



REPUBLIC OF KENYA  
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921  
Finance-Nairobi  
Fax No.: 310833  
Telephone: 2252299

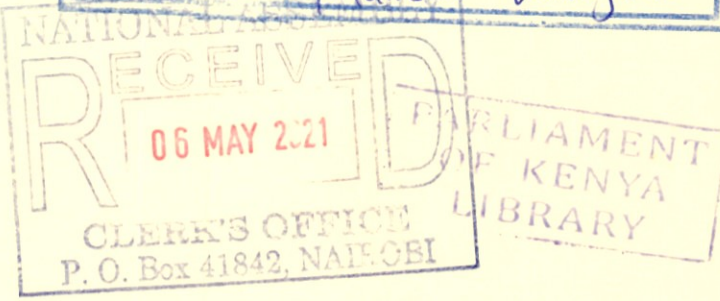
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| THE NATIONAL ASSEMBLY<br>THE NATIONAL TREASURY<br>P.O. Box 30007<br>NAIROBI |                                  |
| DATE: 11 MAY 2021   | TUESDAY                          |
| TABLED BY: b/s/21   | LOM<br>4 <sup>th</sup> May, 2021 |
| BY: Marnah Wanjiku  |                                  |

When Replying Please Quote:

Ref. No: IGFR/EF/01/TY/2 (65)

Mr. Michael Sialai, EBS,  
Clerk of the National Assembly,  
Parliament Buildings,  
NAIROBI.

Dear *Sialai,*



**RE: THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATIONS, 2021**

Reference is made to the above subject matter.

The National Treasury and Planning has developed the Public Finance Management (Equalization Fund Administration) Regulations 2021 which has since been published through legal notice No 54 of Kenya Gazette of 29<sup>th</sup> April, 2021.

As per section 11 of the statutory instrument Act (No 23 of 2013) the National Treasury and planning hereby submit the copy of the Kenya Gazette PFM (Equalization Fund Administration) Regulations 2021 and Explanatory memorandum for parliamentary scrutiny, consideration and approval.

Your prompt attention and action on this matter will be highly appreciated.

Yours *Sincerely,*

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

*10/5  
Head Take  
to case taking  
register and  
response to  
committee  
deposited  
6/5/21*

Encls.

Copy to: **Hon. William Kamket Kassait, MP,**  
Chairman,  
Committee on Delegated Legislation,  
National Assembly,  
Parliament Buildings.



CERTIFIED COPY FOR ORIGINAL

**SPECIAL ISSUE**

529

Kenya Gazette Supplement No. 69

29th April, 2021

(Legislative Supplement No. 29)

LEGAL NOTICE NO. 54

**THE PUBLIC FINANCE MANAGEMENT ACT**

(No. 18 of 2012)

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

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

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

Citation.

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

Interpretation.

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

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

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

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

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

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

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

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

No.16 of 2011.

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

THE NATIONAL ASSEMBLY  
PAPERS LAID

DATE: 11 MAY 2021 DAY: TUESDAY

TABLED BY: LOM  
CLERK-AT-THE-TABLE: Manah Wayiku

“unutilized balance” means any —

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

3 The purpose of these Regulations is to —

Purpose of these  
Regulations

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

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

Establishment of  
the Board

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

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

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

Qualification  
requirement of  
members.

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

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

Tenure of office.

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

Vacation of  
office.

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

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

Functions of the  
Board.

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

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

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

Establishment of committees

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

Expenses of the Board

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

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

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

Meetings of the Board

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

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

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

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

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

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

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

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

Minutes.

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

Disclosure of interest.

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

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

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

Establishment of county technical committee.

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

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

Functions of the county technical committee.

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

Establishment of sub-county technical committee

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

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

Functions of the sub-county technical committee

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

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

Establishment of Project Identification and Implementation Committee

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



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

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

Functions of Project Identification and Implementation Committee.

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

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

Functions of the County Executive Committee Member for finance.

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

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

Chief Executive Officer

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

22 There shall be a Secretariat constituted by the Chief Executive Officer and whose functions shall be to—

Establishment and functions of the Secretariat

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

23 The County Executive Committee Member responsible for matters relating to finance shall submit work plans through county technical committee to the Board for approval

Approval of workplan

24 (1) The funds shall be utilized as conditional grants to the affected counties in accordance with the Division of Revenue Act and the County Allocation Revenue Act for the respective financial year.

Utilisation of funds and preparation of workplans

(2) The County Executive Committee Member responsible for matters relating to finance in each of the counties identified by the Commission on Revenue Allocation shall prepare a workplan setting out—

- (a) a schedule of projects and programmes proposed to be undertaken by the county government in the areas identified by Commission on Revenue Allocation;
- (b) a technical assessment of the viability of the schedule of projects and programmes,

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

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

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

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

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

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

Criteria for identification of projects.

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

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

Submission of  
workplan to the  
Board

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

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

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

Quarterly reports  
on projects and  
disbursements

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

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

Report by the  
County Executive  
Committee  
Member for  
finance

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

No 33 of 2015

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

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

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

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

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

Submission of  
workplan to the  
Board.

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

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

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

Withdrawals from  
the Fund.

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

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

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

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

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

Winding up of the  
Fund.

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

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

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

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

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

Dated the 23rd April, 2021

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

## **EXPLANATORY MEMORANDUM**

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

#### **PART I**

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

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

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

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

**Gazetted on;**

#### **PART II**

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

The purpose of these regulations is to:

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

### **2. THE LEGISLATIVE CONTEXT**

#### **a. The Constitution**

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

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

#### **b. Public Finance Management Act, 2012**

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

The Act has also given powers to the Cabinet Secretary responsible for matters relating to finance to make further regulations on any matter therein. It is in this context that the “The Public Finance Management (Equalization Fund) Regulations, 2021 are made to operationalize the Equalization Fund established under Article 204 of the Constitution by providing mechanism for use of this Fund directly by the national government or indirectly through conditional or unconditional transfers to marginalized counties as identified by the Marginalization Policy determined by the Commission on Revenue Allocation in accordance with Article 216(4) of the Constitution.

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

### **3. POLICY BACKGROUND**

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

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

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



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

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

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

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

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

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

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

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

#### **4. PUBLIC CONSULTATIONS**

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

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

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

#### **5. GUIDANCE**

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

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

## **6. IMPACT ASSESSMENT**

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

## **7. REVIEW OF THE MARGINALIZED COUNTIES.**

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

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

## **8. NATIONAL TREASURY CONTACT PERSON**

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

Made on.....*6th May*.....2021

  
HON. (AMB.) UKUR YATANI, EGH

CABINET SECRETARY/NATIONAL TREASURY AND PLANNING