That Article 204 defines the purpose of the Fund;
- iii. The Public Finance Management Act 2012 on management of public funds
- iv. The PFM Regulations on the flow of funds under intergovernmental fiscal transfers;
- v. The Treasury Circular No.8/2017 on guidelines on inter-governmental fiscal transfers; and
- vi. Alignment of the CRA recommendation with the court ruling that the *Prayer sought by the petition on compelling the 1st and 2nd Respondents to establish an Advisory Board* was not granted.

The Commission submits five recommendations (Attached/01) for consideration by the inter-agency team. The Commission is available for any further consultations.

Yours sincerely,

Dr. Jane Kiringai, EBS
CHAIRPERSON

THE NATIONAL TREASURY

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STATUTORY INSTRUMENT FOR EQUALISATION FUND

Following the inter- agency meeting held on 21st May 2020 under the chairmanship of the Cabinet Secretary, Ministry of Finance and Planning, the Commission on Revenue Allocation makes the following recommendations on the Administration and Management of the Equalisation Fund.

In making this recommendations, the CRA has taken into account the following:

1. That the policy determined by the CRA under Article 216(4) identifies who is marginalised and the Criteria for sharing revenue from the Equalisation Fund among the marginalised areas;
2. That Article 204 defines the purpose of the Fund;
3. The Public Finance Management Act 2012 on management of public funds
4. The PFM Regulations on the flow of funds under intergovernmental fiscal transfers;
5. The Treasury Circular No.8/2017 on guidelines on inter-governmental fiscal transfers; and
6. Alignment of the CRA recommendation with the court ruling that the *Prayer sought by the petition on compelling the 1st and 2nd Respondents to establish an Advisory Board* was not granted.

Recommendation 1: Establishment of the Equalisation Fund Advisory Committee

The CRA recommends for establishment of the Equalisation Fund Advisory Committee. The Non- Remunerative Committee will advise the CS Ministry of Finance and Planning on the following:

1. Conditions to govern the disbursement of funds from the Equalisation Fund,
2. Disbursement schedule of funds from the Equalisation Fund to the marginalised counties,
3. Monitoring and evaluation of disbursement of monies from the Fund.

4. Reliability of financial and non-financial statements submitted to the Fund Administrator.
5. Addressing of complaints relating to the Fund.

Recommendation 2: Membership of the Advisory Committee

The Commission recommends for establishment of a seven-member advisory Committee. The Commission Further recommends that the membership to the Advisory committee should constitute representative from institutions that play a role on matters related to the purpose of the Fund. These are the following:

1. Chairperson appointed by the CS National Treasury (preferably from the Ministry of Devolution and ASAL)
2. Secretary of the Advisory Committee- Fund Administrator
3. COG Representative
4. CRA Representative
5. COB Representative
6. Representative of CECM-Finance to represent the Marginalised Areas
7. Representative of the CSO with a national representation
8. Representative of the Parliamentary Pastoralist Group

Management of the Fund at the County Level

In making its recommendation the CRA has considered the fact that a number of Funds exists at the lower level that are managed by Committees. Notable, is the national Government CDF and the Women Representative Fund. These Committee do not have intergovernmental representatives.

The CRA restates its recommendation as earlier submitted to the National Treasury:

Recommendation 3: Role of County Government

That County Executive Committee Member for Finance in areas identified as marginalised shall undertake the functions defined below

1. The County Executive Committee Member for Finance shall establish two committees, the Sub County Technical Committee ("SCTC") at the Sub County level and the Project Identification and Implementation Committee (PIIC) at the Ward level.

2. The County Executive Committee Member for Finance shall ensure that the guidelines provided by the Fund Administrator on public participation, project identification, prioritisation and costing are adhered to by the SCTC and PIIC;
3. The County Executive Committee Member for Finance shall consolidate all projects approved by the Sub County Technical Committee (SCTC) and submit to the Fund Administrator for funding
4. The County Executive Committee Member for Finance shall prepare financial statements for the fund for each financial year in a form prescribed by the Accounting Standards Board in line with section 84 of the PFM Act and submit to the Fund Administrator
5. The County Executive Committee Member for Finance shall prepare quarterly financial statements for the fund in a form prescribed by the Accounting Standards Board (Section 85 PFM Act) and submit to the Fund Administrator
6. Prepare quarterly reports on Funds received and Implementation status of all projects financed by the Equalisation Fund with a copy to the Fund Administrator and Commission on Revenue Allocation
7. Prepare annual report on implementation on all projects financed by the equalisation Fund with a copy to the Fund Administrator, Commission on Revenue Allocation and Parliament

Recommendation 4: Role of the Sub County Technical Committee (SCTC)

SCTC be chaired by the sub-county administrator to undertake the following functions:

1. Receive project/funding proposals from respective Project Identification and Implementation committees
2. Evaluate and approve all development proposals from the Project Identification and Implementation Committees,
3. Assess the feasibility and cost all project proposals received from the Project Identification and Implementation Committees
4. Submit project proposals and funding requests received from the Project Identification and Implementation Committees to the county government
5. Monitor all projects being undertaken and ensure they meet the objectives they are originally meant to achieve;
6. Prepare quarterly reports on Funds received and Implementation status of all projects financed by the Equalisation Fund with a copy to the copy to the County Executive Committee Member for Finance.

7. Prepare annual reports on implementation on all projects financed by the equalisation Fund with a copy to the copy to the County Executive Committee Member for Finance.

Recommendation 5: Membership of SCTC

1. Sub- county administrator
2. A maximum of four (4) technical officers from ministries relevant to funding priority areas from the county government
3. The chairs of Project Identification and Implementation Committees within the sub county



PASTORALIST PARLIAMENTARY GROUP - PPG
Pastoralism: Our pride and life!

29th August 2020

To Hon Ukur Yattani,
The Cabinet Secretary (CS)
The National Treasury & Planning
Treasury Building, Harambee Avenue
P.O Box 30007-00100
Nairobi

Dear Sir,

Attention: Samuel.kiptorus@treasury.go.ke

RE: Comments on the Draft Public Finance Management (Equalization Fund) Regulations, Bill 2020

We are writing to respond to the public notice issued on 17th August 2020 in which public comments are invited on the draft Public Finance Management (Equalization Fund) Regulations, Bill 2020 within 14 days.

The members of the PPG¹ went through the draft Equalization Fund Regulation, Bill 2020. The views of the members are combined and shared herewith.

In the previous regulations that operationalized the Equalization fund, the members of parliament and indeed the constituency offices was actively involved in the identification and prioritization of the Equalization Fund projects in the Counties. The role played by the MPs and constituency development fund (CDF) offices are important input that should not be ignored. The Equalization Funds is a complementary instrument to the CDF. The constituency Fund structures within the county and at the sub county levels should play more prominent role as proposed by the draft regulation as the representative of the institution of the national parliament within the counties and indeed the offices of the members of Parliament in the Sub counties especially in the identification and prioritization of project at the constituency levels. All the project key decisions in the county should be left to the County government structures.

NG-CDF organ at the constituency and County should be clearly incorporated into various committees that shall be established by the new regulation. At the County level, the constituency office manager is not enough appropriate representation, it should include

¹ PPG is the largest recognized parliamentary caucus in the national assembly. Membership in the 12th Parliament includes 21 Senators, 84 MPs representing 15 pastoralist majority counties in Kenya.

Chairperson of the NG-CDF committee. At the sub -County (constituency level) two members of NG-CDF committee should comprise of the committee and need for more interweave with some independent members and maintain link with the CDF committees at the Ward level.

Therefore, we make the following recommendations to improve on the draft;

SECTION	DRAFT PROPOSAL	AMENDMENT PROPOSED BY PPG
13. ESTABLISHMENT OF COUNTY TECHNICAL TEAM COMMITTEE	<p>Eligible County shall establish an all-inclusive committee to be known as county technical committee comprising;</p> <ul style="list-style-type: none"> a) A chairperson who shall be the County Commissioner b) County Executive Committee Member for Finance c) Constituency Development Fund Manager d) Representative of County Assembly and e) Representative of implementing Sectors ✓ f) Chairpersons of the Constituency Development Fund (CDF) 	<p>the Constituency Fund Managers by policy are often persons who are not resident of the constituencies.</p> <p>Managers are posted by the CDF Board. For the project to benefit from local knowledge. Add clause F: to include the Chairpersons of the CDF should be additional member of county technical committee at the County level. The chairpersons are approved by the KNA and gazetted.</p>
15: ESTABLISHMENT OF SUB COUNTY TECHNICAL COMMITTEE	<p>Each eligible County shall establish a committee at the Sub-County level to be known as Sub County technical Committee comprising –</p> <ul style="list-style-type: none"> a) A chairperson who shall be the Sub -County Commissioner b) A maximum of four technical officers relevant to funding priorities and c) The chairperson of project identification and implementation committee with the Sub 	<p>Add to clause D. to include the Secretary of the Constituency Development committees (CDF) in the County.</p>

	County ✓ d) +Secretary of the Constituency Development Fund in the Constituency	
17. ESTABLISHMENT COMMITTEE AT THE WARD LEVEL	Each eligible County shall establish a committee at the Ward level to be known as Project Identification and Implementation committee comprising – a) A chairperson who shall be the Assistant Sub County Commissioner b) The Village administration of area defined by the Commission of Revenue Allocation as marginalized c) A representative of Women, Youth, Minority and persons with disability ✓ d) + a representative of the Constituency Development Fund committee member at the Sub County level. ✓ e) + a representative of religious group or local NGO with office at the Ward level.	Add to clause D. to include a representative of CDF. A member of the constituency development committee from the ward who is a member of the sub county level committee. And add clause E: to include representatives of the main religious group or registered Faith Based Organization in the area or local NGO established to support the community at Ward level.

Yours Sincerely



Hon. Alois Lentoimaga, MP
Chairman, Pastoralist Parliamentary Group (PPG)

PRINCIPAL SECRETARY
THE NATIONAL TREASURY

29 MAY 2020

424 RECEIVED
PO BOX 30007 - 00100, NAIROBI



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COUNCIL OF GOVERNORS

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

Tel : (020) 2403314, 2403313
+254 729 777 281
E-mail: info@cog.go.ke

Our Ref: COG/6/33 Vol. 14 (38)

28th May, 2020

Dr. Julius Muia
Permanent Secretary
National Treasury
Treasury Building
NAIROBI

Dear Dr. Muia,

STATUS UPDATE ON THE EQUALIZATION FUND PROJECTS

The above matter, your letter dated 6th May 2020 and the meeting convened by the CS National Treasury on the 21st day of May 2020 refers.

We hereby acknowledge receipt of the projects forwarded by yourselves. We however note that only 230 projects have been submitted as opposed to the 352 ongoing projects. As such, we urge that you furnish us with the list of all the on-going projects profiled County by County including a status report thereto.

Pursuant to the resolution of the meeting hereinabove we hereby wish to submit an addendum to the proposals that we made to yourselves for your further reference.

(Attached herein is a copy of the addendum for your information and records)

Please be assured of our highest esteem and regards.

Yours sincerely,

Jacqueline Mogeni, MBS
Chief Executive Officer

- Copy: 1. All Excellency Governors for the Equalization Fund Counties
2. All CEC Members for Finance for the Counties



Administrative routing table with checkboxes and handwritten marks.

RECEIVED
THE NATIONAL TREASURY

12 JUN 2020 364

DIRECTOR GENERAL
BUDGET, FISCAL &
ECONOMIC AFFAIRS

Submission of Proposals from the Council of Governors on Equalization Fund

A) Structure of the Board

The Council of Governors proposes that the board shall comprise of the Following;

1. The chairperson who shall be appointed by ^{The} National Treasury
 2. One person who shall be nominated by the Commission on Revenue Allocation.
 3. One person nominated by the Pastoralists Parliamentary group.
 4. At the County level; An inclusive structure that brings on board Constituency Development fund Managers of various constituencies, the Deputy County Commissioners to form the sub-county and County membership including members of the county Assembly and county Government officials.
 5. A small secretariat of not more than five people preferable two women, and two gentlemen with technical skills to be engaged to help support running of the day to day activities of the board. (We envisage Job Group P-Q for the secretariat support. This shall eliminate bureaucracy and is cost friendly with their remuneration drawn from the Fund.)
- Note that All Persons nominated must be free from fulltime engagements so that they can dedicate time and mind to Equalization Fund activities.

B) Incomplete/On-going Projects

The Council of Governors view on on-going projects is as follows-

1. The National Treasury to furnish the Council of Governors with the list of all the 352 on-going projects profiled County by county including a status report.
2. All legally contracted projects that are on-going with progress visible on the ground are to be completed from respective county's sharable revenue of Equalization Fund.
3. Any project that has a contract but has NOT started to be subjected to the new process under the new board. (They be retendered).
4. Any project that does not have a valid contract should be considered as illegal and be discarded. The Council of Governors will not take responsibility for such projects due to accountability challenges.

C) Resource Sharing at County level

It is the view of the Council of governors that resource sharing at the county level adopts the Commission on Revenue Allocation formula of sharing resources equitably to all sub counties.

Resources to one sub-county can be directed to one impactful project that will transform living standards. This will also take care of marginalization at the sub-county level. ✓

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REPUBLIC OF KENYA
PARLIAMENT

Hon. Alois M. Lentoimaga, MP.

Samburu North Constituency
Member: Trade, Industry & Cooperative
Member: Committee on Implementation

Parliament Buildings
Tel: +254 20 2221291
P.O Box 41842-00100 Nairobi, Kenya

Continental House 3rd Floor Rm. 322
Mobile: +254 720 225 553
E-mail: alentoimaga10@gmail.com

DATE: 22nd May, 2020

TO HON UKUR YATTANI, EBS
CABINET SECRETARY, MINISTRY OF FINANCE
AND NATIONAL TREASURY
P.O. Box 30007-00100. Nairobi, Kenya

Dear Hon UKUR,

RE: SUBMISSION ON MATTERS TO BE INCLUDED IN THE EQUALIZATION FUND REGULATIONS

This is to follow up the discussion of 21st May 2020 meeting with you. I wish to submit our recommendation to be included in the regulation of the Equalization Fund.

Pending the passage of the Equalization Fund Bill which is currently in the Senate, we propose inclusion of the following in any regulations made under the Public finance Management Act, 2012—

The Equalisation Fund Board should comprise—

- (a) a Chairperson **from a marginalized community** appointed by the President with the approval of the National Assembly;
- (b) the Principal Secretary in the Ministry for the time being responsible for matters relating to water;
- (c) the Principal Secretary in the Ministry for the time being responsible for matters relating to roads;
- (d) the Principal Secretary in the Ministry for the time being responsible for matters relating to health;
- (e) the Principal Secretary in the Ministry for the time being responsible for matters relating to National Treasury;

- (f) four persons appointed by the Cabinet Secretary for the time being responsible for the National Treasury **to represent marginalized communities**; and
- (g) a Chief Executive Officer who shall be an ex-officio member and secretary to the Board.
2. Administration of the Fund at the local level should be through Local Equalisation Fund Committees at Ward level **in each marginalized area as determined by the Commission on Revenue Allocation**.
3. Each Local Committee should comprise—
- (a) the national government official responsible for co-ordination of national government functions;
 - (b) two men, one of whom shall be a youth at the date of appointment;
 - (c) two women, one of whom shall be a youth at the date of appointment;
 - (d) one person with disability nominated by a registered group representing persons with disabilities in the marginalized area;
 - (e) two persons nominated by the relevant constituency office in which each Ward is;
 - (f) an officer of the Board seconded to the Committee as an ex officio member; and
 - (g) an officer of the relevant county government as an ex officio member.
4. The Members of all Local Committees should be approved by the National Assembly before appointment.
5. The term of office of the members of a Local Committee should be three years, renewable once.
6. Local Committees should meet at least six times in a year but should not hold more than twenty-four meetings in the same financial year, including sub-committee meetings.
7. A member of a Local Committee may be removed from office on any one or more of the following grounds—
- (a) lack of integrity;
 - (b) gross misconduct;
 - (c) embezzlement of public funds;
 - (d) bringing the committee into disrepute through unbecoming personal public conduct;
 - (e) promoting unethical practice;
 - (f) causing disharmony within the committee; or
 - (g) physical or mental infirmity.

8. A decision to remove a member of a Local Committee should be through a resolution of at least five members of the Committee and the member sought to be removed must be given a fair hearing before the resolution is made.
9. A person should be able to present a petition to the Board for the dissolution of a Local Committee for—
 - (a) serious violation of the Constitution or any other law including a contravention of Chapter Six;
 - (b) gross misconduct, whether in performance of the member's or office holder's functions or otherwise;
 - (c) incompetence;
 - (d) bankruptcy; or
 - (e) any other cause as may be deemed justifiable.
10. A Local Committee should be able to engage such staff as may be necessary for execution of its functions.

Yours Sincerely,


**HON. ALOIS M. LENTOIMAGA, MP. SAMBURU NORTH CONSTITUENCY
CHAIRMAN, PASTORALIST PARLIAMENTARY GROUP (PPG)**

OFFICE OF THE CONTROLLER OF BUDGET



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



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

PROPOSED AMENDMENTS TO THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATIONS 2020

Clause	Section/Regulation	Proposed Amendment	Rationale for Recommendations
1	Citation	Substitute 2019 with 2020 immediately after the word Regulation	To align with the title of the Regulations and the current year
4	Capital of the Fund	Delete the clause	This has been repeated under Clause 5(a)
7 (c) and (d)	Establishment of the Board	Delete clause 7(c) Delete Arid and Semi-Arid Areas (ASALS) in clause 7(d) and replace with 'marginalized area'	Not all marginalized areas are ASALS Just as Senate nominates one person the National Assembly should nominate one person. The appointment should not be limited to the Parliamentary Pastoralist Group.
19	Functions of the County Executive Committee Member for Finance	Include representation of special interest group in the membership of the Board.	Promote inclusivity in the representation of the Board.
19	Functions of the County Executive Committee Member for Finance	Copies of the reports under 19(d) and (e) should be provided to the Controller of Budget	Controller of Budget is responsible for granting of approvals for withdrawal of the funds and prepares reports on the fund, hence should be provided with copies of the reports

21(h)	Functions of the Secretariat	Delete 'Advisory' immediately after 'the functions of the Advisory Board'	The Regulations do not provide for an Advisory Board
22 & 23	Approval of work-plans Preparation of work-plans	Regulation 23 should come before Regulation 22	Practically, preparation of the work-plans comes before the approval
22 (2)	Approval of work	Include the process to follow upon the work-plan being rejected. Include a provision for approval with amendments.	There is need to give room to the County Assembly to exercise its discretion by providing for all possible scenarios.
26	Quarterly Reports on projects and implementation	Include 'the Controller of Budget' immediately after the Cabinet Secretary	The Controller of Budget is responsible for granting approval for the withdrawal of funds from the Equalization Fund and should be provided with the implementation reports for ease of overseeing and monitoring the implementation of the budgets.
27(a)	Reports by the County Executive Committee Member for Finance	Delete the word 'Advisory'	The Regulation does not provide for an Advisory Board
28(3)	Withdrawals from the Fund	Include 'special purpose' immediately after respective	To provide clarity on the special purpose accounts to which the money shall be deposited
29(2)	Winding up of the Fund	Delete the word 'Advisory' and add 'and a copy to the Controller of Budget immediately after the Board'	This will enhance the responsibility of the Controller of Budget in granting the approval for the release of funds.
29(5)		Align the numbering of sub-regulation 3 being referred to. Include ' and a copy to the Controller of Budget' immediately after Senate	The Controller of Budget is a critical player in the process.

Comments on the schedule			
1	Tenure of Office	Provide for a fixed non-renewable term of six years	For continuity
2	Vacation of Office	Delete 'Counties' immediately after Cabinet Secretary	The Board members should be able to tender their resignation to the Cabinet Secretary
3(5)	Meetings of the Board	Delete 'consensus' and replace with 'voiting'	It would be prudent to have a vote where an unanimous decision is not arrived at

THE CONSTITUTION OF KENYA
THE PUBLIC FINANCE MANAGEMENT ACT
(No. 18 of 2012)

PART I—DEFINITIONS

1.1 Title-Guidelines on the Administration of the Equalization Fund established under Article 204 of the Constitution.

1.2 Authorization-These Guidelines are issued under section 12 (2) (k) of the Public Finance Management Act, 2012, which empowers the Cabinet Secretary for Finance to issue guidelines to national government entities with respect to financial matters and monitoring their implementation and compliance.

1.3 Definitions -Terms used in these Guidelines are as defined in the Constitution and the Public Finance Management Act, 2012, except otherwise specified. Other terms used in these Guidelines shall be taken to have the meaning assigned to them hereunder:

1.3.1 "Accounting Standard Board" has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012;

1.3.2 "Cabinet Secretary" has the meaning assigned to it under section 2 of the Public Finance Management Act,2012;

1.3.3 "Financial year" has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012

1.3.4 "Fund" means the Equalization Fund established under Article 204 of the Constitution;

1.3.5 "Marginalized area" means an area identified under policy determined by the Commission on Revenue Allocation in accordance with Article 216 (4) of the Constitution.

1.3.6 "officer administering the funds" means a person nominated by the Principal Secretary responsible for finance designated by the Cabinet Secretary as the administrator of the Fund as per Regulation 20 (i) of the Public Finance Management (National Government) Regulations 2015 provides that "*Accountant-General Department shall be responsible for administering the Consolidated, Equalization and Contingencies Funds*".

Commented [RR1]: Change this to Fund Administrator

1.3.7 "revenue" has the meaning assigned to it under the Commission on Revenue Allocation Act, 2012; and

1.3.8 "Unutilized balance" means –

- 1.3.8.1 any amounts not withdrawn from the Fund at the end of financial year; and
- 1.3.8.2 any amount withdrawn from the Fund for purposes of provision of basic services under an Appropriations Act and not expended at the end of financial year.

1.3.8.3 Amount hear marked for the first policy with 14 Counties Ongoing projects)

1.3.8.4 Amount hear marked for the second policy with 34 Counties (New projects to be identified)

Consider including the definition of Inter Governmental Committee

Commented [RR2]: This has not been used anywhere else in the guidelines.
This section deals with definitions, 1.3.8.3 and 1.3.8.4 do not define anything
Check spelling ear-marked

PART II—STATEMENT POLICY

2.1 Purpose

The purpose of these Guidelines is:

- (i) to specify the sources, object and purpose of the Fund;
- (ii) to provide guidance on the administration and management of the Fund;
- (iii) to establish a management framework to advise the Cabinet Secretary on the proper and effective performance of the Fund;
- (iv) to provide for the withdrawals from the Fund; and
- (v) Provide for completion of ongoing projects under the first policy
- (vi) Provide for implementation of new projects under the second policy
- (vii) Provide for extension of equalisation fund period
- (viii) provide for winding up of the Fund

Commented [RR3]: Nothing has been captured on this in the guidelines

2.2 Capital

The capital of the Fund shall be one half percent of all the revenue collected by the national government as appropriated by Parliament in each financial year.

Commented [RR4]: This definition is short of the definition given under Article 204(1) of the Constitution. it needs to be realigned to the provision of the constitution by including 'calculated on the basis of most recent audited accounts of revenue received'

PART III — SOURCES, OBJECTS AND PURPOSE

3.1 Sources of the fund

The fund shall consist of:

- (a) One half of all revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly
- (b) income generated from proceeds of the Fund; and
- (c) the cumulative amount of revenue from previous years not spent

3.2 Object and purpose of the Fund

The object and purpose of the Fund is to provide basic services including water, roads, health facilities and electricity to the marginalized areas to the extent necessary to bring the quality of those services to the level generally enjoyed by the rest of the nation, so far as possible in an equitable, efficient and transparent manner.

PART IV—MANAGEMENT OF THE FUND

4.1 Establishment of the Fund Management

4.1.1 First Level: National Level

Fund Administrator as designated by the CS National Treasury in line with regulation 20(1)(i) of the Public Finance Management (National Government) Regulations, 2015 which vests this role to the Office of the Accountant-General.

4.1.2 Secretariat

The Inter-Governmental Relations Technical Department to provide secretariat services to the Fund Administrator. This will involve undertaking of the following functions:

- (a) provide technical and administrative services to the Cabinet Secretary
- (b) identify any challenges in the implementation of projects and make recommendations on the remedial measures required to be undertaken;
- (c) maintain a data base setting out information on –
 - (i) projects, operations and programmes undertaken with respect to each county which has been identified by the Commission on Revenue Allocation as being marginalised;
 - (ii) monies appropriated from the Fund with respect to each project or programme; and
 - (iii) status of each project or programme undertake;
- (d) prepare and ensure timely submission of reports to the Cabinet Secretary regarding the implementation of projects and programmes under the Fund;
- (e) make arrangements for periodical monitoring, evaluation and reporting of the criteria, standards and programmes in relation to the objects and functions of the Advisory Board; and
- (f) perform such other functions as may be assigned to it by the Cabinet Secretary.

Commented [RR5]: We propose that the Fund Administrator should be allowed to have a secretariat that is answerable to him. This arrangement is likely to create some either real or perceived conflict

Commented [RR6]: Is it Cabinet Secretary or Fund Administrator. It should be Fund Administrator because he is the one administering the fund

Commented [RR7]: These are functions and duties of the Fund Administrator.

4.1.2 The Fund Administrator shall:

- a) Ensure that the earnings of, or accruals to the Equalization Fund are retained in the Fund
- b) Appropriate Equalization Funds in line with the framework developed by the Commission for Revenue Allocation in the policy identifying marginalised areas
- c) In consultation with other stakeholders develop conditions for disbursements of Equalisation Funds to beneficiary counties
- d) In consultation with other stakeholders develop schedule to the County Allocation of Revenue Act of appropriated funds to beneficiary counties
- e) Issue guidelines in line with the policy on marginalised areas on project identification
- f) Receive approved funding proposals from Inter-Governmental Sub County Technical Committee
- g) Approve disbursements of funds from the Equalisation Fund to marginalised areas
- h) Ensure that money held in the fund, including any earnings or accruals referred to in (a), is spent only for the purposes for which the fund is established.
- i) Prepare financial statements for the fund for each financial year in a form prescribed by the Accounting Standards Board in line with section 84 of the PFM Act.
- j) Prepare quarterly financial statements for the fund in a form prescribed by the Accounting Standards Board (Section 85 PFM Act)
- k) Verify and evaluate project implementation
- l) Manage, control and administer assets of the Fund in such manner and for such purposes as best to promote the purpose for which it is established;
- m) Determine the provisions to be made for capital and recurrent expenditures under the Fund
- n) Receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom

Commented [RR8]: Use Allocate as appropriate is a parliamentary function

Commented [RR9]: There is need to define who are stakeholders

Commented [RR10]: Insinuates that marginalized areas are at sub-counties which is always not the case

4.2 Second Level: County Level

4.2.1 County Executive Committee Member for Finance

- a) The County Executive Committee Member for Finance shall consolidate all projects approved by the Sub County Technical Committee (SCTC) and submit to the Fund Administrator for funding
- b) The County Executive Committee Member for Finance shall prepare financial statements for the fund for each financial year in a form prescribed by the

Accounting Standards Board in line with section 84 of the PFM Act and submit to the Fund Administrator

- c) The County Executive Committee Member for Finance shall prepare quarterly financial statements for the fund in a form prescribed by the Accounting Standards Board (Section 85 PFM Act) and submit to the Fund Administrator
- d) The County Executive Committee Member for Finance shall establish two committees, the Sub County Technical Committee ("SCTC") at the Sub County level and the Project Identification and Implementation Committee (PIC) at the Ward level.
- e) Prepare quarterly reports on Funds received and Implementation status of all projects financed by the Equalisation Fund with a copy to the Fund Administrator and Commission on Revenue Allocation
- f) Prepare annual report on implementation on all projects financed by the equalisation Fund with a copy to the Fund Administrator, Commission on Revenue Allocation and Parliament

Commented [RR11]: Copy should also be supplied to the Controller of Budget

Commented [RR12]: Copy should also be supplied to the Controller of Budget

4.2.2 The SCTC shall:

SCTC shall be chaired by the sub-county administrator and shall undertake the following functions:

- a) Receive project/funding proposals from respective Project Identification and Implementation committees
- b) Evaluate and approve all development proposals from the Project Identification and Implementation Committees,
- c) Assess the feasibility and cost all project proposals received from the Project Identification and Implementation Committees
- d) Submit project proposals and funding requests received from the Project Identification and Implementation Committees to the county government
- e) Monitor all projects being undertaken and ensure they meet the objectives they are originally meant to achieve;
- f) Prepare quarterly reports on Funds received and Implementation status of all projects financed by the Equalisation Fund with a copy to the copy to the County Executive Committee Member for Finance.
- g) Prepare annual report on implementation on all projects financed by the equalisation Fund with a copy to the copy to the County Executive Committee Member for Finance.

Composition

1. Sub- county administrator
2. A maximum of four (4) technical officers from ministries relevant to funding priorities
3. The chairs of Project Identification and Implementation Committees within the sub county

Commented [RR13]: Should be the sub-county administrator as per section 50 of the County Government Act

Commented [RR14]: Should also include a member of the implementing agency from the County

4.2.3 The PIC shall

To be chaired by the Assistant Sub county administrator, The PIC shall: development proposals, the Ward committee will make presentations and proposals to the technical committee at the sub county level for vetting, prioritization, funding and monitoring.

Commented [RR15]: The County Government Act does not provide for the office of Assistant Sub county administrator

Commented [RR16]: This is a new committee not established in these guidelines

Functions

- a) Undertake public participation, in beneficiary areas.
- b) Identify and prioritise project in beneficiary areas in line with guidelines issued by the Fund Administrator
- c) Prepare and submit project/funding proposals to SCTC
- d) Provide oversight on project implementation

Composition

- a) Assistant Sub County Administrator
- b) The villager administrators of areas defined by the Commission on Revenue Allocation as marginalised
- c) A representative of the women, youth, minorities and PWDs

Commented [RR17]: See comment 15 above

4.3 Expenses of the Management

- a) There shall be paid out of the Fund, expenses of the management and such other expenses incurred pursuant to the object and purpose for which the Fund is established.
- b) The expenditure incurred on the Fund shall be on the basis of and limited to annual work programmes and budget estimates prepared by the Administrator of the Fund and approved by the Cabinet Secretary at the beginning of the financial year to which they relate.
- c) Any revision of the approved budget estimates, and of any cost estimate, shall be referred to the Cabinet Secretary for approval.

PART V-PREPARATION AND SUBMISSION OF WORKPLANS

5.1 Projects and programmes for financing under the Fund

The Fund shall finance programmes or projects for the provision of the following basic services in areas identified as marginalised areas by the Commission on Revenue

Allocation—

- (a) water and sanitation;
- (b) roads;
- (c) health facilities;
- (d) electricity;
- (e) such other basic services as shall be identified by the Commission on Revenue Allocation as requiring implementation in a marginalized area.

5.2 Preparation of work plans

(1) Art. 204 (3) (b) of the Constitution provides that "*the national government may use the Equalisation Fund either directly, or indirectly through conditional grants to counties in which marginalised communities exist*".

(2) ~~To adhere to the court ruling, the mode of disbursement of equalization fund~~ resources can only be expended via conditional grant to the affected and therefore the amount shall be put in the Division of Revenue Bill and the attendant schedule be part of the CARB.

(3) The county executive committee member for matters related to finance in each of the counties identified by the Commission on Revenue Allocation shall prepare a workplan setting out -

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

Commented [RR18]: Workplans and budgets should be aligned to the Budget cycle and clear timelines prescribed

Commented [RR19]: Cannot have this in the guidelines

(2) In identifying programs and projects for inclusion in the workplan, the county executive committee member shall –

(a) take into account–

(i) the criteria recommended by CRA

(ii) the costing of the project and the time required for the implementation of the project on a priority basis;

(iii) recommendations by the Commission on Revenue Allocation;

(iv) recommendations, standards and guidelines issued by the fund management;

(v) the interventions required to be undertaken on a priority basis in order to address the needs identified by the Commission on Revenue Allocation for the provision of identified basic services;

(3) The county executive committee member shall ensure that a workplan prepared under paragraph (1) is aligned to the annual development plan of the county prepared under the Public Finance Management Act.

5.3 Approval of workplan

(1) The workplan prepared at County level shall be submitted to the respective county assembly for approval within seven days.

(2) The county executive committee member shall submit the workplan together with an explanatory memorandum which shall include an explanation of any deviation between the workplan and recommendations made by the Board or the relevant Ministry or State Department.

(3) Where the county assembly fails to approve or reject the workplan submitted under paragraph (1), within seven days, the workplan shall be deemed to be approved.

Commented [RR20]: This guidelines do not establish a Board. What is the Rationale of the State Department? Not v clear

Commented [RR21]: What happens when the workplan is rejected. There is need to have a processes to address this

5.4 Submission of workplan to the National Treasury

(1) The county executive committee shall, upon approval of a work plan submit the workplan to the National Treasury

(2) Upon receipt of the workplan, the National Treasury shall – appraise the workplan to ensure compliance with these Guidelines and that it adequately addresses the needs identified by the Commission on Revenue Allocation;

Commented [RR22]: This should be undertaken by the administrator of the fund and the secretariat

Commented [RR23]: See comment 22 above

(a) identify the programmes or projects that require to be implemented on a priority basis; and

(b) make its recommendations to the Cabinet Secretary.

Commented [RR24]: County Executive committee and not CS

(3) Where, upon the recommendation of the Cabinet Secretary finds that the workplan does not sufficiently address the needs identified by the Commission on Revenue Allocation or the information provided, the Cabinet Secretary shall inform the county executive committee member in writing setting out the specific information that is required.

PART VI—WITHDRAWALS FROM THE FUND

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

Commented [RR25]: Who will be making the request?

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

6.3 All withdrawals made from the Fund under paragraph 6.1 shall be deposited into the respective spending agencies account.

Commented [RR26]: We propose that the funds flow directly to the CRF of the affected counties as coloured money

PART VIII-WINDING UP OF THE FUND

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

(a) the Fund management shall prepare a status report on all existing pending projects and their funding requirements in line with the submitted work plans; and

(b) the Cabinet Secretary shall –

(i) make the necessary requisition for the transfer of monies to the county governments for the completion of the projects; and

(ii) shall ensure that monies required for the completion of the projects has been transferred to the respective county governments.

(2) At least twelve months before the expiry of the period specified under Article 204(6) of the Constitution or in legislation enacted by Parliament pursuant to Article 204(7) of the Constitution the county executive committee members in the respective county governments shall submit to the Advisory Board –

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

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

(4) The Cabinet Secretary shall, submit the final report to the National Assembly and the Senate within fourteen days of the receipt of the initial report under paragraph (3).

General Comments

1. There is need to introduce a section/subheading on reporting where at the end of each quarter the administrator submit the quarterly reports and gives copies to the various stakeholders.
2. Financial prudence demand that the Fund Administrator adhered to the administrative cost threshold as set out in the PFMA Regulations. This should be included in the guidelines
3. The established structure appears to very expensive and complex to operate. There is need to brainstorm more on the structure and whether there is need for the Advisory Committee/Board. It is our view that there is no need of having the Advisory Committee the earlier proposals of there being an Advisory board was informed by the Court decision that made a finding that CRA recommendations were binding. CRAs recommendation was that there was need for an Advisory Committee.

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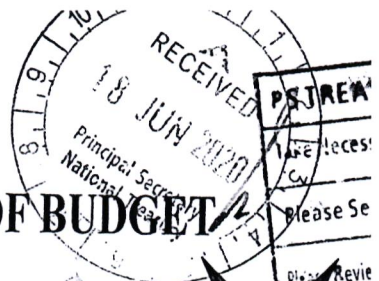
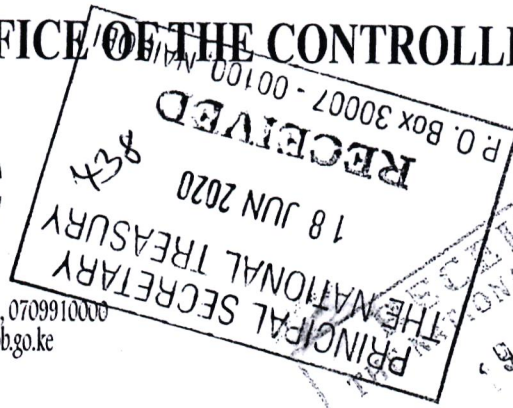
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Tel: 020 2211068, 0738466721, 0709910000
Email: cob@cob.go.ke/Info@cob.go.ke
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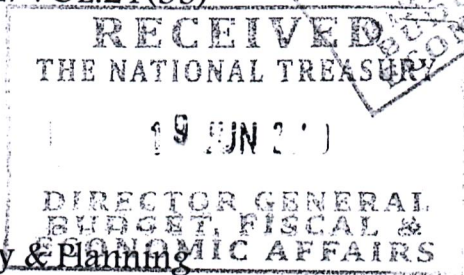
OFFICE OF THE CONTROLLER OF BUDGET



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

Ref: COB/NTP/002/VOL.21(35)
2020

18th June,



Dr. Julius Muia, CBS
Principal Secretary
The National Treasury & Planning
NAIROBI

Dear *Daktari,*

RE: EQUALIZATION FUND STATUTORY INSTRUMENT

The above matter refers.

Following the stakeholders meeting held on 21st May, 2020 and the resolutions made therein, I hereby forward the following comments for your consideration and possible inclusion.

Upon reviewing the Council of Governors proposal on the equalization fund statutory instrument dated 28th May 2020 I would add that;

- a) Membership of the proposed Board not be limited to a person nominated by the Pastoralist Parliamentary Group, but could be expanded to include representatives of the marginalized communities.
- b) On reporting, there would be need to have the Controller of Budget supplied with copies of the quarterly and annual reports prepared by the fund administrator at the National level and the County Executive Committee Member for Finance at the County level.

- c) There is need to cap the administrative costs at 3% of the approved budgets of the Fund and to realign the projects to the budgets timelines.

thank you for your continued cooperation.

YRS *Sincerely,*



Margaret Nyakang'o
CONTROLLER OF BUDGET

NATIONAL ASSEMBLY

COMMENTS ON EQUALISATION FUND STATUTORY INSTRUMENT

Team,

Apologies for taking a little longer time to respond, from the onset, I want to appreciate the team for great work it has done so far. In terms of the constitution of the Board, I have a strong feeling that we should have the Board safe for some minor amendments in terms of the constitution of the Board. I will suggest that we do away with the representation of the Pastoralist group as proposed in the Regulations. Indeed, in the proposed marginalization policy proposed by the CRA, earmarked areas span the entire country and are not necessarily from pastoralist regions and hence it will be tantamount to selective representation. In my view, the representation from the COG suffices.

Thank you

From

Martin Masinde

Representative of National Assembly



REPUBLIC OF KENYA
THE NATIONAL TREASURY & PLANNING

MINUTES OF THE MEETING OF THE INTER-AGENCY TASKFORCE
COMMITTEE APPOINTED TO DEVELOP EQUALIZATION FUND
STATUTORY INSTRUMENTS REGULATIONS, 2021

Via Microsoft Teams Platform hosted at The Treasury Building, 14th Floor
on Wednesday, 7th April, 2021, 2.00 p.m.

MEMBERS PRESENT

No.	Name	Ministry/State Department	Designation	Role
a)	Mr. Samuel K. Kiptorus	National Treasury	Senior Deputy Director	Chairperson
b)	Mr. Geoffrey M. Malombe, HSC	National Treasury	Senior Deputy Accountant General	In attendance
c)	Mr. Guyo Boru	National Treasury	Head, Equalization Fund	In attendance
d)	Ms. Jacqueline Muindi	National Treasury	Senior Principal State Counsel	Member
e)	Ms. Elizabeth Muhia	Office of the Clerk of the Senate	Principal Legal Counsel	Member
f)	Mr. Martin Masinde	Parliamentary Budget Office	Senior Deputy Director/ Member	Member
g)	Ms. Zipporah Muthama	Council of Governors	Legal Officer	Member
h)	Mr. Eugene Lawi	Council of Governors	Legal Officer	Member

No.	Name	Ministry/State Department	Designation	Role
i)	Ms. Rhoda Rutto	Office of the Controller of Budget	Director, Legal Services	Member
j)	Ms. Lineth Oyugi	Commission on Revenue Allocation	Director, Economic Affairs	Member
k)	Ms. Sheila Yieke	Commission on Revenue Allocation	Director, Legal	Member
l)	Ms. Jecinta Hezron	Commission on Revenue Allocation	Office of the Chairperson, CRA	In attendance
SECRETARIAT				
m)	Mr. Bernard Amimo	National Treasury	Senior Economist	Lead Secretary
n)	Ms. Claire Ototo	National Treasury	Senior Administrator	Joint Secretary
o)	Ms. Rose Apunda	National Treasury	Economist	Joint Secretary

ABSENT WITH APOLOGY

No.	Name	Ministry/State Department	Designation	Role
1.	Mr. Samuel Kiiru	National Treasury, Budget	Director of Planning	Member
2.	Ms. Jane Wacuka	National Treasury, Accounting Services	Deputy Accountant General	Member
3.	Ms. Everlyne Kimengich	National Treasury, IFMIS	Senior Accountant	Member

AGENDA

1. Preliminaries:
2. Opening Remarks
3. Deliberations on the Attorney General (AG) Advisory
4. Any other business
5. Adjournments

MINUTE NO.	DELIBERATIONS	REMARKS
MIN.1: Preliminaries	<p align="center">a) <u>Call to Order</u></p> The Chairperson called the meeting to order at 2.05 p.m. and welcomed the members to the equalization fund Inter-Agency Taskforce meeting.	Chairman
1. MIN.2: Opening Remarks	<p>In his opening remarks, the chair informed the meeting that the EF regulations instrument was approved by the Cabinet and later forwarded to the Attorney General for Legal drafting.</p> <p>He reiterated that the purpose of the meeting was to apprise members on the developments/advisory given by the Attorney General on the draft Equalization Fund regulations, seek comments and concurrence on the AG's advisory. The agenda was adopted as presented.</p>	
MIN.3: Deliberations on the Attorney General (AG) Advisory	<p>The draft PFM (Equalization Fund) Regulations 2021 proposed to establish the Equalization Fund Board as a corporate body with mandate to administer the Fund. Having reviewed the position of the Public Finance Management Act and general practice with regard to creation of such bodies, the AG stated as follows:</p> <p>first, "Creation of an incorporated body under the draft Regulations means that the administration of the Fund wholly falls within the new entity. It can sue and be sued on</p>	<p>1) COB, CRA, NT, PBO and office of the Clerk of the Senate had no objection to the Advisory of the AG.</p> <p>2) COG abstained on the following grounds: notice was too short to review and validate the</p>

MINUTE NO.	DELIBERATIONS	REMARKS
	<p>any matter pertaining to its administration.this proposal is ultra vires section 18(1) of the Public Finance Management Act which mandates the National Treasury as the sole administrator of the Equalization Fund in accordance with Article 204 of the Constitution."</p> <p>Secondly, "corporate entities are not a creation of subsidiary legislation unless an Act of Parliament expressly provides for an enabling provision to this effect."</p>	<p>document. They committed to send a written response to NT.</p>
<p>MIN.3: Cont.. Deliberations on the Attorney General (AG) Advisory</p>	<ul style="list-style-type: none"> • The Attorney General's office requested for supply of the definition of the four terms below: <ul style="list-style-type: none"> a) "beneficiary county" b) "first policy" c) "eligible county" and d) "second policy" <p>Members deliberated and agreed to replace beneficiary County with eligible county, for purposes of clarity and to add definition of policy as per article 216(4) of the constitution.</p> <p>That the technical terms "first policy" and "second policy" which have been used in the document</p>	<p>Members agreed to replace "beneficiary county" with "eligible county" and also to retain the use of "first policy" and "second policy" in the regulations</p> <p>Action: NT to incorporate the comments accordingly</p>

MINUTE NO.	DELIBERATIONS	REMARKS
	<p>were for transitional purposes and needed to be defined as per Article 216(4) of the Constitution while specifying the years they covered.</p> <p>In addition, members generally concurred with AGs advisory and agreed on establishment of an unincorporated Board as opposed to incorporated Board. As a result, members noted there will be consequential amendment resulting from proposed amendment.</p>	
<p>MIN. 4, AOB and adjournment</p>	<p>Members sought guidance on the roadmap and next steps on EF given the number of petitions, pending bills from ongoing projects under first policy and the need to identify projects for the second policy. The period for equalization fund was also drawing nearer. There was therefore, an urgent need to Fasttrack the timelines for completion.</p> <p>There being no other business, the meeting was adjourned at 3.45pm.</p>	<p>NT undertook to incorporate all the comments agreed, share the revised regulations with members and forward the same to AG for legal drafting and subsequently to Parliament for approval.</p>

Confirmed as a true record of the proceedings by:

Chairperson:

Signature  Date 08/04/2021

Secretary:

Signature  Date 08/04/2021

PMF Act, 2012

PART VIII – MISCELLANEOUS PROVISIONS

205. Powers of the Cabinet Secretary to make regulations

- (1) The Cabinet Secretary may make regulations, not inconsistent with this Act respecting any matter that is necessary or convenient to be prescribed under this Act or for the carrying out or giving effect to this Act.
- (2) In making regulations under this Act, the Cabinet Secretary shall consult the Intergovernmental Budget and Economic Council.
- (3) A provision of a regulation may—
 - (a) apply generally or be limited in its application;
 - (b) apply differently according to different factors;
 - (c) authorise any matter or thing to be done from time to time; or
 - (d) do any combination of those things.
- (3A) Despite the generality in subsection (1), the Cabinet Secretary may make regulations for raising money by issuing a *Sukuk* bond which shall specify the purpose for which money may be raised.
- (3B) Money raised through a *Sukuk* bond may be raised within or outside Kenya in Kenya shillings or in any other currency or medium of exchange.
- (4) Regulations under subsection (1) shall not take effect unless approved by a resolution passed by Parliament.
- (5) Regulations approved under subsection (4) shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.
- (6) If a House of Parliament does not make a resolution either approving or rejecting any regulations within fifteen sitting days after submission to it for approval, the House shall be deemed to have approved those regulations.

EQUALIZATION FUND IMPLEMENTATION STATUS

BRIEF TO THE COMMITTEE ON DELEGATED LEGISLATION DURING CONSULTATIVE MEETING ON CONSIDERATION OF PUBLISHED PFM (EQUALIZATION FUND) REGULATION 2021

MOMBASA COUNTY ON 27TH MAY, 2021 at 11.00AM

Introduction

The Equalisation Fund was established under Article 204 (1) of the Constitution which requires that one half per cent (0.5%) of all the revenue collected by the national government each year, calculated on the basis of the most recent audited revenues, as approved by the National Assembly, to be paid into the Fund. As a precondition to the utilization of the Equalisation Fund, Article 216(4) of the Constitution requires the Commission on Revenue Allocation to determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas.

Implementation Framework

The Equalisation Fund was being administered through the defunct Equalisation Fund Advisory Board (EFAB) as provided for in section 4.1 of Gazette Notice No 1711 dated 13th March 2015

On 5th November 2019 the High Court made a ruling on Petition no. 292 of 2016. The ruling declared the Equalisation Fund guidelines as unconstitutional, null and void. This in effect disbanded Equalization Fund Advisory Board (EFAB) and any further expenditure from Equalization Fund.

The National Treasury was directed to develop a statutory instrument on the administration of the Equalization fund and it is on this basis that PFM (Equalization Fund) Regulation 2021 was developed and it has since been approved by Cabinet, published and a waiting National Assembly approval.

Disbursements from the Equalization Fund to date

The disbursements made up to date are based on the first policy on marginalization which identified 14 counties as marginalized areas. The policy also recommended the criteria for sharing revenue among the 14 marginalized counties and had a time horizon of three financial years, that is, 2014/15, 2015/16 and 2016/17. The Equalization fund entitlement since promulgation of the constitution 2010 is as shown in Table 1 below:-

Table 1: Equalization Fund entitlement and allocation since inception of Equalization fund financial years 2014/15, 2015/16 and 2016/17

S/No.	Financial Year	Most recent audited revenues approved by the National Assembly		Equalization Fund Allocation (Kshs.)	Equalization Fund Entitlement (0.5% of most recent audited and approved revenues) (Kshs.)
		Base Year for most recent audited revenues approved by National Assembly	Audited and approved revenues by National Assembly (Kshs.)		
	(a)	(b)	(c)	(d)	(e)
1	2011/12	2008/2009	468,151,970,000	0	2,340,759,850
2	2012/13	2009/2010	529,300,000,000	0	2,646,500,000
3	2013/14	2010/2010	529,300,000,000	0	2,646,500,000
4	2014/15	2012/2013	776,900,000,000	400,000,000	3,884,500,000
5	2015/16	2012/2013	776,900,000,000	6,000,000,000	3,884,500,000
6	2016/17	2013/2014	935,600,000,000	6,000,000,000	4,678,000,000
7	2017/18	2013/2014	935,600,000,000	0.0	4,678,000,000.00
8	2018/19	2013/2014	935,600,000,000.00	0.0	4,678,000,000
9	2019/20	2014/2015	1,038,035,000,000.00	0.0	5,190,175,000.00
Total amount due to Equalization Fund			15,345,786,970	12,400,000,000	34,626,934,850

Notes

1. There was no allocation in the first three financial years i.e. 2011/12, 2012/13 and 2013/14 since the first policy identifying the marginalized areas had not been put in place by the Commission on Revenue Allocation.
2. The total money appropriated is **Ksh.12.4 billion** in the Equalization Fund Appropriation Act 2017 and the balances on the same in the Equalization Fund Appropriation Act 2018 for the financial year

Based on the two appropriations, the National Treasury has to date disbursed a total of **Ksh.10,346,573,051** to Ministries, State Departments and Agencies implementing the identified projects in the 14 marginalized counties in financial as shown in tables 2, 3 & 4 below: -

Table 2: Disbursements in FY 2016/17

COUNTIES	State Department for Irrigation	State Department Vocational & Technical Training	State department for Water	Ministry of Health	State Department for Infrastructure Roads	State Department for Energy	State department for Basic Education	The National Treasury	Total
Garissa County			97,816,106.00			70,000,000.00			167,816,106
Isiolo County			50,000,000.00			16,600,000.00			66,600,000
Kilifi County						5,750,000.00			5,750,000
Kwale County						20,000,000.00			20,000,000
Lamu County						60,000,000.00			60,000,000
Mandera County						27,000,000.00			27,000,000
Marsabit county						16,000,000.00			16,000,000
Narok County									-
Samburu County									-
Taita Taveta County									-
Tana River County						15,000,000.00			15,000,000
Turkana county									-
Wajir county									-
West Pokot County			103,782,138.00						103,782,138
Secretariat Administrative Cost	54,791,200.00	7,870,000.00	166,300,000.00	88,155,000.00	102,500,000.00	38,500,000.00	2,249,500.00		460,365,700
Total	54,791,200		417,898,244	88,155,000	102,500,000	268,850,000	2,249,500	-	942,313,944

Table 3: Disbursements in FY 2017/18

COUNTIES	State Department for Irrigation	State Department Vocational & Technical Training	State department for Water	Ministry of Health (Health Facilities)	State Department for Infrastructure (Roads)	State Department for Energy	State department for Education Education	The National Treasury	Total
Garissa County			185,682,609.00	35,000,000.00	317,520,000.00	70,000,000.00			608,202,609.00
Isiolo County			45,158,734.00	30,900,000.00	450,300,000.00	16,600,000.00			542,958,734
Kilifi County			98,883,566.00	56,214,369.00	181,721,610.00	6,000,000.00			342,819,545
Kwale County			136,750,654.00	2,706,250.00	317,475,000.00	77,000,000.00			533,931,904
Lamu County	21,841,872.00		55,068,900.00	89,965,723.00	178,805,300.00	60,000,000.00			405,681,795
Mandera County	185,312,520.00		127,070,518.00	170,600,000.00	300,000,000.00	27,000,000.00			809,983,038
Marsabit county	106,978,800.00		46,759,121.00	94,149,100.00	148,928,000.00	16,000,000.00			412,815,021
Narok County			92,500,543.00	69,393,303.00	270,904,145.00				432,797,991
Samburu County			305,010,167.00		111,800,000.00				416,810,167
Taita Taveta County			40,255,235.00	167,725,000.00	414,500,000.00	15,000,000.00			637,480,235
Tana River County	204,327,007.00		28,171,309.00		179,000,000.00				411,498,316
Turkana county			39,847,657.00	23,750,000.00	320,066,668.00				383,664,325
Wajir county			289,454,791.00	141,200,000.00	80,000,000.00				510,654,791
West Pokot County			32,173,822.00	38,800,000.00	417,575,000.00				488,548,822
Total	518,460,199	-	1,522,787,626	920,403,745	3,688,595,723	287,600,000	-	-	6,937,847,293

Table 4: Disbursements in FY 2018/19

COUNTIES	State Department for Irrigation	State Department Vocational & Technical Training	State department for Water	Ministry of Health (Health Facilities)	State Department for Infrastructure (Roads)	State Department for Energy	State department for Education Education	The National Treasury	Total
Garissa County			57,566,258.00						57,566,258
Kiolo County			36,361,403.50	59,750,000.00					96,111,404
Kilifi County			101,576,474.20	64,045,502.00			23,000,000.00		188,621,976
Kwale County			42,074,602.00	8,118,750.00			50,000,000.00		100,193,352
Lamu County	5,312,684.00		91,460,101.90	53,024,948.00					149,797,734
Mandera County	125,328,632.60		22,522,900.00						147,851,533
Marsabit county	189,333,006.10		50,183,477.50	122,496,400.00					362,012,884
Narok County			61,925,816.50	132,929,908.00					194,855,725
Samburu County			234,895,466.10						234,895,466
Taita Taveta County			21,005,493.00	3,975,000.00					24,980,493
Tana River County	189,059,101.30		68,993,349.35				60,000,000.00		318,052,451
Turkana county			124,963,665.40	67,500,000.00					192,463,665
Wajir county			76,137,534.00	162,800,000.00					238,937,534
West Pokot County			40,071,341.00	120,000,000.00					160,071,341
Total	509,033,424	-	1,029,737,882	794,640,508	-	-	133,000,000	-	2,466,411,814

It should be noted that disbursement of funds from Equalization Fund by the National Treasury to MDAs are based on specific request accompanied by certificates which are ready for payments and with approval of the Controller of Budget.

2. Status of implementation of the projects identified in financial years 2016/17, 2017/18 and 2018/19 in the 14 counties

Projects identified for funding from the Equalization Fund in the 14 counties, and based on the first policy on marginalization were to be financed from entitlements to the Equalization Fund of the financial years 2014/5, 2015/16 & 2016/17 and as appropriated in Equalization Appropriation Act 2017 and Equalization Appropriation Act 2018 to their completion. As such, projects were only identified once based on the first policy in the financial year 2016 and the same have been under implementation since then. New projects will only be identified based on the second policy on marginalization and once the PFM (Equalization fund) regulations 2021 is approved by National Assembly.

Important to note the ongoing projects financed from the Equalization Fund are implemented by specific MDAs who forward status reports of their respective projects to the National Treasury.

As at 30th June, 2019, and based on submission by MDAs, the summary of all the 352 projects financed from the Equalization Fund is as shown in table 5 below:-

Table 5: Status of all the Equalization projects to date

Implementing MDA	No. of Projects	Tendering/ Awarded	Stalled/Not started	Inception	< 50%	50%-75%	76%-99%	100% (completed)
Ministry of Health	84	11	2	0	7	19	35	10
State Department for Infrastructure; through KeRRA	84	7	8	0	8	22	12	27
State Department for Irrigation	24	0	0	0	0	1	2	21
Ministry Water and Sanitation	128	0	6	0	30	20	35	37
State Department for Technical and Vocational Training	2	0	0	0	1	1	0	0
State Department of Early Learning Basic Education	10	0	0	10	0	0	0	0
Ministry of Energy	20	0	3	0	0	0	0	17
TOTAL	352	18	19	10	46	63	84	112

Details of projects per Sector and County and their respective status, and as submitted by respective MDAs, are attached herein as Annex for your perusal and details among them completion dates for each project.

a. Resources spent

As mentioned above, a total of Ksh.12.4 billion on Equalization Fund entitlements relating to financial years 2014/15, 2015/16 & 2016/17 have been appropriated to finance projects identified in 14 marginalized counties and for administrative expenses in their implementation. Of these funds, a total of Ksh.10,346,573,051 have been disbursed to the MDAs implementing the identified projects to be financed for the Equalization Fund.

Out of Ksh.10,346,573,051 disbursed from the Equalization Fund to MDAs since 2016/17, the MDAs have been able to spend a cumulative of Ksh.7,042,468,880 or 68 % of the funds disbursed to them. This expenditure comprises of Ksh.121,550,052 for administrative expenses and Ksh.6,920,918,828 as development expenditure. The detailed development expenditures of MDAs and as per IFMIS report of 8th October, 2019 is as shown in table 6 below and worth to note that no further vote has been expensed because of court determination that the guideline on the administration of the equalization fund is null and void.

Table 6: Development Expenditure VOTE BOOK STATUS REPORT - for the period from Jul-18 to Jun-19 as at 8th October, 2019.

	Ministry / State Department	Approved Estimates (Net)	Cumulative Expenditure	Outstanding Commitments	Total Payment and Commitments	Balance
1	State Department for Infrastructure	3,638,595,723	3,638,595,723	0	3,638,595,723	0
2	Ministry of Health	1,964,219,396	1,163,561,835	0	1,163,561,835	800,657,561
3	State Department for Basic Education	133,000,000	133,000,000	0	133,000,000	0
4	Ministry of Water	2,894,905,578	1,084,107,714	289,200	1,084,396,914	1,810,508,664
5	State Department for Vocational Education	84,000,000	0	0	0	84,000,000
6	State Department for Irrigation	1,015,998,408**	701,026,789	10,235,501	711,262,290	304,736,118
7	State Department for Energy	287,600,000	190,102,066	0	190,102,066	97,497,934
		10,018,319,105	6,910,394,127	10,524,701	6,920,918,828	3,097,400,277

Source: IFMIS

b. Challenges encountered

The Equalization Fund was established in August 2010 upon promulgation of the Constitution which established the Fund under Article 204. Entitlements to the Fund is 0.5 % of the most recently audited revenues of Government and as approved by the National Assembly and became due from financial year 2011/12 to date. This Fund is expected to be in place for 20 years, unless the timeline is extended by a Parliament.

The Fund was operationalized in the financial year 2015/16 and projects to be financed from the Fund identified in December 2016. The operationalization and implementation of the Fund has faced the following challenges since inception to date:-

1. First policy on identifying marginalized areas was intended to cover the financial years 2011/12, 2012/2013 and 2013/14. However, there was a delay in approval of the policy (the policy was approved in December, 2015), the policy covered financial years 2014/15, 2015/16 and 2016/17
2. There was initial delay in grant of approval of the Guidelines for administration of the Equalization Fund. The guidelines were approved by Parliament in 2016;
3. Delayed disbursement of funds from Equalization Fund was due to the lapse of the Equalization Appropriation Act 2017. Although Article 204 of the Constitution does not foresee lapse of funds appropriated to the Equalization Fund until completion of all projects identified for funding from the Fund.
4. On 5th November 2019 the High Court made a ruling on Petition no. 292 of 2016. The ruling declared the Equalization Fund guidelines as unconstitutional, null and void. This in effect disbanded Equalization Fund Advisory Board (EFAB) and any further expenditure from Equalization Fund.

unconstitutional, null and void. This in effect disbanded Equalization Fund Advisory Board (EFAB) and any further expenditure from Equalization Fund.

5. National Treasury was directed to develop new statutory instrument on the administration of the Equalization Fund and the lengthy nature of the process of developing new statutory instrument has caused more delay in operationalizing of Equalization Fund.

In light of the Court decision of 5th November 2019, the Board and Fund secretariat stands dissolved and hence cannot and did not transact any further business on Equalization Fund.

Way Forward

The National Treasury was directed to develop a statutory instrument on the administration of the Equalization Fund and it is on this basis that a multi-agency committee comprising of representatives from National Treasury, National Assembly, Senate, Council of Governors, Commission of Revenue Allocation and Controller of Budget was put in place to develop a new Equalization Fund statutory instrument as directed by the High Court.

Public Finance Management (Equalization Fund) Regulations 2021 was developed and has since been approved by the Cabinet, Published and awaiting National Assembly approval through the Committee of delegated legislation.

We are looking forward for support from National Assembly on resolving the current legal issues surrounding the Fund in a timely manner to ensure that the country achieves the envisaged goals of the Fund provided under Article 204 (6) of the Constitution.



HON. (AMB.) UKUR YATANI, EGH
CABINET SECRETARY/NATIONAL TREASURY AND PLANNING

PRINCIPAL SECRETARY
THE NATIONAL TREASURY
195-09 SEP 2020
TEL: 020 2211068, 0738466721, 0709910000
P.O. BOX 35616-00100, NAIROBI

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19 SEP 2020
Principal Secretary
National Treasury

OFFICE OF THE CONTROLLER OF BUDGET



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



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

PS TREASURY OFFI
Take Necessary Action
Please See Me
Law and Advice
Keep in View
Respected & Appreciated
Please Let's Discuss

Ref: COB/NTP/002/VOL.22(75)

8th September, 2020

Dr. Julius Muia, CBS
Principal Secretary
The National Treasury & Planning
P.O. Box 30007-00100
NAIROBI

Dear *Dr. Muia*

RE: REQUEST FOR SUBMISSION ON THE PUBLIC FINANCE MANAGEMENT
(EQUALIZATION FUND) REGULATIONS, 2020

Reference is made to the above subject matter and the call for public participation publicized in your Website.

Attached please find attached comments on the Public Finance Management (Equalization Fund) Regulations, 2020 for your consideration.

Yours *Sincerely*

Margaret Nyakang'o

Dr. Margaret Nyakang'o
CONTROLLER OF BUDGET

RECEIVED
THE NATIONAL TREASURY
530 10 SEP 2020
DIRECTOR GENERAL
BUDGET, FISCAL &
ECONOMIC AFFAIRS