Paper laid by the Chairperson of the Sessional Committee on Delegated Legislation (Sen. Sang) on 6/11/2014

REPUBLIC OF KENYA

PARLIAMENT

THE SENATE

ELEVENTH PARLIAMENT

…………………………

SECOND SESSION 2014

THE SESSIONAL COMMITTEE

ON

DELEGATED LEGISLATION

A REPORT ON THE GUIDELINES ON ADMINISTRATION OF THE EQUALIZATION FUND, 2014

Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI.

NOVEMBER, 2014

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PREFACE

Hon Speaker Sir,

Establishment and Mandate of the Committee

The Sessional Committee on Delegated Legislation is established pursuant to the Senate Standing Order 214 which states:

1) There shall be a select Committee to be known as the Committee on Delegated Legislation.

2) Whenever a statutory instrument is submitted to the Senate pursuant to the Constitution, any law or these Standing Orders, the statutory instrument shall, unless a contrary intention appears in the relevant legislation, be laid before the Senate by the Chair of the Senate Committee on Delegated Legislation and thereafter stand referred to the Committee.

3) The Committee shall consider in respect of any statutory instrument whether the statutory instrument:-
   a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law;
   b) infringes on fundamental rights and freedoms of the public;
   c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
   d) directly or indirectly bars the jurisdiction of the courts;
   e) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
   f) involves expenditure from the Consolidated Fund or other public revenues;
   g) is defective in its drafting or for any reason, the form or purport of the statutory instrument calls for any elucidation;
   h) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

i) appears to have had unjustifiable delay in its publication or laying before Parliament;

j) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;

k) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;

l) inappropriately delegates legislative powers;

m) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

n) appears for any reason to infringe on the rule of law;

o) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and

p) accords to any other reason that the Committee considers fit to examine.

(4) If the Committee-

a) resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument;

b) does not accede to the statutory instrument, or part of a statutory instrument, the Committee may recommend to the Senate that the Senate resolves that all or any part of the statutory instrument, as the case may be, be annulled.

(5) If the Senate-

a) fails to agree to the recommendation of the Committee under paragraph (4)(b), the statutory instrument shall be deemed to have been approved by Parliament;

b) resolves to annul a statutory, or part of a statutory instrument, the resolution shall, within seven days of the passage of the resolution, be referred to the National Assembly for concurrence.

Membership of the Committee

The Membership of the Committee is as follows:-

1. Sen. Stephen Sang - Chairperson
2. Sen. Judith Sijeny - Vice-Chairperson
3. Sen. (Dr.) Boni Khalwale - Member
4. Sen. Emma Mbura - Member
5. Sen. Daniel Karaba - Member
6. Sen. Liza Chelule - Member
7. Sen. Godliver Omondi - Member
8. Sen. Joy Gwendo - Member

Acknowledgement

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the necessary support extended to it in the execution of its mandate.

Mr. Speaker Sir,

It is my pleasant duty, pursuant to Section 17 of the Statutory Instruments Act, 2014 and Standing Order 214 (4) (b), to present the Report of the Sessional Committee on Delegated Legislation on the Guidelines on the Administration of the Equalization Fund, 2014 for consideration by the House.

Signed.. Date...~~5/20~~ 5/11/2014...........

SEN. STEPHEN SANG

CHAIRPERSON,

SESSIONAL COMMMITTEE ON DELEGATED LEGISLATION.

CHAPTER ONE GUIDELINES ON THE ADMINISTRATION OF THE EQUALIZATION FUND, 2014

1.1 Constitutional Basis of the Equalization Fund

The Equalization Fund is established by Article 204 of the Constitution of Kenya 2010 which states:

(1) *There is established an Equalization Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.*

(2) The national government shall use the Equalization Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

(3) The national government may use the Equalization Fund—

(a) only to the extent that the expenditure of those funds has been approved in an Appropriation Bill enacted by Parliament; and

(b) either directly, or indirectly through conditional grants to counties in which marginalized communities exist.

(4) The Commission on Revenue Allocation shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalization Fund.

(5) Any unexpended money in the Equalization Fund at the end of a particular financial year shall remain in that Fund for use in accordance with clauses (2) and (3) during any subsequent financial year.

(6) This Article lapses twenty years after the effective date, subject to clause

(7) Parliament may enact legislation suspending the effect of clause (6) for a further fixed period of years, subject to clause (8).

(8) Legislation under clause (7) shall be supported by more than half of all the members of the National Assembly, and more than half of all the county delegations in the Senate.

(9) Money shall not be withdrawn from the Equalization Fund unless the Controller of Budget has approved the withdrawal.

1.2 Legal basis of the Guidelines on the Administration of the Equalization Fund, 2014

The Equalization Fund Guidelines 2014 are issued pursuant to Section 12(2) (k) of the Public Finance Management Act which outlines the function of treasury as including among others to;

'...(k) issue guidelines to national government entities with respect to financial matters and monitoring their implementation and compliance.'

1.3 Objective of the Equalization Fund Guidelines

The purpose of the Equalization Fund Guidelines 2014 is:

i. to specify the sources, object and purpose of the Fund;

ii. to provide guidance on the administration and management of the Fund;

iii. to establish an Equalization Fund Board to advise the Cabinet Secretary on the proper and effective performance of the Fund;

iv. to provide for the withdrawals from the Fund; and

v. to provide for the winding up of the Fund

CHAPTER TWO COMMITTEE OBSERVATIONS

The Equalization Fund Guidelines, 2014 were transmitted to the Senate, by the Cabinet Secretary for National Treasury on August 28, 2014, in accordance with Section 11 of the Statutory Instruments Act, 2013.

The Guidelines were referred to the Senate Sessional Committee on Delegated Legislation for scrutiny. During its sitting held on Thursday, 2nd October, 2014, the Committee scrutinized and generally approved of the Guidelines save for Guideline 4.1 (g) of Part IV.

3.0 Part IV –Management of the Fund

Guideline 4.1 provides for the establishment and constitution of unincorporated Board to be known as the Equalization Fund Board. **Further, Guideline 4.1 (g) provides for appointment of Members to the Board as follows:-*"five other Members of either gender appointed by the Cabinet Secretary from outside the public service".***

This guideline does not make provision for the representation of counties at the Equalization Fund Board while the marginalized areas that the fund is expected to serve are found in counties.

The Committee recommends that Guideline 4.1(g) of Part IV of the Equalization Fund Guidelines, 2014, be anulled.