



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

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

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

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

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	<p>What is the Effective Date of this regulation and when will the Officer start preparing the projections for shortfall/surplus?</p>	<p>Comment clarified. Section 205 of the PFMA provides that regulations made under the Act shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.</p>	None	None
	<p>Objectives and Purposes: refers to providing investors and financiers visibility and structure in participation process – Does this contemplate providing role for investors and financiers to participate in the Fund?</p>	<p>Original drafters to clarify the rationale for regulation 3 (d)? The context is that a dedicated fund pool provides transparency, which in turn drives comfort for investors about the availability of resources for the Government to consistently meet its end of the bargain. This is particularly crucial given historicity in Kenya with regard to road construction contracts, which have witnessed varying levels of pending bills, a phenomenon that does not induce confidence about repayment ability, effectively constraining lender risk appetite for exposure to such project development models.</p>		

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		<p>By promoting visibility of the repayment ability, the effect is a lowering of risk pricing by private partners, with the overall outcome that the cost of delivering public services tends to benefit from lower prices, because the market for engagement is more certain, marked by lower information asymmetries.</p>		

<p>Kipkenda & Co. Advocates Off Riverside Drive P.O. Box 56832-00200 Nairobi. Info: info@kipkenda.co.ke</p>	<p>Clarity on the Place of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986. The Public Roads Toll Act Cap. 407 of the Laws of Kenya has subsidiary legislation known as the Public Roads Toll (Public Roads Toll Fund) Rules, 1986 established vide legal notice number 307 of 1986. A reading of the Rules shows the existence of a Public Roads Toll Fund and an officer administering the fund. The Public Roads Toll Fund was established under section 7 of the Public Roads Toll Act cap. 407. We, however, note that the said section 7 was deleted by Act No. 2 of 2007 Fifth Schedule (Kenya Roads Act, 2007). Although Section 7 of the Public Roads Toll Act Cap 407 was deleted, the subsidiary legislation under the Act continue to be in force. This is in accordance with Section 24 of the Interpretations and General Provisions Act, Cap 2 which provides as follows: "Where an Act or part of an Act is repealed, subsidiary/legislation issued under or made in virtue thereof shall, unless a contrary</p>	<p>Comments are incorporated as recommended.</p>	<p>Introduce a new Reg 26 titled 'Repeal and Transition'</p>	<p>Repeal and Transition "26: The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 under the Public Roads Toll Act, Cap 407 of the Laws of Kenya is hereby repealed.</p>
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	<p>intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder. "</p> <p>As per the above foregoing, the question then begs what the place of Public Roads Toll (Public Roads Toll Fund) Rules, 1986 is vis-à-vis the Public Finance Management (National Toll Fund) Regulations, 2020. The two regimes of law cannot exist at the same time since they are serving more or less the same purpose hence we propose for the repeal of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986 before the operationalization of the Public Finance Management (National Toll Fund) Regulations, 2020.</p> <p>The Public Finance Management (National Toll Fund) Regulations, 2020 is more comprehensive as compared to the 1986 Rules hence our proposal for the repeal of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986. Further,</p>			
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	<p>Regulation 5 of the proposed regulations provide that Road Tolls shall be set in accordance with the Public Roads Toll Act, Cap 407 of the Laws of Kenya. This further buttresses the need to harmonise both legislations on the issue of Toll Fund. There is need for clarity that the 1986 rules have been repealed. In that regard, we propose the addition of Regulation 26 to the draft which we proceed to word as follows:</p> <p>Repeal and Transition</p> <p>"26. The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 under the Public Roads Toll Act, Cap 407 of the Laws of Kenya is hereby repealed.</p>			
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<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Definitions of "Projected Shortfall" and "Projected Surplus" As per the draft Regulations, a Projected Shortfall is 5% above projected requirements and a Projected Surplus is 10% above projected requirements for the next 12 months. This seems low as it leaves very little cushion to address any change (in particular in actual traffic or in the exchange rate affecting the level of service payments) over the contemplated period. The ratios used in the relevant definitions should therefore be revised. The appropriate ratio will depend on whether the National Treasury agrees to reflect the ring fencing approach in the Regulations (as explained in paragraph 1 above). Thus, in a ring-fencing scenario, the ratios should be as follows: "Projected Shortfall" means where the Projected Fund Ratio falls below 1.35x3 in any projection period; "Projected Surplus" means where the Project Fund Ratio exceeds 1.45x in any projection period.</p>	<p>Proposal under review</p>	<p>The Financial Analysts to provide rationale for regulation 11</p>	
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	<p>Should the National Treasury decide to reject the ring-fencing approach, ratios should be even higher than the levels indicated above (1.35x and 1.45x) to address the uncertainty associated with the amalgamation of several projects cash flows. Further, utilisation of Project Surpluses should be based on long-term cash projected coverage ratio (akin to a "Project Life Coverage Ratio" as can be seen in a project financing) that includes toll collections versus projected future Service Payments. The ratio specified in sections 11(1)(a) and (c) should be revised accordingly.</p>			
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<p>NortonRose Fulbright LLP and Walker Kontos, In their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 3(d) (Objects and Purpose of Regulations) One of the object and purpose of the Regulations is to provide investors and financiers of Project Roads visibility and structure in the participation processes under the Fund. It is not clear what participation rights (if any) investors and financiers have been afforded under the Regulations. Recommendation: Appropriate provisions to enable investors and financiers participate or obtain information on the operation of the Fund. For instance, see our recommendation in item 8 below requiring the Officer Administering the Fund to publish either on the Ministry's website, the Kenya Gazette and/or 2 newspapers of national circulation, quarterly reports of the projected Inflows and Outflows from the Fund, as well as balance of the Fund at the end each quarter.</p>	<p>There is need to redraft Regulation 3 (d) to provide more clarity on the participation of the investors The comments could be numbered to allow for cross referencing with the explanation on 'providing visibility to investors' as furnished to the World Bank hereabove Section 82 of the PFMA contains provisions that address accountability and publication of financial reports. It provides" Annual reporting by receivers of revenue (1) At the end of each financial year, a receiver of revenue for the national government shall prepare an account in respect of the revenue received and collected by the receiver during that financial year. (2) An account prepared under subsection (1) shall include— (a) a statement of receipts and</p>	<p>Timely and consistent publication of quarterly reports is in line with the Constitutional principles of transparency and accountability in public finance administration.</p>	<p>None</p>

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

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	<p>Regulation 4(2) (Objects and Purpose of the Fund) Regulation 4(2) mentions that the purpose of the Fund is to provide a dedicated public fund from which the "Government's" payment obligations arising from the Project Agreements for the Project Roads shall be met. Reference to the Government in this clause appears incorrect as GoK is not a party to the Project Agreements, and hence the relevant clause should in fact refer to the "Contracting Authority" instead. Recommendation: Appropriate amendments to be made.</p>	<p>Proposal nt accepted. Consideration may be given to accommodating the proposed clarification as follows:</p>	<p>Contracting Authority is a juridical component of the GoK Reg 4</p>	<p>"The objective and purpose of the Fund shall be to provide a dedicated public fund from which Government's payment obligations, for Contracting Authorities that have executed Project Agreements for Project Roads, shall be met."</p>
<p>Bertha Dena</p>	<p>1. Regulation 4(2) Page 4: Objects and Purpose of the Fund: The regulation states that the fund will meet the Government's payment obligations arising from Project Agreements for Project Roads shall be met. This is confusing since in the definition of terms in my understanding</p>	<p>Comment clarified. Agreed. It is necessary to reflect the position that the Project Roads may be PPP arrangements or other Roads declared as toll roads under the PRT Act.</p>	<p>Project Agreement as defined under the PPP Act 2013 refers to all PPP Contracts hence the need to specify that the Fund will meet the Government's</p>	<p>"The objective and purpose of the Fund shall be to provide a dedicated public fund from which Government's payment obligations, for Contracting Authorities that have:</p>

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	<p>- Projects Agreements refers to PPP road projects and Project Roads refers to all roads declared as toll roads by the Cabinet Secretary responsible for roads. In that case which is "Project Agreements for Project Roads."</p>		<p>payment obligations arising from Project Agreements ONLY for Project Roads</p> <p>Reg 4(2)</p>	<p>i) executed Project Agreements; or ii) executed any other Roads Toll Agreement, shall be met."</p>
<p>Institute of Certified Public Accountants (ICPAK)</p>	<p>New Regulation: Toll Road Project Risks The main risks facing toll road projects include preconstruction, construction, traffic, revenue, currency, political, and financial. These risks must all be addressed in a manner satisfactory to debt and equity investors to make investment attractive for committing funds to toll road projects. Recommendation: The regulation should include a clause on toll road project risk management.</p>	<p>Proposal not accepted</p>	<p>Project Risk management formulae are negotiated concepts and agreed outcomes are covered under specific Project Agreements.</p>	

Commented [NW1]: Toll Roads: It appears, are not limited to Project Roads. Tolls are applicable to all roads declared as toll roads under the PRT

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	<p>New Regulation: Guiding Principles Introduce a new Regulation on Guiding Principles to anchor the key tenets of public finance management as enshrined in the PFM Act 2012</p> <p>Recommendation: Introduce a new Regulation to read, The following principles shall guide all aspects of governance, management and administration of the Fund—</p> <ul style="list-style-type: none"> a) there shall be transparency, accountability, ethical and results-oriented management of the Fund; b) monies from the Fund shall be used in a prudent and responsible way; and c) financial management of the Fund shall be responsible, and fiscal reporting shall be clear. <p>Anchors important PFM principles to guide in the management of the Fund. It is essential to have this provision at the Regulations level.</p>	<p>Proposal is not accepted. The Regulations are based on the PFM Act. Indeed the Preamble expressly provides that the Regulations are made pursuant to Section 24 thereof. The recommended principles and values are therefore drawn from the parent PFM Act. Accordingly, the cited tenets are appropriately anchored in the regulations.</p>		None

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THEMATIC AREA: 2. OPERATIONALIZATION OF THE FUND				
World Bank	<p>Allocation of Funds: The current drafting of the regulation does not provide indication as to whether or not the fund will serve projects on a pooled "pari-passu" basis, or by treating projects separately through segregated accounts. A clear statement of principle (including security and ranking) along these lines as well as a well-defined cash waterfall may be useful to clarify the payment mechanics of the NTF. We note that the documentation makes indications of accounts and sub-accounts (which would indicate that separate allocations will be available for certain projects). However, for the avoidance of doubt, more clarity on this aspect is advisable.</p>	Gok position deferred to Dr. Ronuh		

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	<p>Fund Inflows – Confirmation on readiness of project roads to be able to collect tolls for meeting first payment obligation under the Project Agreement? Approval for any initial contribution expected from the Govt Budget to meet payment obligation, if the first toll revenues are insufficient/not ready? The regulation should provide clear indication of how the GOK budget allocation will take place with regards to funding NTF shortfalls, including timing. A fundamental aspect is to make sure that NTF will always have sufficient funds to meet its payment obligations.</p>			

	<p>Projected Surplus - We understand that the GOK wants to have the ability to sweep a portion of the excess cash of the NTF. While we fully appreciate the rationale, such mechanism should be carefully contemplated to avoid impacting the financial robustness of the NTF</p> <p>This should be seen as a source of funds for the GOK only in very extreme and robust circumstances. For example, the release of funds should take place only if: i) the Projected Fund Ratio is very high (i.e. the 1 10x trigger is quite low); and ii) the NTF is fully-funded on a stand-alone basis with toll collections only, without any previous or future exogenous government injections of funding. Keep in mind that Service Payments will be impacted by traffic flows as well as foreign exchange fluctuations, so we would recommend a much more conservative threshold in all cases.</p> <p>ii. In our view, the release of funds should be allowed based on two fundamental criteria:</p> <ul style="list-style-type: none"> · long-term cash · projected coverage 	<p>Gok position deferred to Dr. Ronoh</p>		
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	<p>ratio that includes toll collections versus projected future payments, similar to a lender's Loan Life Coverage Ratio; and short term cash coverage ratio which would be based on immediately available cash available versus the projected future outflows for the next 12-24 months, akin to a Debt Service Coverage Ratio.</p> <p>iii. This cocktail of ratios would enhance short term liquidity as well as longer term solvency in creating a more bankable NTF and providing a better credit risk for the Bank's PRG, as well as a more robust credit profile for the private market.</p> <p>iv. Ratio Level of Projected Shortfall - Similar to the point above about the release of surplus funds,</p>			
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	<p>the 1.05x level which triggers a projected shortfall is quite low considering the uncertainties around the service payments and toll revenues of the Projects (i.e. number of projects, level of tariffs during the life of the projects, level of traffic, FX risk, inflation etc). Given the degree of traffic and macroeconomic variables that are included in the payment formulas, we would recommend a much more robust level to trigger the projected shortfall procedures.</p>			
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	<p>Other uncertainties of the current drafting of the regulation relate to the amount of cash that should remain in the account after any surplus payment (i.e a significant cash cushion shall remain in the NTF) and the timing and method of the calculation as it seems difficult to allow such outflows based on projections (i.e. in our opinion, it shall be authorized only based on available cash after costs have been fully covered).</p>			
	<p>Process/Allowance for Deductions: Regulation 14, b and 15 are not fully clear with respect to the process/allowance for deductions.</p>			
	<p>Procedures of the Fund: Disbursements from the Fund will be against "proper documentation" as detailed in these regulations. It is important that the timing for the review of the documentation by the NTF is clearly stated to avoid misunderstandings, delays/or any other administrative problems that</p>	<p>GoK response deferred to Dr. Ronoh</p>		

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	could interrupt the smooth flow of funds when due.			
	<p>What is the projection period for calculating the Projected Fund Ratio? Are Projected Shortfall/Surplus calculated for 12 rolling months? Definition to state this clearly.</p>			
	<p>Officer to satisfy itself that each payment instruction submitted is "eligible" – The invoices should have already been agreed/reviewed/approved at the underlying Project Agreement level (for example 29.3.1 and 29.3.2 clarifies this). What is the need for additional 'eligibility' criteria check at the Fund level?</p>			

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	<p>Right to Question and Reject Payment Instruction – The Officer has the 'power to suspend disbursements against invoices until such matters are resolved' – this is not consistent with the provisions of the underlying Project Agreement, where eligible payments would have been already certified. Once certified under the Project Agreement, there should not be further suspensions of payments by the Fund. The rationale for this right could be questionable. It is important to note that the Fund is not a party to the underlying Project Agreement</p> <p>The document is a bit silent on the actions that the NTF can implement to invest the surplus of the fund, if any, to compensate for inflation and FX risk – I understand that APs are paid in US</p>			

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<p>Geoffrey Koech National TaxPayer Association Pioneer Building Room 308 Oginga Odinga Street P. O. Box 204- 40123 Kisumu +254100176341</p>	<p>Disbursement from the fund. To enhance accountability, we are of the opinion that the input of the Controller of budget should be factored in when it comes to the disbursement of the funds. The Administrator should also require the approval of the COG committee on transport on County Roads that have benefitted through the PPP agreements.</p>	<p>Proposal not accepted. In addition, the enhanced accountability requirement is adequately prescribed in Section 82 of the PFMA, which inter alia, requires annual receivers of revenue, not later than 3 months after the end of the financial year, to (a) submit the accounts to the Auditor-General with a copy to the National Treasury, Controller of Budget and the Commission on Revenue Allocation; and (b) publish and publicize the financial statements.</p>	<p>There are accountability mechanisms under Regulations 13 and 14 to ensure eligibility of disbursements under the fund. In any event, disbursements principles are governed by Project Agreements and introducing input of the Controller of Budget would amount to introducing administrative bureaucracies.</p>	<p>None</p>

<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Ring fencing / Other projects The Consortium's remains of the strong opinion that the Fund should have segregated funds to support each project individually and thus the Regulations should provide for ring fencing provisions.</p> <p>If however the National Treasury decides to maintain the current approach reflected in the draft Regulations (absence of ring fencing), the Consortium considers that the following adjustments to the functioning of the Fund should be made:</p> <p>(i) A list of the initial Project Roads intended to be covered by payments from the Fund should be included as an appendix to the Regulations.</p> <p>(ii) Addition of any new project to the scope of payment obligations of the Fund should be subject to the approval of the existing Service Providers, which cannot be withheld if the Cabinet Secretary is able to demonstrate to the reasonable satisfaction of the Service Providers the financial capacity of the Fund to meet the payment obligations under such new project;</p>	<p>GoK position on this proposal deferred to Dr. Konoh</p>	
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	<p>(iii) The Regulations should clarify that all Service Payments (i.e. payments to be made under all Project Agreements) shall be made on a pari passu basis (i.e. the available funds to be allocated between all Service Providers pro rata to the amount of the Service Payment due and payable to each such Service Provider); and</p> <p>(iv) Further, the quarterly periods/payment dates should be the same under each Project Agreement. Otherwise, there could be some inherent subordination on a quarterly basis if multiple projects are grouped together.</p>			
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	<p>Payments into the Fund</p> <p>2.1 Initial funding of the Fund – Regulation 11(1)(c)</p> <p>Upon establishment of the fund, and until the Projected Fund Ratio is equal to or exceeds the Projected Shortfall threshold, the Officer Administering the Fund shall “cause to be appropriated such budgetary allocations as shall be adequate to cover all of the Fund’s obligations”.</p> <p>The Consortium would expect that a certain minimum amount is deposited to the Fund upon its establishment and that</p> <p>ii. further, a certain level of funding of the Fund is reached at the end of each quarter, so that there is a progressive build-up of the Fund (failing which the annual or supplementary budget process should be initiated to secure budgetary appropriations to cover the required level of funding) in order to ensure that the Projected Fund Ratio is equal to or exceeds</p>			

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	<p>Projected Shortfall threshold² by the start of the operation period of the Project (and of each subsequent project). It would be desirable for the schedule of such initial build-up to be documented as part of the Regulations so as to provide appropriate visibility to the relevant stakeholders.</p>			

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	<p>Further, and as noted below, the Consortium would like to understand what sources of funding are being considered to address the initial funding requirements of the Fund.</p> <p>2.2 Appropriation of the budgetary allocations - Regulation 11(1)(b) and (c)</p> <p>The Consortium understands that the provisions of paragraphs (b) and (c) of section 11(1) would not be construed as an obligation on the Parliament to provide sufficient funding. Therefore, the Regulations should also deal with the case where the Parliament would reject a budget proposal for appropriation of funds to the Fund</p>			
	<p>Insurance – Regulation 6(f) The type of insurance referred to in this section should be clarified (e.g. business interruption insurance). Besides the last part of this provision: “only where the losses suffered by the Contracting</p>	<p>Gok position on this proposal deferred to Dr. Ronoh</p>		

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	<p>Authority have been met from the Fund² should be clarified.</p> <p>Other sources of funding - Regulation 6(g) The other sources of funding mentioned in this section should be specified, especially in light of the need to address the initial funding requirements of the Fund</p>	<p>Proposal not accepted.</p>	<p>Specifying sources of funding is self limiting to the Cabinet Secretary's discretion to source for other resources for the benefit of the fund</p>	

	<p>Payments out of the Fund Hierarchy of payments – Regulation 7</p> <p>There is no hierarchy between the permitted payments out of the Fund, meaning that payments other than Service Payments could be prioritised over Service Payments. In our view, and without prejudice of our comment under paragraph 1 above (ring fencing), the following hierarchy should be established between various permitted payments:</p> <p>1) Service Payments; 2) Other payments under the Project Agreement (other than compensation for Political Events and Termination Payments) including in particular compensation that may be due and payable by the Contracting Authority in accordance with the provisions on Compensation Event, Qualifying Change in Law, Contracting Authority Change, shifting on obstructing utilities etc...; 3) The approved annual operating budget of the Fund; and 4) Any other eligible expenditure incurred in pursuance of</p>	<p>Proposal to add additional limb in 2nd rank covering other payments which may become due under the Project Agreement is acceptable in principle subject to drafting</p>	<p>Adding and specifying "other payments" which may become due captures the spirit of Regulation 6 (g) which seeks to accommodate</p>	
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	<p>the object and purpose for which the Fund is established.</p> <p>The Consortium proposes an additional limb in 2nd rank covering other payments which may become due under the Project Agreement(s) and which in our opinion should also be payable from the Fund. The Consortium further notes with respect to the last limb 4) that it is not clear what qualifies as "eligible expenditure" in pursuance of the object of the Fund. This term should therefore be clearly defined.</p> <p>Additionally, it should be clarified that the payment from the Fund can be made to finance such "eligible expenditure" only to the extent that</p> <ul style="list-style-type: none"> (i) there is a Projected Surplus and (ii) such payment does not exceed the amount of the available Projected Surplus. 	<p>money from other sources.</p>	
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	<p>Recipient of payment – Regulation 13(1) The draft Regulations do not clearly state who is the recipient of the payments from the Fund (regulation 13(1) and 14(b) imply that these are the Service Providers but they do not state that explicitly). The disbursement procedure should therefore be clarified to specify that all payments out of the Fund are made directly to the Service Providers (or the Lenders, as the case may be), in discharge of the corresponding Contracting Authority payment obligations, but not to the Contracting Authority.</p>	<p>Proposal accepted</p>	<p>There is need to redraft the regulations and specify with clarity that disbursements shall be specifically those out of the fund.</p>	

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	<p>Payment accounts - Regulation 14(b)</p> <p>Under this section, payments can be made only to the bank account indicated in the Project Agreement. We note that in circumstances of enforcement, the Lenders will have the right to direct the Contracting Authority to make payments to a different bank account for the benefit of the Lenders under the Lenders' Direct Agreement. This provision should be clarified to provide that payments to accounts specified in the LDA are also permitted, as otherwise it would cut across the rights of the Lenders (and give rise to concerns on their part).</p>	<p>Gok position on this proposal deferred to Dr. Ronoh</p>		

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	<p>Payment instruction and proper documentation – Regulation 13(1)(c), 14(a) and 15</p> <p>The Consortium notes that the Officer Administering the Fund has a certain degree of discretion in the appreciation of the “eligibility” of the payment to be made (i.e. requirement for “proper documentation”, appreciation of “eligibility of the payment recipient” and the “power to suspend disbursements”).</p> <p>The Consortium would expect a more “automatic” payment procedure: i.e. all invoices are reviewed and certified by the Contracting Authority (with the assistance of the Independent Expert) in accordance with the relevant provisions of the Project Agreement. Once the Contracting Authority has submitted a payment instruction to the Fund, there should be no further consideration with respect to the eligibility of payment/payment recipient by the</p>	<p>GoK does not accept this proposal</p>	<p>There is a statutory obligation on the management of contingent liabilities and subjecting eligibility of payment to the Officer administering the Fund captures the spirit of effective Fiscal and Contingent Liabilities Management.</p>	

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

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Use of Project Surplus – Regulation 18(2) In line with our previous comment on the use of the Project Surplus, this section should be clarified to add the following: “provided such withdrawal does not exceed the amount of the available Projected Surplus and does not lead to a Projected Shortfall”.</p>	<p>GoK does not accept this proposal</p>	<p>The proposed drafting language obfuscates the original text.</p>	
	<p>Security over the Fund’s accounts – Regulation 16 and 17 The Regulations should make clear that no pledge of other security interest shall be granted on any bank account of the Fund.</p>	<p>GoK does not accept this proposal.</p>	<p>The proposal is not justified.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Bank to hold the Fund's bank account(s) – Regulation 16</p> <p>Regulation 16 provides that the Fund will be held in a bank account with a bank approved under the Public Finance Management Act. It is suggested that the Fund be held with the Central Bank as it seems to be the practice for most national road funds seen in other parts of the world that the accounts are sitting within the Central Bank.</p>			

<p>NortonRose Fulbright LLP and Walker Kontos, in their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 7(a) (Payments of out the Fund), Regulation 13(1)(a) and Regulation 18(3) We note that (a) compensation for Political Events and (b) Termination Payments are excluded from payment certified by a Contracting Authority as being due to a Service Provider, however there is still some uncertainty as to what payments are intended to be covered by the Regulations. Regulation 13(1)(a) refers expressly to the Fund covering "contracted obligations", whereas Regulation 18(3) assumes that surpluses from the Fund will cover "contingent liabilities arising from Project Agreements". Aside from Political Events and Termination Payments, a typical Project Agreement may cover a number of other contractual payment obligations of the Contracting Authority over and above the regular payments due to the Service Provider, for example: (i) Compensation Event moneys; (ii) payments for Variations or Changes in Law; (iii) moneys paid where the Authority is self-insurance following an Insurability; (iv)</p>	<p>GoK accepts the proposal in principle</p>	<p>There is need to redraft to provide clarity on what payments are intended to be covered by the Regulations.</p>	
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	<p>indemnity payments, etc. These are neither Political Events nor Termination Payments (so are not expressly excluded, and they are also “contracted obligations” of a sort, but they are also contingent liabilities). We note that the Public Finance Management (Roads Annuity Fund) Regulations, 2015 (the Road Annuity Fund Regulations) appeared to take a restrictive approach, with the intent that that fund would cover only annuity payments and not other payments. If the intention is that the Fund should only cover similar, regularly contracted payments (e.g. availability payments) rather than contingent liabilities, then this should be made clear.</p> <p>Recommendation: Wording to be reconsidered for clarity</p>			
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Regulation 6(c) (Payments in and Out)

It is doubtful whether the Road Tolls levied on Road Users would in the formative years of the Fund be sufficient to cover payments due to Service Providers. It is further uncertain what amount of moneys will need be appropriated by Parliament to the Fund under Regulation 11 to allow the Projected Fund Ratio to be met in these early years, but it could be a significant sum. There should be clear statements in the reports to be delivered in respect of the Fund as to the level of shortfalls expected from the Road Tolls against Fund liabilities, with appropriate contingency to reflect possible delays or slower implementation / phasing-in / public acceptance of road tolling, so that there is transparency in advance of the appropriation process. In contrast, the Public Finance Management (Roads Annuity Fund) Regulations, 2015 (the Road Annuity Fund Regulations) provides that the initial capital of the Funder under the Road Annuity Programme

	<p>would be KES 500 Million (approx US\$5 Million) for the 2014/2015 financial year when the Road Annury Regulations came into force</p> <p>Recommendation: Greater clarity should be provided as to the level of government appropriations expected to be made in the early years of the Fund's operation. It may also be appropriate for an initial capital of a fixed amount to be appropriated by Parliament to the Fund.</p>			
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Regulation 14(Payment Procedure by the Officer Administering the Fund)

We note that for purposes of payment out of the Fund by the Officer Administering the Fund, each payment instruction must be made in writing and authenticated by the certificate of the Contracting Authority. It is not clear what the contents of the payment instruction should be and whether or not it should contain any accompanying documentation, to be submitted by a Contracting Authority. Such information is critical in order to avoid time loss due to incomplete payment instructions or clarifications sought by the Officer Administering the Fund which may cause the suspension of disbursement against invoices by the Officer Administering the Fund (see regulation 15) until such requests have been complied with. In contrast, the Road Annuity Fund Regulations require applications for payment out of the Road Annuity Funds to be made by a contracting authority in a format prescribed by the Officer Administering the Fund,

	<p>and further provides a list of supporting documentation which should accompany the application for payment out of the Fund. Further, we believe that the statement in Regulation 14(c) should be a stand-alone obligation on the Officer Administering the Fund to ensure that the payment processes take place within the required period; whereas at the moment it is subject to the opening wording which appears to be a weaker obligation on the Officer to "satisfy itself" about the payment processes. Compare Regulation 21(c) of the Road Annuity Fund Regulations which is clearer.</p> <p>Recommendation: We recommend that there be a format prescribed by the Officer Administering the Fund in respect of a payment instruction and the setting out in the Regulations of a list of the supporting documentation thereto (if any) to be submitted by a Contracting Authority. The obligation of the Officer Administering the Fund in Regulation 14(c) to ensure payments are made should be made clearer</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Francis Ngokonyo, PPP Committee Member</p>	<p>Project Finance principles require that a PPP project has its own account operated by the Special Purpose Vehicle Company ensuring that all revenues for that project are used in respect of the project concerned only. In some cases, the Project Lenders want to have a say at how the project revenues are used. Monitoring of inflows and outflows will tell how a particular project is performing. How is this covered in the NTF Regulations 2020?</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Bertha Dena	<p>Regulation 18(3) Page 6: Declaration and use of surplus fund:</p> <p>The regulation states that surplus fund application will include payment towards Any sovereign debt contracted toward development of road projects in Kenya. This means the fund will be applied to even roads, not under toll regime which seems to contradict the justification statement for tolling that excludes development of roads as one way to apply the toll funds -</p> <p>See section 5e of the "Regulatory Impact Statement on the Draft Public Finance Management(NTF)Regulation 2020" that states;</p> <p>Furthermore, the Fund is open only to maintenance and rehabilitation works, not the development of new road infrastructure). Please clarify this part of the regulation</p>	GoK agrees with the comments of the stakeholder	There is need to redraft regulation 18 (3) to limit payment of surplus funds to Toll Roads. (Position clarified, there's need to redraft)	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Peter. M. Mundinia DIRECTOR GENERAL KeNHA</p>	<p>Regulation 6 - we should consider the following inflows into the Fund: -</p> <ul style="list-style-type: none"> i. Proceeds from levies on roadside development ii. Proceeds from any roadside stations which form part of the project scope iii. Penalties arising from any breaches by the Service Provider iv. Proceeds from value capture. This will only apply if appropriate laws are amended 	<p>GoK accepts this proposal subject to drafting</p>	<p>Additional inflows will increase the fund basket</p>	
	<p>Regulation 7 — Delayed payments also constitute Political Events. Given the sums involved, we should consider excluding delayed payments from the list of Political Events to allow direct settlement from the fund.</p>	<p>GoK position on this proposal deferred to Dr. Ronoh</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>Regulation 7: Payments Out of the Fund Regulations under 7(a) recognises Compensation for Political Events as part of the eligible expenditure by the officer administering the fund. However, political risks must be well analysed and proper mitigation measures put in place. Recommendation: Amend by deleting 7(a) as follows: 7(a) Payments certified by a Contracting Authority as being due to a Service Provider or a Toll Operator under a Project Agreement and in accordance with these Regulations, excluding: ' Compensation for Political Events' Paying for political events from toll funds might lead to wastage of the collected funds at the expense of its core mandate. The regulations should be rigid not to allow political interference. Toll fund must be de linked from all political events.</p>	<p>Gok position on this proposal shall be aligned to the ones immediately above.</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation. 15: Right to Question and Reject Payment Instruction Lack of clarity in terms of administrative cost as a percentage of the fund.</p> <p>Recommendation: The administration costs (allowances, general administration costs, et al) should not exceed three per centum (3%) of the fund. The provision should be aligned with the requirement of PFM Act.</p>	<p>GoK position on this proposal deferred to Dr. Ronoh</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 18: Declaration and Use of Surplus Funds It is very risky to declare existence of a surplus based on projections as described in Regulation 18(1). It gets worse when such projected surplus is expended or utilized as described in regulation 18(2) & (3) Recommendation: Project surplus should only be declared retrospectively This will ensure that such declaration is based on a surplus that has been realized. Retrospective declaration of project surplus will safeguard the funds and will avoid a situation where the proposed National Toll Fund gets financially distressed</p>	<p>Gok position on this proposal deferred to Dr. Ronoh</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 24: Review of Performance of the Fund Reviewing body, no clarity on the body/institution that will undertake this function. Recommendation: Specify the body which shall undertake review under this regulation. For clarity of roles.</p>	<p>GoK accepts this proposal</p>	<p>The PFMA is silent on the body/institution that should carry out a review of performance.</p>	
	<p>Regulation 25: Winding Up No proper gap analysis has been provided especially with regard to the existing funds. Why establish a temporary Fund yet there exists other Funds such as the Roads Maintenance Levy which ought to be revised to cater for the gaps which these Fund seeks to address? Recommendation: The Regulation proposes to be for a period of ten years and then it shall be wound up. No proper gap analysis has been provided especially with regard to the existing funds.</p>	<p>GoK comment deferred to Dr. Renoh.</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Uasin Gishu County	<p>Regulation 7 Should read;</p> <p>7. Payments out of the Fund shall comprise of the following;</p> <p>a) Payments certified by a contracting authority as being due to a service provider of a Toll operator under a Project Agreement and in accordance with these Regulations being;</p> <p>a. The approved annual operating budget of the Fund.</p> <p>b. Any other eligible expenditure incurred in pursuance of the object and purpose for which the Fund is established and excluding;</p> <p>a. Compensation for political events.</p> <p>b. Termination payments.</p>	Gok accepts this proposal	The proposed drafting language is express on sources of payment out of the fund.	
THEMATIC AREA 3: GOVERNANCE				

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Consumers Federation of Kenya (COFEK)	<p>Composition of the Oversight Committee: In terms of composition, COFEK must be allowed to nominate a member to the Fund</p>		<p>The Oversight Committee to administer the fund is adequately represented. Allowing COFEK to nominate a member of the Fund will open a window for all Associations to seek a right to nominate members of the Oversight Committee.</p>	
World Bank	<p>The Oversight Committee needs to be described in more details (including decision process, frequency of meetings, etc). It should be staffed with independent parties as well as secretaries and the Attorney General. We consider that it is important that the projections, management and audit functions of the NTF are "depoliticized" entirely. The management is carried out by</p>	<p>GoK does not accept this proposal</p>	<p>The current wording under Regulation 8 is standard and sufficient.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>the Officer Administering the Fund who can delegate some of his functions to a designated entity. We would need to better understand this delegation.</p> <p>Functions and powers of the Oversight Committee: a. What does the 'review and approve the annual work programme mean? Per 4.2 objectives and purpose, the Fund provides a dedicated public fund to meet Government's payment obligations arising from Project Agreements. Considering that the payment obligations under the Project Agreement should have been already entered, what is the role of 'approval' function? b. What is the timeline/process for approving requests for budgetary</p>	<p>Gok response on this proposal deferred to Dr. Ronoh</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>appropriations to meet projected shortfalls? How long it will take to receive the additional budget for shortfalls?</p> <p>c. What does 'authorize allocation' mean? Will there be a prioritization or payments for each Project Agreement?</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>We note that the Regulation 11 provides for the monitoring of Projected Shortfall by the Officer Administering the Fund. It is also important to have clarity on the process related to the obligations of the GoK to compensate for Projected Shortfalls once identified. What will be the administrative process to enable the transfer of cash? Would it be possible to consider that the introduction of the obligation for the GoK to top up the NTF within [X] days following notification by the Officer Administering? Is there an extraordinary process in case of an unexpected cash shortfall? Clarity is needed here as this is a key creditworthiness consideration.</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Review of the performance of the NTF: The review of the performance of the NTF after 10 years seems quite late. If the NTF is facing issues, would another process be implemented? In addition, funders may require the Fund to be audited annually by a Big Four auditor, which would seem prudent in any case. This should be further considered in light of Kenyan Regulations and Laws for such entities.</p>	<p>GoK takes note of the comments</p>	<p>The period after which the review shall be carried out is sufficient and there is no justification to alter this period</p>	
	<p>Winding up of the NTF: We would like to understand if the winding up of the NTF can only take place once all the Project Agreements have been terminated/expired (i.e. no more GOK payment obligations)? If not, the winding up of the NTF should carry early termination rights for any concessionaires that are still operating. This may be implied by</p>	<p>GoK response on this proposal deferred to Dr. Roach</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>clause 25, but it may be worth reiterating</p> <p>Oversight Committee: Only the Principal Secretary ('for the time being') has almost all the responsibilities. When will the roles for the committee be distributed?</p>	<p>Gok has clarified these comments</p>	<p>The Oversight Committee has a collective responsibility</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Daniel Mutegi Giti PHD in Urban Management Candidate, University of Nairobi; Principal Housing Officer; Lead Expert EIA/EA; MEIK; Public Private Partnerships (PPPs) Expert; Urban Manager, International Project Management; Transformational Leader. Ministry of Transport, Infrastructure, Housing and Urban Development Email: mutegigiti@gmail.com Tel: +254726295038 Twitter: @danielgiti</p>	<p>Regulation 8 on "Oversight and Administration of the fund" can be said to be heavily leaning on government. My proposal is for the broadening of this team to include key private sector players, who can be conveniently be brought on board from KEPISA or KPDA (PPPs requires a thorough engagement of the private sector to finance a robust PPP programme, hence their inclusion will ensure they understand the PPP process and have a buy in for its application beyond the tolling programme). It should also have a representative of Banks through Kenya Bankers Association (a robust regime of PPPs financing will require that local banks dedicate substantial amounts to financing PPPs in infrastructure, which has the effect of addressing the risks as a result of currency depreciation risks where much of the funds are sourced externally). There should also be a representative of universities</p>	<p>GoK does not accept this proposal</p>	<p>The Oversight Committee is adequately represented.</p>	

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

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 8 (3) on the functions of the oversight committee should have their functions expanded to include such functions as ... raising additional funding/soliciting for funds/ developing a bigger envelope for increased roads financing programme – which can be done through appropriate incorporation of commercial bank loans, sponsor equities, use of local capital example from pension funds and Saccos; the programme can net additional funds through pollution taxing – vehicles that emit more CO2 can pay a little higher; we can have roads built using loans, funds from enterprises and individuals and investments made from corporations, consider tolls for design, build, own, operate and transfer as sources of greater financing of roads, infrastructure equity placements.... among others. There should be a section that rightly shows that the country will be keen to apply a wide range of</p>			

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

<p>Kipkenda and Co Advocates Off Riverside Drive P.O. Box 56832-00200 Nairobi. Info: info@kipkenda.co.ke</p>	<p>Membership to the Oversight Committee under Regulation 8 the Draft Regulations: Regulation 8(1) of the Public Finance Management (National Toll Fund) Regulations, 2020 provides for the establishment of an oversight committee which shall consist of inter alia the Principal Secretary for the time being responsible for matters relating to roads and the Principal Secretary for the time being responsible for matters relating to transport. Currently, the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works consists of the following state departments: a) State Department for Transport; b) State Department for Infrastructure; c) State Department for Maritime and Shipping Affairs; d) State Department for Public Works; and e) State Department for Housing and Urban Development. Further, the Ministry is composed of four Principal Secretaries namely:</p>	<p>GoK has clarified these comments</p>	<p>The Principal Secretary responsible for Transport is part of the Oversight Committee</p>	
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	<p>a) Principal Secretary for Transport and Infrastructure; b) Principal Secretary for Maritime and Shipping Affairs; c) Principal Secretary for Public Works, and d) Principal Secretary for Housing and Urban Development</p> <p>From the above foregoing, it is important to note that there is NO Principal Secretary for roads. The Principal Secretary for Transport and Infrastructure deals with matters relating to all the means of transport in Kenya. It is therefore our considered opinion that having a Principal Secretary for the time being responsible for matters relating to roads and the Principal Secretary for the time being responsible for matters relating to transport as members of the oversight committee is just but unnecessary duplicity of roles as the State Department for Transport has only one Principal Secretary</p> <p>Having the Principal Secretary for Transport in the Oversight Committee should suffice as their function within the Committee established under Regulation 8 of</p>			
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	<p>the Public Finance Management (National Toll Fund) Regulations, 2020 will only be limited to matters roads which is the all essence of these regulations; dealing with road tolls and their management</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Geoffrey Koech National TaxPayers Association Pioneer Building Room 308 Oginga Odinga Street P.O. Box 204- 40123 Kisumu. +254100176341</p>	<p>The composition of the Committee. As per the provisions of Regulation 8, the membership of the committee is strictly made up of the executive, this is against the spirit of inclusion and this will lock other players in the industry. As representatives of the taxpayers we propose the inclusion of representatives from the Council of Governors, Auditor General, the road users association, be it matatu operators association, truck owners association or COFEK representative. This will ensure inclusion in the management and administration of the fund.</p>	<p>Gok does not accept this proposal</p>	<p>The Oversight Committee is adequately represented.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Access to information. In a bid to ensure accountability, it will be of interest to the users to access information on the management and administration of the fund. We are of the view that among the functions of the administrator, let there be an express duty that he or she will be the custodian of all information concerning the fund and he/she will come up with regulations on how to fulfill Article 35 of the Constitution. In the spirit of promoting Open Governance, the Administrator should be able to avail the contracts and all project related documents to the members of the public.</p>	<p>GoK does not accept this proposal</p>	<p>Access to information mechanism shall be implemented as per provisions of the Access to Information Act, 2016 Laws of Kenya.</p>	
	<p>Conflict management and resolution. The oversight committee is in charge of approvals of payment, in the event of non-approval and a party is not satisfied with the decision a mechanism on conflict</p>	<p>GoK does not accept this proposal</p>	<p>The regulations provide the criteria that has to be met for eligibility of disbursement out of the fund.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provisions of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	resolution should be spelt out in the regulations.			

<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Projections – Regulation 10(1) The Consortium notes the importance of certain functions of the Fund being handled by independent parties. This seems particularly important as regards the projection function. The Consortium would expect that all projections of the Fund are produced by the Independent Expert, which should be an internationally recognized and reputable person or organization with substantial experience in the development of traffic forecasts, toll revenue projections and road project agreements (and not by the Officer Administering the Fund himself).</p> <p>The Regulations should also explicitly mention that such projections should be based on macroeconomic forward-looking assumptions (with regards in particular to GDP Growth, inflation, or foreign exchange rate assumptions) derived from a consensus of three internationally recognized and reputable independent sources for macro-economic forecasts, such</p>	<p>GoK accepts the proposal that the Service provider should be equally consulted under Regulation 10 (1) (f)</p>	
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	<p>assumptions to be used both to produce traffic and revenue forecasts as well as to forecast future Service Payments (specifically as regards foreign exchange and inflation assumptions)</p> <p>We note that under section 10(1)(f) the Independent Expert is required to consult with the Contracting Authority in preparing the projections, but not with the Service Providers. We think such projections should be prepared in consultation with the Service Providers in a transparent manner to ensure that their views are also taken into account and the projections are more accurate. Upon approval by the Oversight Committee, all final projections should be sent to each Contracting Authority and each Service Provider.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Performance of the Fund – Regulation 24(1) The Consortium would expect that the performance of the Fund is reviewed on the annual basis by an independent auditor from a reputable international accounting firm.</p>	<p>GoK position on this proposal deferred to Dr. Ronoh</p>		
	<p>Winding-up of the Fund – Regulation 25(1) It should be clarified that the winding up of the Fund can only take place if all the relevant payment obligations under all Project Agreements are satisfied in full.</p>	<p>GoK position on this proposal deferred to Dr. Ronoh</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>NortonRose Fulbright LLP and Walker Kontos, In their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 8(2) (Oversight Committee) We note that the proposed ex-officio members of the Oversight Committee (i.e. a representative of each Contracting Authority involved in a Project Road and a representative of the PPP Unit) are already represented through the principal secretaries of the various line ministries. Instead of the proposed ex-officio members, and for purposes of better oversight and management of the Fund, the Oversight Committee should be broadened to include representatives from the relevant industry practitioners or professional bodies (i.e. engineers, accountants and/or lawyers). This is indeed the case under the Road Annuity Regulations Recommendation: Oversight Committee should, for better oversight and management, be expanded to include representatives</p>	<p>GOK does not accept this proposal</p>	<p>Oversight Committee is adequately represented</p>	

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

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 9 (Officer Administering the Fund)</p> <p>Unlike the Officer Administering the Fund under the Road Annuity Regulations (who is the Principal Secretary for the time being responsible for matters related to roads), we note that the officer administering the Fund, for purposes of the Regulations is an appointee of the Cabinet Secretary. As such, there in need to ensure that a suitable person possessing the necessary qualifications and technical skills is appointed to administer the Fund (rather than merely a political appointee).</p> <p>Recommendation: We recommend the setting out of minimum qualification (i.e. academic and technical requirements) requirements for a person to be appointed as the Officer Administering the Fund to ensure professional and good management of the Fund.</p>	<p>Gok accepts this proposal to the extent that the criteria for appointment of the Officer Administering the Fund should be set out in the regulations</p>	<p>Setting out the criteria for appointment of the Officer Administering the Fund will ensure transparency and competitiveness in appointment</p>	

	<p>Regulation 10(1)(e) (Functions of Officer Administering the Fund) We note that the reporting obligations or provision of information relating to the Fund's project inflows and outflows, the Projected Fund Ratio and statement on the Projected Shortfalls by the Officer Administering the Fund is limited only to Contracting Authorities and Service Providers. In contrast, we note that the Roads Annuity Fund Regulations require the Officer Administering the Fund to (a) publish on an annual basis on the website of the ministry responsible for matters relating to roads, the estimates prepared of Roads Annuity Programme funding and payment obligations for the forthcoming financial year and (b) publish on a quarterly basis on the website of the ministry responsible for matters relating to roads, the balance of funds held in the account designated for annuity payment obligations.</p> <p>Recommendation: In addition to providing the Contracting Authorities and the Service Providers with information relating</p>	<p>Recommendation on publication of quarterly reports is agreed in principle subject to drafting</p>	<p>The proposed publication is in line with the Public Finance principles of transparency and accountability</p>
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	<p>to the project inflow and outflows of the Fund, the Projected Fund Ratio and statement on the Projected Shortfalls, we recommend that the Officer Administering the Fund be further obligated to publish either on the Ministry's website, the Kenya Gazette and/or 2 newspapers of national circulation, quarterly reports of the projected Inflows and Outflows from the Fund, the Projected Fund Ratio and statement on the Projected Shortfalls, as well as balance of the Fund at each Quarter.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Francis Ngokonyo, PPP Committee Member</p>	<p>At Regulation 8 on Oversight Committee, It appears to me that we may require one or two Private Sector Members as this process is governing PPP project funds.</p> <p>In the same Regulation, it appears to me like the Administrator of the Fund should be part of the Committee to facilitate discussions of the Fund. This can be ex officio</p> <p>In the same Regulation at (3) i)& j) we may require to emphasize for roads projects only.</p> <p>At Regulation 10 (f) on appointment of the Independent Expert, this should not be left to the Administrator of the Fund only. The Oversight Committee and possibly the CS can be brought into this process.</p>	<p>GoK does not accept this position.</p> <p>GoK has clarified this position.</p> <p>GoK position on this point deferred to Dr. Renoh</p>	<p>The Oversight Committee is adequately represented.</p> <p>As per Regulation 8(1) The Administrator of the Fund is not part of the Oversight Committee</p>	

<p>Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>Regulation 8: Oversight Committee This is a finance and money collection law. It is also geared to PPP, but the private sector is not represented in the Committee. In line with corporate governance principles of oversight, there is need for the oversight committee to have representation from outside the government Recommendation: Amend the Regulations to include the following. The committee members to be capped at nine (9) members; i. Broaden representation to include private sector Amend therefore by adding 8(1)(f) Four other persons representing the following institutions: Institution of Engineers of Kenya ii. Institute of Certified Public Accountants of Kenya iii. Kenya Private Sector Alliance iv. Private Sector entity in the roads subsector</p>	<p>GoK does not accept this proposal.</p>	<p>Oversight Committee is adequately represented.</p>	
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	<p>Regulation 9: Officer Administering the Fund Appointment of officer administering the fund. The regulation provides that the "Cabinet Secretary will appoint an officer to administer the Fund" There is need for guidance on the "how" of appointment of the officer administering the Fund need to be provided to allow for fair selection With oversight measure above, let this position be treated as CEO of pseudo government position. Let it be advertised. Let committee carry out interviews and nominate 3 names for appointment by the Cabinet Secretary Recommendation: Amend Regulation 9 to read as follows: Officer Administering the Fund 1. There shall be an Officer Administering the Fund appointed by the Cabinet Secretary 2. A person shall qualify to be appointed as Officer Administering the Fund under this Regulation if he or she — a) is a citizen of Kenya b) has a degree in business, finance, accounting or related field</p>	<p>GOK accepts this proposal</p>	<p>This is to ensure competitiveness in the selection process of the Officer Administering the Fund.</p>	
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	<p>of study from a university recognized in Kenya, and is a member of a professional body in good standing</p> <p>c) meets the requirements of Chapter Six of the Constitution. Independence of the Officer administering the fund is important. The Officer should have tenure of office and his removal from office should vest in the committee. This is revenue collection that needs to be treated independently of the National Treasury</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 10(1) (a) Functions of Officer Administering the Fund The Officer administering the Fund is responsible for the day to day administration of the Fund. Supervision shall be carried out by the Oversight Committee Recommendation: Delete the words to supervise. For efficient administration and accountability</p>	<p>Gok accepts this proposal</p>	<p>For effective checks and balances, it is good practice to distinguish the administrative function from the supervision role.</p>	
	<p>Regulation 11: Addressing Shortfalls in the Fund The provision is an administrative one and hence ought not to be in law. Recommendation: The provision ought to be deleted. For enhanced efficient administration and accountability</p>	<p>Gok does not accept the proposed deletion</p>	<p>Regulation 11 as drafted is standard</p>	
<p>Uasin Gishu County</p>	<p>Regulation 8: In the oversight committee, the Council of Governors should have two (2) representatives. The Principal Secretary for Devolution should also be included in the committee. This is because the entire purpose of the</p>	<p>Gok does not accept this position</p>	<p>The Oversight Committee is adequately represented.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	Regulations directly affects counties on the projects being undertaken.			
	Regulation 9 This Section should specify qualifications and process of recruitment of an Administrator. The nature of engagement of an Administrator should also be specified.	GoK accepts this proposal	Setting out the criteria for appointment of the Officer Administering the Fund will ensure transparency and competitiveness in appointment	
	Regulation 16 There is need to expressly state who are the signatories to the bank accounts.	GoK response to this proposal deferred to Dr. Rouch		
THEMATIC AREA NO. 4: LEVYING OF TOLLS				

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Consumers Federation of Kenya (COFEK)	In terms of operationalization, the proposed Toll Fund will only decide the roads to be tolled based on credible statistics of traffic and type of traffic flow, by time, day, month and from which basis a decision will be made to what extent toll fees may be decided.	GoK accepts this proposal	In accordance with transparency and accountability governance principles, it is imperative to disclose the criteria for selecting Toll Roads	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	RELEVANT PROVISION OF THE REGULATIONS	PROPOSED DRAFTING TO THE REGULATIONS
<p>Daniel Mutegi Giti PHD in Urban Management Candidate, University of Nairobi; Principal Housing Officer; Lead Expert EIA/EA; MEIK; Public Private Partnerships (PPPs) Expert; Urban Manager; International Project Management; Transformational Leader. Ministry of Transport, Infrastructure, Housing and Urban Development Email: mutegigiti@gmail.com Tel: +254726295038 Twitter: @danielgiti</p>	<p>The regulations should consider ensuring that adequate information and disclosure is provided to show the categories of roads to be subjected to the programme</p>	<p>GoK accepts this proposal</p>	<p>In accordance with transparency and accountability governance principles, it is imperative to disclose the criteria for selecting Toll Roads</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Robert Karuki hobnkaruki@gmail.com</p>	<p>I find this idea to apply toll on the specified roads namely JKIA Expressway, Southern Bypass, Mau Summit Road alongside others to be a double burden on road users and the tax payers. Already we are paying a hefty road development levy on the fuel that our cars use. What then is the basis for applying a toll fee for us to use roads built with borrowed money which our children will pay for? If it's to punish us, then please go ahead. It's not as if being a Kenyan isn't a handicap already. In addition, the Kenyan government of this day cannot be trusted to be accountable with any resources that it pools</p>	<p>Gok has clarified this comments</p>	<p>Toll is not a tax of general application and it is a user fee & Tolled Roads will not be subject to maintenance, repairs and rehabilitation under the National Toll Fund-all these costs will be bundled up in the PPP arrangement and will be fully catered for under the Tolling arrangement</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Solomon L Sakana Producer Studio 46 LinkedIn:Solomon Sakana Facebook : Solomon Sawyer Twitter: @leina01 Number: +254-710-357-267</p>	<p>I am by no means against the tolls, what I am against is that currently as motorists we are overburdened by unnecessary tax, currently for every litre of fuel I take the government takes 47 Ksh, and let's be honest no car only buys a litre of fuel at the pump. Within the same taxes and levies we have a road tax which let's face it our roads could use an upgrade, we also have the fuel levy which has affected the most vulnerable of communities who rely on kerosene to cook as well as other home uses. I suggest this, if you are going to implement the said bill ensure that taxes on roads and fuel are eliminated as well as lower the VAT on fuel, thus making it a more favorable bill to all Kenyans</p>	<p>GoK has clarified this comments</p>	<p>Toll is not a tax of general application and it is a user fee & Tolled Roads will not be subject to maintenance, repairs and rehabilitation under the National Toll Fund-all these costs will be bundled up in the PPP arrangement and will be fully catered for under the Tolling arrangement</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>George Muga mugagow@gmail.com</p>	<p>Kindly let me know how you intend to proceed with this and still maintain road maintenance levy. Amounts to double dipping or taxation. ii. In countries where road toll fees are charged there is corresponding liability on the collector for damages to the suspension and tyres of the toll payer's vehicle caused by poor road. What is the enforcement of this component and the time frame for the collector to remedy this?</p>	<p>GOK has clarified this comments</p>	<p>Toll is not a tax of general application and it is a user fee & Tolloed Roads will not be subject to maintenance, repairs and rehabilitation under the National Toll Fund-all these costs will be bundled up in the PPP arrangement and will be fully catered for under the Tolling arrangement</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Njoroge Wachira wachiraen@gmail.com Nakuru.</p>	<p>Widespread road improvement in a resource poor nation like Kenya cannot be achieved without partnership with the private sector. Such roads should be of high quality (dual carriage way), of high use and durable. As such this system should be reserved for class A and B roads for now. The government should use its resources to improve the other classes of road. Already existing roads such as Thika road which were built using other funding mechanisms should not be included in the toll system.</p>	<p>GoK has clarified this comments</p>	<p>The Objective and purpose of the Regulations are set out under Regulation 3</p>	
<p>Peter Kymani Twitter: @Pettikim</p>	<p>The idea of introducing 'fuel levy' for diesel and petrol was to cater for road maintenance. If Ministry of Transport re-introduces toll for the same old highways, motorists will suffer double jeopardy.</p>		<p>Toll is not a tax of general application and it is a user fee & Tolloed Roads will not be subject to maintenance, repairs and rehabilitation under the National Toll Fund-all these costs will be bundled up in the PPP</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>James Opere Twitter: @JamesOpere1</p>	<p>Paying toll fees on a road where you sometimes hit potholes breaking the car, sometimes you spend hours on traffic, what's the toll meant to cater for if not individual interest?</p>		<p>The primary objective of tolling is to raise additional funds directly from road users it's not a tax of general application.</p>	
<p>Barrack Oieno Twitter: @okushjanam</p>	<p>Unacceptable at all, we cannot pay Ksh. 18 per litre and pay toll again let them choose between the two which one they prefer</p>		<p>The proposed toll fee is not by any means a tax of general application. It is a user fee.</p>	
<p>Mwangili_ Twitter: @mwangimi</p>	<p>We can't pay both fuel levy and toll charges</p>		<p>The toll is not a tax of general application – it is a user fee.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Murwa mundu Twitter: @Gicicio	There is a Road levy in each litre of fuel sold. Even power generators and tractors which do not use the road pay it as consumption tax. The Senate and National Assembly have a fuel allowance so they do not care. Toll stations amounts to double taxation		The proposed toll fee is not by any means a tax of general application. It is a user fee.	
Alexander sarikas Twitter: @AlexanderSarik4	If 18 bob is removed per litre, then tolls are okay, but not both.		The proposed toll fee is not by any means a tax of general application. It is a user fee.	
Mc Twitter: @mcblax	I choose toll over 18 Kshs road levy.		The proposed toll fee is not by any means a tax of general application. It is a user fee.	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>National TaxPayers Association Pioneer Building Room 308 Oginga Odinga Street P.O. Box 204- 40123 Kisumu</p>	<p>Toll fees. The total fees chargeable should be agreeable annually with the input of relevant stakeholders.</p>	<p>GOK takes note of the comment</p>		
<p>Saitoti Torome, CBS Principal Secretary State Department of Planning</p>	<p>The existing Fuel Levy Fund should be reviewed to allow the use of funds to construct new roads. The tolling roads should be identified prior so that those willing to pay will be made aware early and those not willing to pay have alternatives routes for easier movement.</p>	<p>This proposal is in order but focus should be on the draft regulations</p> <p>GOK accepts this proposal</p>	<p>As part of the wider public participation exercise, the Tolling Roads shall be published early before use</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>The Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>New Regulation: Seed Capital and classification of Roads to be tolled These Regulations do not classify the roads to be tolled. Recommendation: For the toll to be successful, the regulation should give a guideline on the seed capital for operation the Toll fund. It should also come clear on which roads to be tolled. This must be clear and understandable to all stakeholders. Therefore, there must be a cut off on which roads or bridges to be classified as a toll section. The government must raise sufficient funds to support the kick starting of the toll fund. This can be done through infrastructure bond or any other instrument of financing available to the government. Recommendation: Amend by inserting a new Regulation (a) Classifying the roads to be tolled and criteria for identification of such roads. (b) Provision of seed capital to the Fund before roll-out and</p>	<p>GoK accepts the proposal to classify Toll Roads</p>	<p>As part of the wider public participation exercise, the Tolling Roads shall be published early before use</p>	

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

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
THEMATIC AREA NO.5: TOLLING SYSTEM AND STRUCTURE				
<p>Daniel Mutegi Giti PHD in Urban Management Candidate, University of Nairobi; Principal Housing Officer; Lead Expert EIA/EA; MEIK; Public Private Partnerships (PPPs) Expert; Urban Manager; International Project Management; Transformational Leader. Ministry of Transport, Infrastructure, Housing and Urban Development Email: mutegigiti@gmail.com Tel: +254726295038 Twitter: @danielgiti</p>	<p>The regulations should consider the application of advanced tolling technology which will reduce the actual costs in implementing the programme – use of GPS to measure distant traveled by vehicles, age, size and level of emissions, use of automated tolling stations such that it's easy to use and does not lead to traffic jams. This is because research has shown a strong correlation between willingness to use toll roads, hence pay the user fees, and the development of roads provided the exercise is easy to use and effective. This can be done by installing toll booths that are electronically operated, which can then be linked to a system that links one driving license and their banks to enhance the effective operationalization of fines and payment for services. The electronic details can be addressed in specific contracts such that it has a</p>	<p>GoK has clarified these comments and use of technology has been factored in implementing Toll Roads.</p>		

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

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>The tolling programme should be made in an innovative manner to win wider public support – adding extra lanes in already constructed highways; graduated tolling as per the peak of the road; congestion pricing which will enable Kenya to address multiple objectives of addressing traffic congestion and also reduce usage of small cars on the other hand; introduction of charging incentives – more charges for emission free cars, persons that do carpooling; rely on infrastructure equity placements, infrastructure revenue bonds, non-recourse financing on the basis of toll revenue; introduction of innovative designs- widening existing infrastructure like roads, construction of bridges and tunnels in densely populated areas which will make users to have a choice of using traditional or the toll road</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>Procedures of the Fund: Regulations 13, 14 and 16 Administration and procedures of the fund is majorly manual. This is cumbersome and could provide a loophole for corruption ensure efficiency Recommendation: Amend to introduce Regulation 14 on Electronic Tolling This should read as follows: The Officer Administering the Fund shall, establish electronic mechanisms in the administration and management of the Fund, including disbursement out; and payment into the fund; The model which will be employed by the Toll Fund to collect revenue will create confidence to the users. Otherwise it may lead to resistance in paying for the facility. Advances in electronic tolling technologies—such as automatic vehicle identification, which allows motorists to pay tolls without stopping—can make toll collection</p>	<p>GoK has clarified these comments</p>	<p>Officer Administering the Fund shall administer the funds as per the requirements of the Public Finance Management Act</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	more convenient, lower toll collection costs. The Toll fund revenue collection process should be paperless with little or no human intervention.			
THEMATIC AREA NO: 6 ; GENERAL				
Consumer Federation of Kenya (COFEK) @	Has physical public participation been conducted?		GoK has and continues to conduct appropriate public participation.	
World Bank	Definitions such as 'Private Party' and 'Service Provider' are not defined in the Project Agreement; while 'Service Payments' and 'Independent Expert' have different definitions between the Regulations and Project Agreement.			
Motorist Association	Has enough public participation been carried out?	GoK continues to conduct public participation	GoK has and continues to conduct appropriate public participation.	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Regulation 4(2) (Objects and Purpose of Fund) The drafting of this section should be made consistent with section 7(a) which provides for exclusions from permitted payments (i.e. compensation for Political Events and Termination Payments) to make clear that not all of the Government's payment obligations will be paid from the Fund (ex. "...a dedicated public fund from which certain Government's obligations... shall be met").</p>	<p>Gok position deferred to Dr. Ronoh</p>		
	<p>Definition of "Projected Fund Ratio" The Consortium notes that unpaid invoice amounts / unpaid service payments / those in arrears are not treated in this definition. We suggest that such amounts be aggregated in the required NTF balance and fund ratios, i.e. the requirement to reserve for them does not go away by virtue of time having passed, in which case the definition of the "Projected Fund</p>	<p>Gok position deferred to Dr. Ronoh</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	Ratio" should be revised accordingly.			
	<p>Regulation 22 provides that "the existing government financial and procurement regulations shall apply in the administration of the Fund." This provision should be more specific.</p> <p>In any case, it should be clarified that the Regulations supersede the other regulations to the extent of any inconsistency.</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>NortonRose Fulbright LLP and Walker Kontos, In their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 2 (Interpretation) The term "Fund" as used in the Regulations has not been defined in the interpretation section thereunder. Recommendation: Appropriate definition to be inserted in the interpretation section.</p> <p>ii. The term "Gazette" as used in the Regulations has not been used or referred to in the Regulations. Recommendation: To be deleted if not relevant for purposes of the Regulations, or alternatively, to be adopted in accordance with our recommendations under item 8 below. (recommendation under Regulation 10(1)(e) (Functions of Officer Administering the Fund)</p> <p>iii. The term "Private Party" has an ambiguity – commas should be put around the phrase "or all Toll Operator ... Authorised Toll Collector" to make it clear that Service Providers do not also need to be authorised toll collectors</p>	<p>GOK accepts this proposal</p> <p>GOK accepts this proposal</p> <p>GOK does not accept this proposal</p>	<p>Addition of the definition of the word 'Fund' to mean the National Tolling Fund</p> <p>Deletion of the definition 'Gazette' at regulation 2</p> <p>The use of the term 'or' signifies alternatives</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Recommendation: Appropriate amendment to be made.</p>			
	<p>iv. The definition of the term "Project Roads" does not specify the legislation under which the Cabinet Secretary may declare a road to be a toll road. Also, it is possible that a Project Agreement may relate to a road that is partially tolled and partially free-to-use, but the definition of Project Road only relates to a toll road. The term "Project Road" should for the purposes of the Regulations also include any non-tolled roads which are part of a Project Agreement that principally relates to a tolled road.</p> <p>Recommendation: Relevant amendments to be made to refer to section 3(a) of the Public Toll Roads Act which empowers the Cabinet Secretary to declare any public road</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>or a portion thereof as a toll road. Relevant amendment to be made to ensure that the Fund can still be used to cover availability payments for a non-tolled road within a relevant Project Agreement.</p>			
	<p>v. The "Projected Fund Ratio" is used in the context of a 12 month look forward. This period seems understandable in the context of assessing the minimum value of the Fund to meet payments over the next year, but in terms of assessing whether to safely pull out any Projected Surplus, we would have</p>			

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

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Saitoti Torome, CBS Principal Secretary State Department of Planning</p>	<p>To get the acceptability of the tolling roads from the public, more comprehensive sensitization should be done so that we can change the public attitudes toward the tolling road system. The roads users should be aware of the objective and the benefits in a simple way.</p>	<p>Gok accepts this recommendation</p>	<p>Comprehensive public participation and sensitization are key prerequisites under the Statutory Instruments Act, 2013.</p>	
	<p>Make the public aware of National Tolling Fund ex ante and ex post</p>			
	<p>Involve the Ministry responsible for National Planning during planning process for easier monitoring and feedback</p>			
<p>Bertha Dena</p>	<p>I request the PPP Committee be given the Toll Policy to be able to have a meaningful debate on the proposed Toll regulation with respect to its appropriateness.</p>		<p>Gok accepts this recommendation</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Peter. M. Mundinia DIRECTOR GENERAL KeNHA</p>	<p>Definitions Under the definition of Officer Administering Fund, the appropriate cross reference should be Regulation 9 and not 11 Section 4 - the name of the Fund should be consistent in both the NTF Regulations and the proposed amendments to the Public Road Toll Act, 1984.</p> <p>We are fine with the rest of the provisions and hope that it will be established at the earliest since the bankability of Nairobi — Nakuru — Mau Summit PPP project is dependent on it.</p>	<p>GoK accepts this recommendation GoK takes note of the recommendation to align the terminologies under the regulations with those under the Public Roads Toll Act, Cap.407</p>	<p>The recommendation to amend is justified. The proposed Public Roads Toll (Amendment) Bill, 2019 has introduced a Section to provide for establishment of a National Toll Fund and thus align the terminology of fund under the Public Roads Toll Act with that under the Draft Regulations.</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	Regulation 18(3), the third paragraph should be amended to read budgetary allocations out of the Fund.."			
Institute of Certified Public Accountants of Kenya (ICPAK)	<p>Regulation 2: Interpretation Cross referencing Recommendation: In the definition of the term "Fund Secretariat" delete the phrase "regulation 14" and substitute therefor the phrase "regulation 12". Correct referencing: Fund secretariat is established under regulation 12.</p> <p>Regulation 2: Interpretation Cross referencing Recommendation: In the definition of the term "Officer administering the Fund" delete the phrase "regulation 11" and substitute therefor the phrase "regulation 9". Correct referencing: The officer administering the Fund is designated under regulation 9.</p>	GoK accepts this recommendation	The recommendation to amend is justified	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 7: Payments Out of the Fund Numbering Recommendation: Change the numbering a,b,c,d to i, ii, iii, iv To avoid confusion since the same numbering style appears twice.</p>	<p>GoK accepts to redraft Regulation 7</p>	<p>GoK will redraft the regulation to adopt standard numbering style</p>	

<p>The Institute of Certified Public Accountants (ICPAK)</p>	<p>New Regulation: Public Participation and consultation in national tolling process These regulations lack elaborate provisions on consultation and participation of the public (road users). This can lead to public resistance to Tolling One of the greatest impediments to toll roads is the public's resistance to paying tolls, especially on existing roads that the public often perceives as already paid for through tax revenues. Public resistance to tolling has impeded or halted private toll road programs in environment Advances in electronic tolling should reduce public resistance associated with the inconvenience of having to stop to pay tolls. However, the concept of road pricing is still not widely accepted. Of particular concern to some opponents of tolling is the alleged inequity of charging the public, especially low-income passengers, to use a vital public facility. There is a need to undertake proper public sensitization and provide an assurance that the collected funds will be utilized to better lives of all</p>	<p>GoK takes note of this comment.</p>	<p>GoK has and continues to conduct appropriate public participation.</p>	
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	<p>citizens. Willingness to pay survey should also give an indicator before signing a toll fund project agreement</p> <p>Recommendation: Amend by including a new Regulation</p> <p>The Officer Administering the Fund shall facilitate public participation in the management of National Toll Fund in accordance to Public Finance Management Act 2012 and Article 10 and Article 201 of the Constitution of Kenya.</p> <p>There should be a willingness to pay survey and thorough stake holder involvement in each of the proposed toll project.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Paul Mwangi Maringa Principal Secretary State Department of Public Works.</p>	<p>Why the singular reference to KURA? We have KENHA, KERRA, KRB & ERB too. The sponsor of all our current road toll initiatives so far is KenHA</p>	<p>Gok response on this comment deferred to Dr. Ronoh</p>		
<p>Uasin Gishu County</p>	<p>Regulation 3 (d) This section is not clear in flow of language and meaning. Regulation 3 (e) should be amended to read "make provisions for connected purposes with and incidental to the foregoing objects and purposes." Regulation 6 (a) This section takes us back to definition of Toll Roads under the interpretation part. The power by the Cabinet Secretary to declare a Toll Road should be in consultation with the County Government where the road cuts through and approved by the National Assembly. The declaration of a Toll Road to be made by the Cabinet Secretary for Roads.</p>	<p>Gok does not accept the proposition that Regulation 3 (d) is unclear Gok does not accept the proposal to amend Regulation 3 (e) Gok does not accept the proposal to amend Regulation 6 (a)</p>	<p>Regulation 3 (d) is couched in standard legislative drafting language The proposed amendment obfuscates the meaning under Regulation 3 (e) as currently drafted. There is no legal requirement for consulting the County Governments in declaring a Toll Road. Section 18 of</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
			Part 1 of the Fourth schedule of the Constitution provides that transport and communication is a national government function.	
	The Regulations should operate under the public Finance Management Act, 2012 and should not make any reference to the Public Roads Toll Act, Cap. 407. If it has to make reference to Public Roads Toll Act, then the same to be amended to be in line with Public Finance Management Act,2012 and these Regulation in respect to our proposed definition of Project Roads.	GoK does not accept this proposal.	The regulations are made pursuant to Section 24 of the Public Finance Management Act, 2012 which provision grants the Cabinet Secretary powers to establish a Toll Fund. Reference to the Public Roads Toll Act, Cap 407	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 8 (3) (m) Should be deleted in its entirety as the same is well catered under Section 10.(g) and (12).</p>	<p>GoK does not accept this proposed amendment.</p>	<p>(PRTA) is inevitable because, amongst other reasons, the PRTA is the parent statute that empowers the Minister/Cabinet Secretary to declare a toll road.</p>	
			<p>Regulations 8 (3) (m) and 10 (d) are different in scope. The latter provides that the Officer Administering the Fund shall recommend the appointment of Fund secretariat staff while the former provides that the Oversight Committee shall approve the recruitment and</p>	

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
			remuneration of staff of the fund	
	<p>Regulation 14 the use of the word "itself" in reference to Administrator is not proper. Use word "he "</p>	GoK does not accept this proposal.	The word "itself" refers to the office and is not indicative of gender	

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

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

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

Annex 1

Office of PS, National Treasury

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

S/No.	Regulation	Comment	Proposal	Response from PPP Directorate
1	Reg. 3	The objectives are not clear and are mixed – up in both Regulation 3 and Regulation 4 (2) c	There is need to make a decision, what are the objectives and purpose of the Fund either by adopting Regulation 4 (2), which seems to be more clear and deleting both the provisions in Regulations 3 and Regulation 4 (2) and develop clear objectives, which addresses why the Fund is desired.	Accepted and amended
2	Reg. 4 (1)	This Regulation should be dedicated to the establishment of the Fund, without convoluting it with the manner the Fund will be budgeted for, accounting for and reported on. The Public Finance Management Act, 2021 has different sections dealing with these issues	This Regulation should be re-casted only to capture the establishment and the name of the Fund.	Accepted and amended
3	Reg.4 (2)	See comments on S/No. 1 under Regulation 3.	This Regulation should be harmonized with Regulation 3 and deleted from Regulation 4	Accepted and amended
4	Reg. 5	No comment	This fine	Retained
5.	Reg.6	Where reference is made for a specific source of revenue under an Act of Parliament, the Specific section which levies or charges this source should be quoted. Where, it is not clear source provided for under an Act of Parliament or any other existing Regulation, then that source of monies should be under (i). This is because legislation cannot be anticipatory	The sources of monies to this Fund, should be clear and quote relevant sections of the law, which gives power for those levies/charges	According to documentation from KeNHA, the applicable law for: (b) fees or charges imposed on Road Users accessing Project Roads with overloaded axles levied in accordance with Part III of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, Section 58 of the Traffic Act and Section 21 of the East African Community

				Vehicle Load Control Act, 2016. (f) proceeds from levies on roadside developments including road side stations which form part of the scope of works for Project Roads, as well as proceeds from any access fees and advertisements along the Project Roads levied in accordance with Part II of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013,
6	Reg. 7 (a) and (b)	These two Regulations are the same safe for the exclusion in (b). Therefore it is preferred if (b) is retained and delete (a) given it will cause confusion during implementation.	It is recommended that Regulation 7 (a) be deleted and keep Regulation 7 (b) which is more comprehensive.	Accepted and amended
7	Reg. 8 (3) (f)	This is a function of the Administrator of the Fund. This is not an oversight function and therefore should be deleted from this Regulation and provided for under the functions of the Officer administering the Fund	The function provided for under Regulation 8 (3) (f) be deleted from functions of the Committee and be provided for as a function of the Administrator of the Fund	Accepted and amended
8	Reg.8 (4)	It is important to indicate that these functions are additional to the functions under Reg.8 (3)	Regulation 8 (3) and (4) should be harmonized	Regulation 8(4) is now Regulation 9(2). 3 additional sub clauses have been incorporated for clarity
9	Reg.8 (5) (e)	It is important to indicate that the term of imprisonment should not exceed six months. Further unless a financial offence is defined, this is vague and will be difficult to implement.	This Regulation should be clear that the term of imprisonment is more than six months and also define what a "Financial offence" means in these Regulations	Now Reg 10(1)(e). Alternative language proposed which does not include 'financial offence'
10	Reg.8 (6)	The Administrator of the Fund, this is a designation and cannot be recruitment. This is provided for under Section 24 (5) of the Public Finance Management Act, 2012.	The Officer administering the Fund should be removed from this Regulation which requires competitive recruitment.	Accepted and amended

11	Reg.8 (6) (7)	Boards and Committee are not recruited through competitive processes. Therefore this matter be reviewed.	Therefore Reg. 8, should be reviewed. In this regard, other due diligence framework should be put in place for identification of the independent committee members including their minimum qualifications.	An additional due diligence framework also incorporated.
12	Reg. 9	This Regulation requires officer administering the Fund to be recruited through a competitive process. This is not in compliance with section 24 (5) of the Public Finance Management Act, 2012.	The PFM Act, 2012 envisaged already a serving officer, will be designated as the Administrator of the Fund to manage the wage bill. This Regulation should be deleted. Further, the Principal Secretary/Accounting Officer, State Department of Infrastructure should be designated the Administrator of the Fund, since the mandate of the Fund, in substance is provision of road services. The National Treasury should not administer such a Fund, where the policy mandate is with another Ministry /State Department.	Designation process now incorporated under Reg 11. Designation of the PS Infrastructure however has not specified to provide the CS with the latitude to designate the OAF
13	Reg.10	This Regulation should consolidate all the functions and responsibilities of the Administrator under one sub regulation. Some of the responsibilities unimplementable and therefore the responsibilities need to be moderated. For example Reg. 10 (3) (b) (iii) – ensure that there are held within the Fund, sufficient funds to meet the quarterly and annual obligations of the Fund. The Administrator cannot allocate himself or herself additional resources unless through the budgetary process.	The Responsibilities /Functions of the Administrator be consolidated and moderated for what is practically possible, within the purview of the administrator of the Fund.	Reg 12 (3) b) iii) has been deleted
14	Reg. 11	This Regulation generally addresses the question of adequate budgeting	This Regulation should be simplified to two or three sub-	Now Regulation 13.

		and provision of adequate resources to meet the Fund obligations. However, the way it is constructed it does not address the budget calendar of Government. Towards this end, it should be simplified to provide for the manner of preparation of annual budgets and the annual budget revision/supplementary framework.	regulation, which are clear and concise to address the following:- a. Annual budget of the Fund b. Annual work programme of the Fund; c. Budget revision framework in year	Regulation 13 (a) simplified. Regulation 13(b) makes reference to Part III of the Act which addresses the GoK Budget process
15	Reg.12	The recruitment of Secretariat staff including the Head of Secretariat, should be responsibility of the Committee in consultation with the Public Service Commission, and not the Administrator. This is a good governance practice.	This Regulation should be revised to provide for the Committee to recruit staff in consultation with the Public Service commission	Recruitment of staff appears under Reg 12 (e) now. Since appointment of staff appears more administrative, this has been retained at the HR management level. The OAF will furnish recommendations to the Committee for final approval.
16	Reg.13	This is fine.	This is fine	Retained
17	Reg. 14	This Regulation refers to detailed documentation in Regulation 14. This reference needs cross checking given this is Regulation 14. In addition, it is not clear whether these requirements are additional to the Public Finance Management Act, 2012 and its Regulations requirements or the PFM Act, 2012 does not apply.	It is important for this Regulation, to clearly state, that these requirements are additional to the requirements under the Public Finance Management Act, 2012 and its Regulations.	Accepted and incorporated including reference to the PFMA under the new Reg 17
18	Reg. 15	It is not clear, that this Regulation is trying to address. Given, that payments are contractual obligations between the Fund and third parties. This should be done through contractual obligations between the two parties and not in the Regulations.	This Regulation should be reviewed to provide for contractual obligations by both parties, which shall be provided in the contract document.	This refers to the new Reg.18 'right to question and withhold payment'. It is required to conform to the provisions of the PFMA, which is now one of the requirements under the new Reg 17, referenced in Reg 18
19	Reg. 16.	This should be provided for in the contract between the Fund and third parties and not in the Regulations. This is important because third	This should be provided for under the contracts between the Fund and third parties.	New Reg 19. It is important that the opening of accounts (pursuant to Section 28

		parties, will not be bound by the Regulations but the contracts they sign between themselves and the Fund.		of the PFMA) and the <i>pari passu</i> ranking of liabilities is incorporated into the Regulations
20	Reg. 17 (2)	It is not clear what this sub-regulation is trying to address. This will cause confusion in law and should be deleted.	Delete Reg.17 (2) because it serves no purpose in law	Retained since it requires the OAF to observe the budget process under Part III of the PFM
21	Reg.18	This is fine	This is fine	Retained
22	Reg.19	It is not clear what this Regulation intends to address except creating legal obligations to the Administrator of the Fund, which he/she has no authority over, such as allocation of adequate budget. It is an unimplementable Regulation	This Regulation should be deleted and mechanism be provided under the Regulation, which relates to budget approval process of the Fund and how deficits shall be addressed during the supplementary or revision of the budget of the Fund.	Now Reg. 22. Retained for fund management purposes. The concept of 'Declaration and Use of Surplus Funds' also exists in similar funds eg the Road Annuity Fund.
23	Reg. 20	This is fine	This is fine	Retained
24	Reg.21	This is fine	This is fine	Retained
25	Reg.22	This Regulation relates to the duties of the officer administering the Fund and should be consolidated together with Regulation 10 which is dealing with functions of the Fund Administrator.	Merge this Regulation with Regulation 10.	Now Reg.25. Retained as an independent requirement since it relates to a Constitutional responsibility (Access to Information)
26	Reg.23	This is fine	This is fine	Retained
27	Reg. 24 (1)	This is fine	This is fine	Retained
28	Reg.24 (2)	This sub-regulation deals with the budget preparation, approval and revision process. Therefore, the sub-regulation should be merged and consolidated with all the provisions relating to budget approval process of the Fund	All Regulations and sub-regulations relating to budget approval process should be consolidated and provided for under one Regulation, for ease of implementation and reduce confusion throughout the Regulations.	This is a performance report as opposed to a budget preparation report. The content has therefore been retained
29	Reg. 25	This is fine	This is fine	Retained
30	Reg.26	This is not in compliance with the PFM Act, 2012 which states that the	This Regulation should be aligned with the provisions of	The Regulation complies with Section 24(8) of the

		Fund shall lapse, beyond which both Cabinet and Parliament approval should be sought for its continued existence.	the Public Finance Management Act,2012 and its Regulation	Act, which allows the CS to wind up a Fund with the approval of the National Assembly. Reg 207 of the Regulations <i>inter alia</i> provides that where the lifespan of a Fund lapses the CS may commence the process of winding up if it is determined that the Fund has completed the objectives for which it was set up. The wording has therefore been retained
31	Reg.27	This is fine	This is fine	Retained
32	Reg.28	This is fine, given all public funds are deemed to be under PFM Act, under Second Schedule Section 9.	This is fine	Retained

Annex A: Comments from The Macro and Fiscal Affairs Department of the National Treasury

Clause in Regulations		Amendment Proposed	Rationale/Justification
Preamble		<p>IN EXERCISE of the powers conferred by Section 24 (4) of the Public Finance Management Act, and Section 6A of the Public Roads Toll Act, Cap 407, the Cabinet Secretary for the National Treasury makes the following Regulations: —</p>	<p>Section 6A of the Public Roads Tolls Act, Cap 407 provides for the "Establishment of the Fund". It would therefore be appropriate to cross reference this provision</p>
Definitions		<p>Amend definition of "Projected Fund Ratio" as follows: "Projected Fund Ratio" as at a particular future date means the minimum ratio of 1.3 times of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date, calculated for twelve forward rolling months, <u>provided that this ratio shall, at a minimum, be computed taking into account arrears, amounts invoiced but not settled and not yet classified as arrears, and other amounts that will become due over the forecast period</u> ;</p>	<p>Since the ratio cannot be defined as a "minimum", but rather as a specific metric The Projected Shortfall/Surplus is to be calculated for 12 rolling months. The definition therefore needs to state this clearly.</p>
Service Payments		<p>Amend definition of "Service Payments"</p> <p>"Service Payments" means payments by whatever name due to and invoiced by a Service Provider or Toll Operator a Private Party pursuant to a Project</p>	<p>Since the definition of 'private party' includes a Service Provider or a Toll Operator</p>

		Agreement and in accordance with these Regulations	
Regulation 3 and 5(2)		Delete Regulation 5(2) so that Regulation 5 deals solely with establishment	There is content repetition between Regulations 3 and 5(2) as both Regulations highlight the objective and purpose of the Fund. Since the Regulations are silent on the administrative costs of the Fund. This has been harmonized in line with the PFM (National Government) Regulations, 2015.
New Clause		Administrative Costs The Officer Administering the Fund shall ensure the administration costs of the Fund shall be a maximum of three (3%) percent of the approved budgets of the Fund;	
Regulation 6		Amend sub regulations (b) and (f) as follows: Sub regulation (b): "fees or charges imposed on Road Users accessing Project Roads with overloaded axles levied in accordance with Part III of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, Section 58 of the Traffic Act and Section 21 of the East African Community Vehicle Load Control Act, 2016." Sub regulation (f) "proceeds from levies on roadside developments including road side stations which form part of the scope of works for Project Roads, as well as proceeds from any access fees and advertisements along the Project Roads levied in accordance with Part II of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013,"	To ensure that in so far as the source of funds relates to a charge or a levy, the specific applicable statute and the associated section should be cited

Regulation 7		Delete Regulation 7(a) and retain Regulation 7(b)	To avoid content duplication
Regulation 9(1)(f)		Amend Regulation 9(1) (f) as follows and have it listed under the functions of the Officer Administering the Fund: <i>"authorize withdrawals from the Fund of Projected Surpluses upon approval by the Cabinet Secretary in accordance with these Regulations and any guidelines it approves for this purpose"</i>	Since the function is not an oversight function
Regulation 10		Delete Regulation 10(2) and amend Regulations (3) and (4) to have the Cabinet Secretary appoint person(s) to fill the vacancy based on the criteria set out under Regulation 8(1)(e) expanded to include the following minimum requirements: (i) Holds a degree in the relevant field from a university recognized in Kenya (ii) Has proven fund management or other relevant professional experience (iii) Has served in a position of senior management for a period of at least 6 years (iv) Has not served in the same entity as an employee in the preceding 5 years (v) Meets the requirements of Chapter six of the Constitution (vi) Has no convictions resulting from integrity related matters or civil liabilities.	To remove the competitive appointment process for filling of vacancies arising from Regulation 10(1) since Boards and Committees are not recruited through competitive processes
Regulation 10(1)(e)		Amend Regulation 10(1)(e) as follows:	Since there is no definition for 'financial offence'

		<p>"Is convicted of an offence involving dishonesty or fraud or moral turpitude and sentenced to imprisonment for a term exceeding six months."</p>	
Regulation 12(3)(b)(iii)		<p>Delete Regulation (3)(b)(iii) which provides that the OAF shall ensure that there are held within the Fund sufficient funds to meet the quarterly and annual obligations of the Fund.</p>	<p>The deletion is recommended since the Administrator cannot allocate for themselves additional resources unless through the budgetary process</p>
Regulation 12(3)(c)(v)		<p>Amend the first two lines of Regulation 12 (3) (c)(v) to read "preparation, signature and with the approval of the Committee, transmission to the Auditor – General...."</p>	<p>Editorial correction</p>
Proviso to Regulation 12(3)(c)(v)		<p>Amend the proviso appearing at the tail end of Regulation 12 (3)(c)(v) as follows: "Provided that for the purpose of subclauses (c)(i) and (c)(ii), the Officer Administering the Fund, in making projections for the purpose of determining surpluses or addressing shortfalls, may take into account such macroeconomic forward-looking assumptions derived from recognized and reputable independent sources for macro-economic forecasts, to the extent these are available, such assumptions to be used both to produce traffic and revenue forecasts as well as to forecast future Service Payments, and may, at its discretion, retain advisors for this purpose, and provided further that the Officer Administering the Fund may recommend to the Oversight Committee, and the Committee may issue, such guidelines on</p>	<p>To establish a more robust regime for the declaration and withdrawal of surpluses from the Fund</p>

		<p><u>conditions to be met before surpluses are declared and or withdrawn, taking into account the liabilities of the Fund, as may be necessary for the better carrying out of the objects of this Regulation".</u></p>	
Regulation 13(a)		<p>Revise Regulation 13(a) on "Addressing shortfalls in the Fund", as follows:</p> <p>"13(a). For the better implementation of the obligations under regulation 12(3)(c), (d), and (e), the Officer Administering the Fund shall provide an estimate of the Projected Fund Ratio for each quarter of the immediate subsequent 12-month period with the view to determining whether the Fund shall realize a Projected Shortfall or Projected Surplus for the forecast period. provided that for this purpose, Projected Fund Ratio shall, at a minimum, be computed taking into account arrears, amounts involved but not settled and not yet classified as arrears, and other amounts that will become due over the forecast period</p>	<p>The amendment is premised on observations that the Regulation should be simplified. The proviso has therefore been included in the definition of the "Projected Fund Ratio"</p>
Regulation 22(1)		<p>Regulation 22(1) on "Declaration and use of surplus funds" should make reference to both Regulations 12(3) (c) and (d).</p>	<p>Editorial correction</p>
Regulation 26(2)		<p>Regulation 26(2) on "Submission of Annual Performance Reports" <i>inter alia</i> provides that the Officer Administering the Fund shall prepare and submit to the Committee and the Cabinet Secretary, within three months of the start of each financial year, an annual Fund Performance Report relating to the previous financial year....' It is recommended</p>	<p>For consistency with the wording under the Public Finance Management Act, 2012</p>

		<p>that the clause be rephrased to indicate that the report shall be prepared and submitted 'within three months after the end of the financial year'</p>	
<p>Regulation 29(2)</p>		<p>On "Winding Up" The three conditions under Regulation 29(2) for winding up the fund are conjunctive through the use of 'and' so that no winding up may take place unless all three conditions have been satisfied.</p>	<p>Editorial correction</p>

THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2020
 November 2020 Draft
 Matrix of Review Comments from the World Bank

Matrix of comments from World Bank as at Jan 18, 2021

Regulation Number (per November Draft)	Topic	Issue raised in WBG Review of April 2020 Draft of NTF Regulations	Status of Issue in November 2020 Draft of NTF Regulations	WBG review of amendments needed on NTF provisions that need to be amended - WBG review	December 2020 Draft of NTF Regulations: <u>1/</u> How WB Comments have been addressed	GoK response as at 18 th January 2021
A. KEY ISSUES						
Reg 2 (Interpretation)	Definition of "Project Roads"	The regulations define "Project Roads" as being all the roads declared as toll roads by the relevant Cabinet Secretary. There is no stipulation of clear, transparent and feasible criteria under which "Project Roads" will be determined. This introduces a significant adverse selection risk, where projects of doubtful feasibility/economics may be introduced, hence weakening the credit strength of the Fund.	Not addressed.	<ul style="list-style-type: none"> ▪ We note that this definition now includes non-tolled roads potentially being included in a Project Agreement that principally relate to a tolled road (for which a Project Agreement obligates service or other payments from the Fund). This could raise concerns in the case where a PPP project has a combination of fewer tolled kilometers than non-tolled kilometers. We note that our primary concern around a clear process with economic & feasibility assessment of NTF's affordability of future project remains critical for the bankability of the arrangement, which has not been addressed. 	The issues raised by the WB have not been addressed.	<p>-The definition maintains that the roads remain principally 'toll roads'</p> <p>The genesis of this provision stems from the Section 4A of the PRT Act which permits the Minister to specify a portion of a road to be a toll road.</p> <p>So where there is a combination of tolled and non tolled roads, it is the portion that is declared to be a toll road that will apply to the Regulations</p> <p>Bankability:.....</p>

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Regulation Number (per November Draft)	Topic	Issue raised in WBG review of April 2020 Draft of NTF Regulations	Status of Issue in November 2020 Draft of NTF Regulations	WBG review of amendments needed on NTF provisions that need to be amended WBG review	December 2020 Draft of NTF Regulations: <u>II/How WB</u> Comments have been addressed	GoK response as at 18 th January 2021
Reg. 2	Definition of Projected Fund Ratio	What is the projection period for calculating the Projected Fund Ratio?		<ul style="list-style-type: none"> We expect Projected Shortfall/Surplus to be calculated for 12 rolling months. Definition should state this clearly, even though the 10.(3).(c).ii & iii refers the need for quarterly reporting on a rolling 12 months of the projected Inflows and Outflows. 	This has not been addressed.	To include the words '.....calculated for 12 rolling months.' at the end of the definition
Reg. 2	Definition of Short-Term Liquid Instruments	This will impact the selection criteria for surplus funds investment in sub-Reg. 10(3)(d)(ii). The Fund Administrator will invest surplus funds in <u>approved</u> Short-Term Liquid Instruments. The definition of Short-Term Liquid instruments needs tightening to avoid undue risk.		<ul style="list-style-type: none"> Drafting correction: Short-Term Liquid Instruments is a defined term The issuers of the marketable financial security should be defined and limited to either Central Bank or Tier 1 commercial banks (with minimum credit rating levels acceptable to the <u>Leaders and Guarantors</u>) in Kenya. 	<ul style="list-style-type: none"> Short-Term Liquid Instruments is now a defined term. The second issue (delineation of marketable securities) has not been addressed. 	Regulation 8(3)(j), provides the following as one of the functions of the Oversight Committee: “(j) establish the Fund’s investment policies with respect to surplus cash;” The granular detail of which specific securities qualify for investment (including the proposals highlighted by WB) should form part of the content of the

THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2020

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Regs. 2 and 4	Definition of the Projected Fund Ratio and Objects and Purpose of the Fund	The proposed 1.05x ratio for shortfall and 1.10 ratio for surplus are low, with limited margins to sustain shocks. In addition, the initial arrangement where the Gok was to provide a 6-month L/C (2 quarterly payments) on top of the PRG is now off the table. An appropriate level for the ratio maybe around 1.5x and 2.0x respectively for shortfall and surplus.	The Projected Fund Ratio as at a particular future has been fixed at 1.3, which is now the reference point for both shortfall (any amount below the Projected Fund Ratio) and surplus (any amount above the Projected Fund Ratio).	While it is appreciated that the shortfall amount reference ratio has increased from 1.05x to 1.3x and that the surplus amount reference ratio has also increased from 1.10x to 1.3x, both as a consequence of the introduction of a fixed Projected Fund Ratio of 1.3x, both results are still insufficient as buffers for shocks. We would expect the shortfall and surplus ratios to be set at 1.5x and 2.0x, respectively. [Also refer our comment on Reg 19 clause below].	<p>The W/B has agreed to live with the 1.3x shortfall and surplus ratio. While we acknowledge the Gok's approach to keep 1.3x on both surplus and shortfall, however, it is all the more critical that the additional safeguard requirements to accompany this ratio, in lieu of the ringfencing (either within or outside</p>	As earlier indicated, the NRTF is a National Toll Fund and will not rank obligations under it nor subrogate projects. The ring fencing approach was therefore not accepted

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				<p>The following additional provisions in the Regulations for the following would be required by the World Bank:</p> <p>a. “Ring-fencing” of payment cashflows for NNM project and other initial set of projects as a priority i.e., prioritization and segregation of funds within the NTF to prioritize projects as they are initially added. This will ensure that any new projects after the initial list are added only after confirmation of NTF’s affordability.</p> <p>b. Clear identification of initial set of projects with contracted payment cashflows should be listed. NTF’s affordability should be confirmed before any new project is added. Such confirmation will be part of the guarantee related covenants in IDA guarantees legal</p>	<p>the NTF, as was referred by the GoK-NTF in our earlier conversation, be reflected in the regulation. These have not been provided/added.</p>	

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Regs. 4 and 7	Purpose of the Fund and payments to be made out of the Fund	We understand that the only purpose of the Fund is to make the scheduled Service Payments under the Project Agreements and no "other exceptional payments" such as Political Risk and Early Termination Events. This is a positive feature that must be preserved (and applied to all potential exceptional payments) as the NTF is not an appropriate source of large one-off payments. We also expect that exceptional payment obligations under the Project Agreement such as payment on compensation events, etc. are to be covered outside the NTF sources. We urge that this be explicitly clarified in the regulations.	Reg. 7 (c) is an open-ended catch-all phrase for 'any other eligible object and purpose for which the Fund is established' which potentially opens the door for other payments given the wording in Reg. 4(2).	In order to mitigate the risk arising in the wording of Reg 7 (c), we propose to limit the purpose of the Fund to meet only the scheduled contractual payments (e.g., pre-defined Quarterly Service Payments) arising from Project Agreements for Project Roads (as defined in 4(2)). An open-ended wording could create uncertainties on broader use of unscheduled payments (e.g., compensation events, change in law payments), which NTF is not expected to cover.	This has not been addressed and the revised/new drafting has further increased the risk for the NTF cash flow. Moreover, we note the addition of a new category of 'Other Payments' in Reg 7 (c) which is a further divergence from our comments and the view expressed by the PPP team on the call of 17.12.2020 (as being in agreement with our position on this matter).	Regulation 7(d) can be rephrased as follows: "any other eligible expenditure incurred for the purpose of meeting scheduled contractual payments arising from Project Agreements for Project Roads

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Reg.6	Payments into the Fund: Insurance Proceeds	It would be helpful to clarify under which context these proceeds from projects would be paid into the project fund under sub-Reg. 6(h)	Not addressed.	<ul style="list-style-type: none"> ▪ While in principle, this clause makes sense but it important to clarify better. In particular, it is not clear as to how the losses suffered by the CA would be met from the Fund. This assumes that the Fund makes certain payments to the CA or to the Service Provider (on behalf of the CA) for an event that the CA considers as a loss. It is not clear when and why this scenario can materialize (i.e. payments made from the fund to cover losses suffered by the contracting authority that are triggered by actions of the service providers). ▪ Considering the Fund makes payment only after the CA approves the invoices, this clause has to be verified for terms and conditions of the Project Agreement, for consistency. 	This has not been addressed.	The clarity would be drawn from the insurance coverage provisions under the PA

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Reg. 8	Oversight Committee: Appointment, Suspension and Removal of Members	This is the key governance body. It is proposed to be composed of representatives from four ministries plus one from the Attorney General's Chambers. Although representation of senior public sector officials is not unusual, consideration should be given to the inclusion of a number of members who are not public sector officials but some independent members coming with relevant seniority and experience e.g. in matters of audit, governance, finance, law and civil engineering. Such a public-private set-up would encourage a diversity of views between public and private sector, given the PPP linked genesis of the Fund. We consider that it is important that the projections, management and audit functions of the Fund	The revised draft has the following changes: (1) removed representation of PS for Transport, whom in view of the inter-modal transport relationship of the Roads sub-sector, would be considered key in the OC; (ii) added to allow 3 "other non-public officials" to be appointed by the Cabinet secretary; and, (iii) the Officer Administering the fund was also added to the composition of the Committee.	<ul style="list-style-type: none"> To ensure strong technical competences (for example recommendation by relevant professional associations, etc.), there is a need to define clear qualification criteria and appointment process for the "non-public" OC members. We note the need for provisions to cater for suspension of OC members and Officer Administering the Fund upon being formally investigated for offences relating to integrity and reinstatement upon acquittal or where no formal prosecution is recommended by the Director Prosecution. The Officer Administering the Fund should have no role in the appointment, suspension or removal of OC members. It raises potential conflicts. 	These concerns have not been addressed.	This recommendation can be catered for within the context of Regulation 8(4), which empowers the OC to make recommendations to the CS to sustain and improve the governance framework Regulation 8(5) makes reference to Article 251 of the Constitution which articulates the process Agreed: Under the Regulations however, the role of the OAF is purely administrative as the Secretariat to the OC and not decision making eg Reg8(6)

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Reg.8	Oversight Committee: Operations	<p>are “depoliticized”, both in appearance and in substance.</p> <p>We recommend that the operations of the Oversight Committee be described in more details (including decision process, frequency of meetings, etc.).</p>	<p>This was amended to remove all functions related to approving estimates of inflows/outflows, operating costs, and add matters related to approving independent advisors for the fund (if needed). It was also generally provided that the responsibility of the Committee is to make recommendations to the Treasury CS to ensure long term sustainability of the fund. The CS will appoint replacement of a member with the help of the Officer Administering the Fund.</p>	<ul style="list-style-type: none"> ▪ We also recommend that the operations of the Oversight Committee be described in more details (including decision-making process, frequency of meetings, etc.). ▪ It's also important that the Officer Administering the Fund has no vote in the OC because of the potential conflict. ▪ The operational details of the OC should be tightened including the potential risks arising from the OAF undertaking the secretarial function of the entity overseeing their function, giving rise to potential conflicts. ▪ No provision has been made for the replacement of the OAF 	<p>These concerns have not been addressed.</p>	<p>:notifying the OC of a vacancy in the OC;</p> <p>This recommendation can be catered for within the context of Regulation 8(4), which empowers the OC to make recommendations to the CS to sustain and improve the governance framework</p> <p>Regulation 8(5) makes reference to Article 251 of the Constitution which articulates the process</p> <p>Agreed. Under the Regulations however, the role of the OAF is purely administrative as the Secretariat to</p>

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Reg. 8	Functions and powers of the Oversight Committee	What does the 'review and approve the annual work programme' in sub-Reg. 8(3)(a) mean?	Not addressed	Per 4.2 objectives and purpose, the Fund provides dedicated public fund to meet Government's payment obligations arising from Project Agreements. The nature and reason of this function needs to be clarified in the Fund context; it seems to be a carry-over for the arrangement under the Road Maintenance Levy Fund (where the executing agencies - including KeNHA and KURA - are required to submit annual work programs that are reviewed and approved by KRB, as the fund manager).	These concerns have not been addressed.	This is an important function of the OC to ensure fiscal discipline and sustainability of the Fund is maintained.
Reg. 8	Functions and powers of the Oversight Committee:	What does 'authorise allocation' in sub-Reg. 8(3)(b) mean? Will there be a prioritisation or payments for each Project Agreement?	Not addressed	Similar to earlier remarks, considering that the payment obligations under the Project Agreement should have been contractually agreed upon between the Contracting	These concerns have not been addressed.	This is an oversight function and will not be a prioritization mechanism. Since the budgets are approved the

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Reg. 10	Functions of the Officer Administering the Fund: Fund Accounts	<p>We would recommend putting in place a mechanism that would ensure that the tolls collected for one Project Road are used in priority to pay for the service payments of that Project Road, for example, through sub-accounts per project.</p> <p>We will need to demonstrate the affordability of the project for the GoK and a substantial part of the rationale will be to demonstrate that tolls for each Project Road would potentially cover a substantial part of service payments for that Project Road. A clear statement of principle (including security and ranking) along these lines, as well as, a well-defined cash waterfall may be useful</p>	<p>Not fully addressed. An additional mention of the sub-account was added (sub-Reg 10(3)(b)(i)).</p>	<p>Authority and Service Providers, there is need to clarify this.</p> <p>We note that sub-Reg 10(3)(b)(i) introduces sub-accounts but they are not specifically linked to specific Project Roads.</p> <p>We would recommend putting in place a mechanism that would ensure that the tolls collected for one Project Road are used in priority to pay for the service payments of that Project Road, for example, through specific sub-accounts per project.</p> <p>GoK needs to assess and confirm the affordability of each project by NTF before they are added. A clear statement of principle (including security and ranking) along these lines, as well as, a well-defined cash waterfall may be useful to clarify the payment mechanics of the Fund.</p> <p>As mentioned above, this will be key covenant in IDA.</p>	<p><u>These concerns have not been addressed.</u></p>	<p>authorization is purely administrative</p> <p>The allocations refer to payments made in accordance with Regulation 13. As in the note above, there will be no prioritization of payments.</p>

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Reg. 10	Functions of the Officer Administering the Fund	The management of the Fund would be carried out by the Officer Administering the Fund who can outsource some of their functions to third parties. Please clarify to help us better understand this delegation.	Not addressed. Furthermore, - more functions have been added to the OAF including setting up of HR/Audit/reporting systems; preparation of the budgets, ensure adequate level of funds and address shortfalls, propose a detailed formula for the determination of the shortfall/surplus, cause to be appropriate budgetary allocations to the fund until it has reached appropriate levels of revenues, prepare annual reports, raising additional resources for the fund, invest surplus of cash)	<ul style="list-style-type: none"> Guarantee related legal agreements. In terms of the function of implementation of the Fund's investment policies, the OAF's role should be to make recommendations to the Oversight Committee and then implement the decisions of the Oversight Committee in line with the provisions of the Regulations. There should be provisions for suspension (e.g. formal investigation for integrity-related offences) and removal of the OAF. Circumstances for any outsourcing should be clearly outlined, including the cost and other implications. OAF should hire an independent international expert(s) to prepare the projections of the Fund, which the OAF will use for the management of the Fund. The terms of 	These concerns have not been addressed.	-In terms of the function of implementation of the Fund's investment policies, the OAF's role should be to make recommendations to the OC and then implement the decisions of the OC in line with the provisions of the Regulations: to be included -There should be provisions for suspension & removal of the OAF, catered for by dint of Reg 24 - Circumstances for outsourcing should be clearly outlined including cost and other implications: the safeguard is Reg

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			<p>- the criteria for selection of the OAF is now specified, including selection by the members of the Oversight Committee through a tender process; the selection criteria itself seem weak (only individuals being eligible with no provision for a firm to be appointed, 10 years' experience in fund management required) so there is a risk of lack of technical capacity (in addition, no provision has been made for the replacement of the OAF)</p>	<p>reference and methodology for preparing projections should be clearly defined, based on best practices.</p>		<p>10(4) which requires that any outsourcing be subject to approval by the Committee - OAF should hire an independent international expert to prepare the projections of the Fund in line with best practices: a proviso has been incorporated to Regulation 10(3)(c)(v) to address the retention of an advisor and the use of international best practices, with the OAF retaining the statutory role as the principal.</p>
Reg. 10	Functions and powers of the Officer	What is the timeline/process for approving requests for	Not addressed	<ul style="list-style-type: none"> ▪ As a drafting point, the term "Budget Framework" is 	<ul style="list-style-type: none"> ▪ "Budget Framework" is 	<ul style="list-style-type: none"> ▪ The Budget Framework process is

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	Administering the Fund	budgetary appropriations to meet projected shortfalls in sub- Reg. 10(3)(a)(ii)? How long it will take to receive the additional budget for shortfalls?		<ul style="list-style-type: none"> Framework? needs to be defined. It is important that both the timeline and the process for approving requests for budgetary appropriations to meet projected shortfalls are provided for in the Regulations, including the time that it will take to receive the additional budget for shortfalls. 	<ul style="list-style-type: none"> now a defined term. Other concerns have not been addressed. 	captured in the PFM Act 2012
Reg. 11	Addressing Shortfalls in the Fund	This Regulation provides for the monitoring of Projected Shortfall by the Officer Administering the Fund. It is important to have clarity on the process related to the obligations of the GOK to compensate Projected Shortfalls once identified.	Not addressed	<ul style="list-style-type: none"> Important to have clarity on the process related to the obligations of the GOK to compensate for Projected Shortfalls once identified. It is critical for the introduction of an obligation for the GoK to meet the shortfall at the Fund within a specified number of days following notification by the Officer Administering the Fund. Is there an extraordinary process in case of an unexpected cash shortfall? Clarity 	<ul style="list-style-type: none"> These concerns have not been addressed. We note that there is an inclusion, via a proviso to Reg. 10 (c)(v), of discretionary reference by the Officer Administering the Fund to external and independent expertise which falls short of the expectation that this would be an objective, non-discretionary measure. 	The process of addressing shortfalls falls within the Budget Framework under the PFMA

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				<p>is needed on the above points as this is a key creditworthiness consideration for the IDA Guarantee.</p> <ul style="list-style-type: none"> ▪ Finally, the projections used in the calculation of the Projected Shortfalls (and Surpluses), in all cases, should be based on the projection reports prepared by the Independent International Expert(s). 	<p>▪ We also note the addition of a new paragraph (c) in Reg. 11 (1) which raises additional questions, as follows:</p> <ul style="list-style-type: none"> ⊖ What is meant by 'carrying capacity of the fund' as it is not a defined term? ⊖ 'the Oversight Committee shall advise the Cabinet Secretary on the advisability and implications of admitting new project liabilities into the Fund' is not consistent with Reg. 4(2) and Reg. 7 and our concerns expressed thereon on how the Fund accrues liabilities, which should be limited to the scheduled quarterly 	

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Reg. 14	Payment Procedure by the OAF	Clauses 14.b and 15 are not fully clear with respect to the process/allowance for deductions.	In substance not addressed.	The following clarifications are required to be made to Reg. 14: <ul style="list-style-type: none"> Deletion of 'eligibility of payment recipient' from sub-Reg 14 (1) (a) as this is settled at the level of the Project Agreement to which the NTF is not a party. The CA's payment instruction should hold true for the Fund. 	<ul style="list-style-type: none"> This concern has not been addressed. Reg. 14(1)(b) drafting error: 'Project' as a stand-alone term is not a defined term. Reference to 'Project's financiers' should be changed to 'project financiers' to correct the grammar and reflect that it's undefined. 	<ul style="list-style-type: none"> Proposed deletion of 'eligibility of payment recipient' in sub regulation (1) to be effected.
Reg. 15	Right of OAF to Question and Reject	The Officer has the power to suspend disbursements against	In substance not addressed.	We reiterate our request for a payment procedure that is explicitly devoid of any	This concern has not been addressed.	The matters referred to are important

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	Payment Instruction	invoices until such matters are resolved' – this is not consistent with the provisions of the underlying Project Agreement, where eligible payments would have been already certified. Once certified under the Project Agreement, there should not be further suspensions of payments by the Fund. The rationale for this right could be questionable. It is important to note that the Fund is not a party to the underlying Project Agreement.		discretionary rights on the part of the OAF or the Oversight Committee as these may raise potential delay and/or non-payment risks. Once all invoices are reviewed and certified by the Contracting Authority (with the assistance of the Independent Expert appointed under the Project Agreement) and a payment instruction submitted to the Fund by the Contracting Authority, there should be no further discretion regarding eligibility for payment of that invoice, including delays or withholding.		procedural requirements under Reg 14, that must be met and do not affect the eligibility for payment or the substance of the certified amounts
Reg.16	Opening of Accounts, and	The Officer Administering the Fund shall cause to be opened		Once certified under the Project Agreement, there should not be further suspensions of payments by the Fund. The rationale for this right could be questionable. It is important to note that the Fund is not a party to the underlying Project Agreement. We recommend that the Fund accounts are held either with the Central Bank	These concerns have not been addressed.	Section 28 of the PFMA read together with Reg

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	equality of Fund liabilities	in the name of the Fund such bank accounts for the Fund in a bank or banks approved in accordance with Section 28 of the Act, as may be necessary for the purposes for which the Fund is established.		of Kenya or Tier 1 commercial banks (with minimum credit rating levels acceptable to the Guarantor) in Kenya.		82 of the PFM (National Govt) Regulations 2015, provide the CBK as the default bank for this purpose. The exceptions to this are stringent in order to preserve the default position
Reg. 16	Opening of Accounts and Equality of Fund Liabilities	The current draft does not indicate whether the Fund will serve projects on a pooled "pari-passu" basis or treat projects separately through segregated accounts. The contemplated mechanism considers pooling together the cash to make the service payments for all PPP "Projects Roads". It is however unclear how the funds would be allocated among the various projects e.g. (a) will the projects be treated on a pari passu basis or will there be some kind of priority ranking, and (b) if	The new sub-Reg. 16 (2) provides that "All liabilities relating to contracted obligations of the Fund shall rank equally".	As indicated above, we recommend segregating project specific accounts for each project, prioritizing initial list of projects and adding future projects only based on defined consent/approval processes. The payment timelines of all projects should also be aligned to ensure availability of cash at the Fund.	These concerns have not been addressed.	The Fund will not segregate project specific accounts, but will serve projects on a pooled 'pari passu' basis. With regard to the inclusion of additional projects, Reg 11(1)(c) has been introduced whereby the OAF is required to make recommendations to the OC so that Cabinet is duly advised on the implications of admitting new

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		payment dates are different, there will be a structural subordination of some projects over others especially if the available cash does not enable the Fund to cover all the financial obligations under the Project Agreements.				projects to the Fund.
Reg.18	Procedure for Prefunding the Fund	On Fund inflows, there's unresolved lack of clarity around this issue.	We note that the new Regulation 18 provides for pre-funding of the Fund.	<ul style="list-style-type: none"> ▪ While the new Reg. 18 provides for pre-funding of the Fund, there's little detail on a minimum threshold or amount and the relevant sources based on projected needs (especially for the construction period Early Payments based on section completion). Such detail would enhance stakeholder comfort on the financial integrity of the Fund. ▪ WB would like to have an independent discussion on the prefunding requirements that goes beyond the purview of the NTF regulation. The prefunding levels are to 	These concerns have not been addressed.	<p>-Reg 18 makes reference to Part III of the Act which deals with the entire budget process including the requirement to submit budget estimates. The administrative mechanism for this will be calculated in line with the process under Reg 11.</p> <p>-(xxx)</p> <p>-(xxx)</p>

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Reg. 18	Fund Inflows	In terms of assessment of inflows, it is also important that forecasts or other assumptions (e.g. traffic data, currency exchange rate) are as accurate as possible to correctly assess the inflows.	There is a provision under the functions of the OAF, for appointing qualified experts to help prepare projections, but this is not stated as a requirement.	<p>While the regulation provides for the Officer Administering the Fund to cause appropriate budgetary allocations to meet fund initial obligations ("until such a time as toll revenues attain the threshold"), there remains an uncertainty on such amounts.</p> <p>We strongly recommend an independent expert opinion of the assumptions (by a consultant/auditor with relevant financial and technical capability) can provide comfort on this objective. (This ties in with our other remark about the need for an independent expert(s) to be specifically engaged to prepare the projections of the Fund, in</p>	This concern has not been addressed.	-The amounts will be deduced pursuant to the process in note 18 above -As highlighted in Note 12 a proviso has been incorporated to Regulation 10(3)(c)(v) to address the retention of an advisor and the use of international best practices in the preparation of the projections
				<p>be assessed periodically based on the expected traffic volume.</p> <ul style="list-style-type: none"> In addition, we strongly recommend prefunding of the entire amount of Early Payments for sectional completion ahead of Effectiveness. 		

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Reg. 19	Declaration and Use of Surplus Funds	The Fund's surpluses can be withdrawn and returned to the GoK. This raises liquidity risks concerning payments to Service Providers. We therefore proposed that it may be appropriate to include more requirements to the current provisions, to avoid such withdrawal ultimately resulting in a shortfall. For example, the Surplus shall only be paid after [3] consecutive years of Surplus on a rolling basis and the cash could be withdrawn up to the shortfall ratio ([1.5x] for example), etc.	Not addressed. It was specified that the surplus will be defined as "exists where the Project Fund Ratio exceeds 1.3x in any [12-months] projection period, provided that for this purpose, actual cash balances (not projected future inflows) within the Fund shall be the basis determining the Projected Fund Ratio". The wording related to the cash criteria is unclear.	<p>the course of which these assessments can also be made).</p> <p>a. Drafting errors:</p> <ul style="list-style-type: none"> ▪ Reference to Regulation 10 (1)(d) in Reg.19 is incorrect. A drafting error to be corrected. ▪ Reg 19(2)(i) makes reference to Fund Ratio instead of Projected Fund Ratio. <p>b. The NTF is expected to be fully-funded on a stand-alone basis with toll collections only, without any previous or future exogenous government injections of funding. Moreover, Service Payments will be impacted by the following uncertainties (number of projects,</p>	<ul style="list-style-type: none"> ▪ The drafting error have not been corrected. ▪ We note the change made to Reg. 19 (3) to address payment of surpluses not leading to shortfalls. ▪ Nonetheless, and in spite of the minor change above, the key concerns raised in respect of this Regulation have not been addressed. 	<ul style="list-style-type: none"> -to be amended to refer to Reg 10(3)(d) -to be corrected <p style="text-align: right;">-Regulation 6 provides that the NRTF will be funded from several sources, including toll collections</p>

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				<p>level of tariffs, FX risk, inflation etc.). To manage liquidity concerns arising from these factors, we would recommend a much more conservative threshold in all cases, such as a minimum of 1.5 of Projected Fund Ratio for triggering the surplus. Substance tests to be met before withdrawal of surpluses: We reiterate our suggestion to specify conditions under which the surplus may be transferred to GoK even if the surplus for a particular year is met, as follows:</p> <p>a. Short-term projection basis: This is similar to the Debt Service Coverage Ratio in project finance. The short-term cash coverage ratio would be based on immediately available cash versus the</p>		<p>-The 1.3x is benchmarked against similar GoK approved projects in Kenya</p>
						-(xxxx)
						-(xxxx)

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				<p>projected future outflows for the next 12-24 months. The Surplus calculated using this short-term cash coverage ratio may only be payable after 3 consecutive years of Surpluses on a rolling basis where such withdrawal would not trigger a shortfall; and</p> <p>b. Long-term projection basis: Similar to the Project Life Coverage Ratio that is applied in project financing, this looks at projected toll collections versus projected future Service Payments over the life of the fund. The discount rate used in the Project Life Coverage Ratio calculation could be the rate of</p>		

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Reg.22	Access to Information	The Fund shall have the 'power to access any project related data'.	In substance not addressed.	<ul style="list-style-type: none"> ▪ This should be tied to the underlying Project Agreement and should be within the purview of confidentiality provisions. ▪ Secondly, we request that the publication of the relevant financial information (Fund Projections, financial reports) to be a matter of course rather than discretion, in the Fund's website by the OAF, in line with transparency requirements in order to ensure effective access of information of all relevant stakeholders and the public, 	These concerns have not been addressed.	<ul style="list-style-type: none"> -To be amended to reference the PA -To be amended as requested

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Reg. 25	Review of the Performance of the Fund	The review of the performance of the NTF after 10 years seems too late to catch any issues that could be timely addressed.	Not addressed.	including the Fund's financial projections. A first review after every 2 years may be more appropriate. Such review should be conducted by an independent auditor from a reputable international accounting firm (which, for instance, may act as an appointee of the Auditor General), taking into account the appropriate legislative requirements.	This concern has not been addressed.	The purpose of the review under Regulation 25 is to conform to The National Government PFMA Regulations, 2015, which provide for a review for the approval of the continued existence of the Fund after a 10-year period (Reg 207). This does not in any way set aside the OC's mandate to consistently oversee the performance of the Fund and where deemed necessary, including requiring the appointment of independent advisors to

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Reg. 26	Winding up of the Fund	We would like to understand if the winding up of the NTF can only take place once all the Project Agreements have been terminated/expired (i.e. no more GOK payment obligations)? If not, the winding up of the NTF should carry early termination rights for any concessionaires that are still operating. This may be implied by clause 25, but it may be worth reiterating.	This was clarified through the new Reg.26.	We appreciate the introduction of a new Reg. 26 to address our concern. We request that the three conditions under 26.(2) for winding up the fund are conjunctive through the use of 'and' so that no winding up may take place unless all three conditions have been satisfied.	This concern has not been addressed.	Agreed provide expert opinion on any matter

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B. TECHNICAL/SECTORAL ISSUES			GoK Response
Reg.2	Definition of Project Roads	<p>The Regulations define "Project Roads" as all the roads declared as toll roads and are provided or will be provided by a Service Provider. Does that mean that a road built by Government using public funds (including Development Partner loans and credits) would not qualify as a Project Road under these regulations? For example, the Thika Highway?</p>	<p>This concern has not been addressed.</p> <p style="text-align: right;">xxxx</p>
Reg. 2	Definition of Project Roads	<p>The eligibility criteria for a road to be considered a Toll road or a Project Road as defined in the regulations, and if not already in the list given in Schedule I of the Toll Road Act, is not clear.</p>	<p>This concern has not been addressed.</p> <p style="text-align: right;">xxxx</p>
Reg. 5	Road Tolls	<p>Clause 5 refers to Toll rates as set according to the Toll Roads ACT Cap 407. The proposed Toll Act lacks any indication of the base toll rates, except for transit traffic. Is an amendment in the works?</p>	<p>This concern has not been addressed.</p> <p style="text-align: right;">xxxx</p>
Reg.6	Payments into the Fund	<p>Reg. 6(a), provides that toll revenue from all Project Roads will be deposited into the Fund. This approach assigns revenue risk to the government.</p>	<p>This concern has not been addressed.</p> <p style="text-align: right;">xxxxxx</p>

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				<ul style="list-style-type: none"> regardless of the future risk/opportunities of toll revenue? Secondly, it would be important to iron out inconsistencies between section 4B of the Public Toll Roads Act which entitles the [Service Provider] to collect the tolls "...for his or her own account" and Reg 6(a) which obligates the tolls to be paid into the Fund. (Under Kenyan law, the hierarchy of interpretation favours the Act over the Regulations). 		
Reg 6	Payments into the Fund	Proceeds from roadside developments or roadside stations will accrue to the Fund.	It needs to be clarified who will have invested in these roadside developments.	This concern has not been addressed.	xxxx	
Reg 10	Functions of Officer Administering the Fund	Sub-Reg. 10(3)(a)(ii) assumes guaranteed allocations from the budget to make up for any shortfalls.	How feasible is this option under the current Post-COVID circumstances? If so, will these interest-free loans be repaid when there is a surplus, as per the provisions in Clause 19 (4)? Clarity required.	This concern has not been addressed.	xxxx	
General	Road concessioning as government policy	Overall, it is not clear if the Government will still allow concessionaires to own and improve concessioned road assets in exchange for tolling and making a return on private investment.	Moreover, it would help if the regulations could outline: <ul style="list-style-type: none"> Based on the actual expenditure, how can budget appropriations be revised (Supplementary budget?) during the year? Who will be tasked to provide/collect the information on outturn expenditure? What are the challenges in budget execution, and how can these be overcome and influence budget allotment? 	This concern has not been addressed.	xxxx	
General	Accounting basis: Accrual instead of cash	Given the role and responsibilities of the Fund, it may help if its accounting is accrual-based rather than cash-based.				

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C. OTHER ISSUES						
General	Effective Date	What is the Effective Date of this regulation and when will the projections for shortfall/surplus start being prepared?	Not addressed	Clarity required.		Gok Response
D. OTHER DRAFTING POINTS						
		Defined term "Projected Fund Ratio". This cannot be defined as a "minimum", but rather the ratio of the projected inflows to the projected outflows. The definition of the Projected Surplus below captures the reference to the 1.3 times threshold.		For consideration and revision.	This concern has not been addressed.	To delete reference to the term 'minimum'
		Defined term "Projected Surplus": Should read "exists where the Projected (...)" instead as "exists where the Project (...)".		For consideration and revision.	This concern has been addressed.	Effected within December 18 th draft
		The Term Public Service Commission is capitalised but not defined, as well as "Budget Framework".		For consideration and revision.	These concerns have been addressed.	Effected within December 18 th draft
		Article 11 (1) (b) refers to "(...)" cause to be Addressing Shortfalls in Fund (...)" Drafting is unclear and the terms capitalized not defined. Same with the drafting in clause 14 (1): "The Officer Administering the Fund shall satisfy itself (...)".		For consideration and revision.	These concerns have not been addressed.	Effected within December 18 th draft
		Article 14 (2) (b) should refer to "longer" rather than "larger".		For consideration and revision.	This concern has not been addressed.	Effected within December 18 th draft
		Definitions of 'Private Party' and 'Service Provider' are not provided in the Project Agreement; while 'Service Payments' and 'Independent Expert' have different definitions between the Regulations and Project	Some changes were made in the definition of "service Payment" and "Independent Expert" to	For consideration and revision.	These concerns call for harmonization of definitions between the standard Project Agreement and the Regulations and formal,	-(xxxx)

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		<p>Agreement. Defined Term - Clause 10.1 (f): the term "independent expert" should be put in capitalized as it is a defined term</p>	<p>address the fact that it may have different meaning in the relevant Project Agreements. No changes in definitions of "Private Party" and "Service Provider"</p>	<p>written confirmation that this has been done.</p>	<p>-Noted for amendment. Correct ref is 10(3)(e)(ii) -(xxx)</p>
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