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**THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT- FIFTH SESSION**

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF

- i. **The Public Finance Management (Biashara Kenya Fund) Regulations, 2021 (L.N No. 55 of 2021)**
- ii. **The Public Finance Management (Uwezo Fund) (Revocation) Regulations (LN No.56 of 2021);**
- iii. **The Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021 (LN No. 57 of 2021); and**
- iv. **The Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations (LN No. 58 of 2021)**

SEPTEMBER 2021

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 21 SEP 2021	DAY: TUESDAY
TABLED BY:	CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION
CLERK-AT THE-TABLE:	

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

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ABBREVIATIONS

AGPO	Access to Government Procurement Opportunities
LN	Legal Notice
PFM	Public Finance Management Act
PWDs	Persons Living with Disability
RMA	Regulatory Making Authority
SI	Statutory Instruments
SME	Small and Medium Enterprises
SO	Standing Order

CHAIRPERSON'S FOREWORD

The Public Finance Management (Biashara Kenya Fund) Regulations, 2021 (*Legal Notice No 55 of 2021*) were made by the Cabinet Secretary, National Treasury and Planning pursuant to section 24(4) of the Public Finance Management Act, 2012 on the 30th April, 2021. The regulations were received by the Clerk of National Assembly and tabled before the House on the same day on 13th May, 2021, being within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act, 2013.

The Regulations seek to collapse the provisions of the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2021 (*LN No. 56 of 2021*), the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021, (*LN No. 57 of 2021*), the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, (*LN No. 58 of 2021*). The justification given for this merger is that the establishment of a new Fund seeks to operationalise Articles 27, 55 (b) (c) and 56 (b)(c) of the Constitution of Kenya which provide for affirmative action programmes and other resources in respect to disadvantaged groups and youth aimed at ensuring equitable development of the State. The Regulations are also intended to operationalise the Presidential Taskforce on Parastatal Reform Report of 2014 which recommended the merger of the existing affirmative action Funds.

The source of the Fund would be an initial capital of KSh. 2.5 billion appropriated by Parliament in 2020/21 and additional capital through subsequent financial years appropriations, among other sources.

The Committee held previous meetings with the National Treasury & Planning in respect to the draft Regulations, more particularly during the consultative meeting with the Cabinet Secretary National Treasury & Planning who made submissions to the Committee on the Regulations on 1st of February, 2021 at Whitesands Hotel, Mombasa. On Thursday, 1st October, 2020 at Serena Hotel, Nairobi, a further consultative breakfast meeting was held between the Committee on Delegated Legislation and the Cabinet Secretaries for the Ministry of Public Service, Youth and Gender, Ministry of ICT & Innovation and the Principal Secretary for the National Treasury and Planning.

During the meetings with the regulation making authority and other stakeholders, pertinent issues were raised concerning the proposed merger. Pursuant to Section 13 (q) of the Statutory Instruments Act, the Committee made a resolution with the National Treasury *inter alia* pointed out the following concerns—

- 1) Pursuant to section 13(q) of the Statutory Instruments Act, 2013, the Committee noted that the new Regulation seek to deliberately revoke the role of Members of Parliament and other political offices involved during the disbursement of funds for purposes of oversight and monitoring.
- 2) That the requirement for disbursement of funds through Financial Intermediaries as stipulated in the regulations is in contravention of section 13(l) of the Statutory Instruments Act, 2013 as it makes rights , liberties or obligations of the potential and intended beneficiaries from the Fund, unduly dependent on insufficiently defined administrative powers;

- 3) That it may be imperative that the regulation making authority considers reducing the stipulated maximum amount proposed lent to the beneficiaries to allow for more citizens falling within the affirmative action bracket to benefit from the Fund.
- 4) That the provision on Investment of Idle Funds would offend section 13 (g) of the Statutory Instruments Act, 2013 as it imposes direct expenditure from the Consolidated Fund or other public revenues.
- 5) That pursuant to section 13(c) of the Statutory Instruments Act, 2013, the Regulations contain a subject matter that is incidental or ancillary to Constitutional economic rights of a section of Kenyans, hence contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament through a more vigorous parliamentary process;
- 6) That the National Treasury and other stakeholders ought to review the monetary qualifications of various categories of enterprises in a way that is more considerate than what is contained in the regulations.
- 7) That there ought to be use of percentage or ratios in lending out the monies to the beneficiaries or a more rational approach be employed.

At its meeting held with the National Treasury on 1st February, 2021, the Committee implored upon the National Treasury being the regulation-making authority to consider the concerns raised and the resolutions arrived at between the National Treasury and the Committee and address the same prior to publication of the instrument in accordance with section 16 of the Act, The National Treasury ignored, refused and/ or declined to heed to the joint resolutions and proceeded to publish and submit the Regulations to Parliament without addressing the aforementioned concerns by the Committee.

The Committee upon receipt of the published Regulations, scrutinised the Regulations in accordance with the Constitution and other relevant laws and the National Assembly Standing Orders and observed further that the Regulations contravene section 6, 7, and 8 of the Statutory Instruments Act, 2013 that requires the regulation-making authority to carry out a Regulatory Impact Assessment and submit to Parliament a Regulatory Impact Statement to that effect, if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, which is characteristic of the instant regulations.

The Public Finance Management (Biashara Kenya Fund) Regulations, 2021 in all its aspects have a huge impact on the community especially the youth, women, persons with disabilities and small and medium business enterprises. The regulation-making authority therefore in failing to conduct, gazette and submit a Regulatory Impact Statement with an attendant certificate as required by the Act contravened section 6 of the Statutory Instruments Act, 2013.

The Committee also observed that the Explanatory Memorandum submitted alongside the Regulations indicated that several stakeholders were consulted including the Committee on Delegated Legislation; however, it does not comprehensively demonstrate the details of consultations with the public and responses provided to that effect as required under the Schedule to the Statutory Instrument Act.

The National Treasury also indicated that different stakeholders had different views on the mode of implementation of the Biashara Kenya Fund but largely agreed the need to have a one-stop shop.

Having satisfied itself that the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 contravene various sections of the Statutory Instruments Act, the Committee then recommends that the House **resolves to annul them in entirety** for the reasons advanced herein.

The Committee also **resolved to recommend to the House, the annulment** of the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2021 (*LN No. 56 of 2021*), the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021, (*LN No. 57 of 2021*), the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, (*LN No. 58 of 2021*) as they seek to collapse the three (3) existing affirmative action Funds into Biashara Kenya Fund without proper justification on the need for a merger.

The merger seems speculative and does not provide any tangible strategies to address the challenges facing the current Funds. The merger will also result in the loss of identity for women and youth and likely marginalise PWDs, which defeats the purpose for which the three Funds were established in the first place, i.e., to cater for the vulnerable groups (youth, women and PWDs) who cannot easily access loans through conventional banks and other lending institutions.

The reinstatement of the three existing Funds through the proposed revocation of LNs 56, 57 and 58 will also pave way for wider stakeholder consultations on the merger including enactment of an Act of Parliament to provide the legal framework for the management, control, regulation, and operations of the new entity.

The Committee wishes to express its gratitude to the Speaker for the support accorded to the Committee in the discharge of its mandate. The Committee also wishes to record its appreciation to the Office of the Clerk of the National Assembly and the supporting Directorates for providing the necessary technical support to the Committee.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 210 (4), it is my pleasure and duty to present to the House the Committee's **Report on the Consideration of Public Finance Management (Biashara Kenya Fund) Regulations, 2021, the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2021 (*LN No. 56 of 2021*), the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021, (*LN No. 57 of 2021*), the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, (*LN No. 58 of 2021*).**

HON. KAMKET KASSAIT WILLIAM, M.P.

1.0 PREFACE

1.1. Establishment and Mandate of the Committee

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

1.2. Committee Membership

3. The Committee membership comprises –

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

Tiaty Constituency

KANU

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

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

The Hon. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

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

Nominated

Jubilee Party

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

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

Funyula Constituency

Orange Democratic Movement

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

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

Tharaka Constituency

Democratic Party

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Munene Wambugu, M.P.
Kirinyaga Central Constituency
Jubilee Party

The Hon. Patrick Mariru, M.P.
Laikipia West Constituency
Jubilee Party

The Hon. Sammy Seroney, M.P.
Nominated
Wiper Democratic Movement – Kenya

The Hon. Tindi Mwale, M.P.
Butere Constituency
Amani National Congress

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

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

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

1.3. Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Mr. Mohamed Jimale
Clerk Assistant II (Team Leader)

Ms. Ruth Mwihaki
Clerk Assistant II

Mr. Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Fiona Musili
Research Officer II

Ms. Noelle Chelagat
Media Relations Officer II

Mr. Anthony Wamae
Assistant Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

2.0 CONSIDERATION OF THE INSTRUMENTS

2.1 Public Finance Management (Biashara Kenya Fund) Regulations, 2021

2.1.1 Introduction

1. In exercise of the powers conferred by **section 24(4) of the Public Finance Management Act, (No. 18 of 2012)**, the Cabinet Secretary for the National Treasury and Planning published the **Public Finance Management (Biashara Kenya Fund) Regulations, 2021** on 30th April, 2021 *vide LN No.55 of 2021*. The Regulations were submitted for scrutiny on 13th May, 2021 and subsequently tabled before the House on the same day on 13th May, 2021, being within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act, 2013.
2. The National Treasury indicated that the Regulations are intended to operationalise Articles 27, 55 (b) (c) and 56 (b)(c) which provide for affirmative action programmes and other resources in respect to disadvantaged groups and youth aimed at ensuring equitable development of the State.
3. Further that the Regulations are also intended to operationalise the Presidential Taskforce on Parastatal Reform Report of 2014 which recommended the merger of the existing affirmative action Funds.

2.1.2 Purpose of the Regulations

4. The purpose of the Regulations is stated as to provide a one-stop shop for target groups looking for business loans from government, to improve effectiveness and to eliminate overlaps.
5. The Regulations seek to establish a Fund to be known as “Biashara Kenya Fund” the mandate of which is to provide affordable financing, business support services, affordable commercial infrastructure and market linkages to enterprises owned by youth, women, persons living with disabilities and micro, small and medium enterprises (SMEs).
6. According to the National Treasury, the Fund’s intervention in supporting SME’s is expected to achieve the following outcomes:
 - a) improved household income of the targeted groups;
 - b) expanded access to affordable credit;
 - c) increased capacity building and skills development;
 - d) formalized and mature SMEs in retail trade;
 - e) strengthened SMEs industry;
 - f) improved ICT infrastructure, facilities and services;
 - g) expanded market linkage, and
 - h) increased uptake of Access to Government Procurement Opportunities (AGPO).
7. To achieve this purpose, the Regulations in particular:
 - a) specify the sources, expenditure, capital, object and purpose of the Fund;
 - b) provide guidance on the administration and management of the Fund;
 - c) establish the Biashara Kenya Fund Board to oversee the Fund and advise the Cabinet Secretary on the proper and effective performance of the Fund;

- d) provide for the withdrawals from the Fund,
- e) specify the loan eligibility criteria, application procedures, conditions for disbursement, interest and loan repayments
- f) provide for investment of the Fund
- g) provide for retention of receipt and earnings of the Fund
- h) provides for offences and penalties
- i) provide for the winding up of the Fund.

8. To achieve its objective, the establishment of Biashara Kenya Fund through the proposed Regulations seek to revoke the following affirmative action Funds –

- (i) *the Uwezo Fund established under Legal Notice No. 21 of 21st February, 2014;*
- (ii) *the Youth Enterprise Development Fund established under Legal Notice 167 of 8th December, 2006; and*
- (iii) *the Women Enterprise Fund established under Legal Notice No. 147 of 3rd August, 2007.*

2.1.3 Summary of the Regulations

3.0 **Regulations 3 - 6** establish the **Biashara Kenya Fund** with the initial capital of **KSh. 2.5 billion** appropriated in the budget for 2020/21 financial year. Other subsequent funding will be through appropriation by Parliament and others such grants, income from investment among others. The utilization of the Fund is apportioned as shown hereunder.

S.N	Category	Proportion
1	Women	35%
2	Youth	35%
3	Persons with living with Disability	10%
4	Micro, Small and Medium Enterprises (MSMEs)	17%
5	Administrative Cost	3%
Total		100%

9. **Regulation 7** provides for object and purpose of the Fund.
10. **Regulation 8** provides for the management of the Fund where a Biashara Kenya Fund Oversight Advisory Board with it's functions enumerated under **Regulation 10**. In terms of administration of the Fund, the Regulations (**Regulation 11**) gives this responsibility to the Principal Secretary in charge of Gender or any other person designated by the Cabinet Secretary, National Treasury. The Regulations also provide for the Chief Executive Officer of the Fund as well as a Secretariat to support the day-to-day affairs of the Fund. The Chief Executive Officer and the Secretariat are to be appointed competitively in consultation with the Public Service Commission.

11. **Regulation 13 and 14** provide for funding eligibility and loan application criteria for targeted groups and the required documentations for processing of applications for funding respectively.
12. **Regulation 16** provides for the **loan repayment interest at the rate of 6% annually** but with reducing balance and that the said interest shall be incurred by the borrowers. Regulation 18 does provide for a **grace period of three (3) months** before commencement of servicing their loan.
13. **Regulation 19** provides for **lending through agents**, capped at 20% of the Fund; where microfinance institutions, registered Non-Governmental Organizations engaged in financing, savings and credit co-operatives among others apply for loans from the Board for on-ward lending to the Women, Youth, Persons with Disability and MSMEs.
14. **Regulations 21 and 22**, deals with the Agent required to repay the loan at the agreed period with an interest rate of **3%**. In the event that an agent agrees to provide a counterpart funding of a similar amount applied for, the Board may revise interest payable by such an agent to a minimum of **1%**. However, the interest for the on-lent loan shall be up to a maximum of **10%** per annum, reducing balance.
15. **Regulation 26** provides for the various offences and penalties whereas **Regulation 27** makes provisions for winding of the Fund.

3.1.1 Scrutiny of the Instrument

16. In considering the Regulations, the Committee made reference to pre-publication consultations held with the regulation making authority (The National Treasury) on Thursday, 1st October, 2020 at Serena Hotel, Nairobi. A consultative breakfast meeting was also held between the Members of the Committee on Delegated Legislation and the Cabinet Secretaries for the Ministry of Public Service, Youth and Gender; Ministry of ICT & Innovation; and the Principal Secretary for the National Treasury and Planning.
17. The Committee also held a prepublication meeting with the Cabinet Secretary, National Treasury & Planning who made submissions to the Committee on the Regulations on Monday 1st February, 2021 at Whitesands Hotel, in Mombasa County.
18. The Committee, at its sitting held on Wednesday 1st September, 2021 considered the Regulations and scrutinized the same for conformity with the Constitution, the Public Finance Management Act (*No. 18 of 2012*), the Interpretation and General Provisions Act, (Cap 2) the Statutory Instruments Act (*No. 23 of 2013*) and which regulates the making, scrutiny and publication of the Regulations.
19. **Issues raised by Members in the previous meeting at Serena Hotel in Nairobi held on 1st October 2020**
 - (i) That the **Consultations** undertaken with various stakeholders like Members of Parliament, FIDA, Kenya Women Alliance, KEWOPA, Maendeleo ya Wanawake etc. was not adequately demonstrated since the evidence of public participation was not provided.
 - (ii) That the taskforce ought to have to reconsidered **Regulation 4 (3)** which provides that the Board may **recommend the variation of the thresholds with the concurrence of the Cabinet Secretary**.

- (iii) **The issue of Financial intermediaries stipulated under Regulation 19:** That the requirement under Regulation 19 that Intermediaries will receive the funds at 3% (Regulation. 21) and lend at 10% (Regulation 23 (2) therefore making credit access too expensive for the disadvantaged groups and defeating the purpose for which the Funds were established. That the Youth Enterprise Development Fund and the Women Enterprise Fund were established to give easily accessible and affordable credit without going through the commercial banks. Intermediaries will set conditions that might lock out would-be beneficiaries. It was suggested that it may not be necessary to fix what is already working.
- (iv) **That Regulation 20 (1)(g) and 23(2)** further delegates to the Board powers to issue guidelines as it may consider necessary, contrary to section 13(m) of Statutory Instruments Act on inappropriate delegation of legislative powers.
- (v) That **Regulation 26** provides for Offenses and Penalties and ought to give the option of fine first before conviction.
- (vi) It was the Committee's contention that concerns on the rationale for establishment of each of the affirmative action ought to be reviewed. The proposed merger is likely to lock out marginalized groups from accessing funds since they have to compete amongst each other as opposed to the existing framework where each of the distinct groups are assured access to the funds.
- (vii) According to the Committee, Persons With Disabilities and youth from informal settlements are not adequately catered for in the proposed Regulations.
- (viii) The Committee further opined that transition mechanisms are not clear, especially on existing loans.
- (ix) It was the Committee's contention that the National Treasury may consider merging management of the Funds but maintain the separate Funds and may further consider using the CDF-model for allocating funds to the marginalized groups.
- (x) The Committee sought to know further, pursuant to section 13(q) of the Statutory Instruments Act, the rationale for not including the National Government Affirmative Action Fund (NGAAF) for merger.
- (xi) The Committee further observed that mechanism for devolving the proposed Fund to the Counties was not clearly provided for in the Regulations.
- (xii) It was the Committee's contention that for the purpose of the public's understanding, the National Treasury ought to provide the status of the Kshs 2B allocated for the proposed merger in 2019, as well as provide justification for the additional Kshs. 1.5B in the current Financial Year.

- (xiii) **In respect to viability of the Fund:** it was the Committee’s contention that considering the poor repayment of loans for the existing Funds with outstanding loans at Kshs. 10B, the National Treasury ought to demonstrate what action they intend to take to improve loan repayment.
- (xiv) The Committee raised concerns that it was perplexing why they had to bring MSMEs to benefit from public funds earmarked for disadvantaged groups?
- (xv) That the proposed Regulations ought to address the perceived biases towards women and youth in the society that has presumably marginalised older men in the society;
- (xvi) That the proposed Regulations also appear to be punitive to those who have been accessing the Funds in a bid to encourage new beneficiaries;
- (xvii) That, Members of Parliament be involved in identification and support of different target groups since local leaders understand local dynamics;
- (xviii) That the remedy for defaulters in the proposed Regulations needs to be well elaborated;
- (xix) That the merger should guard against private entities and intermediaries trading with the monies from the Fund; and
- (xx) That under Regulation 11 and 12, the Executive ought to not interfere with the day-to-day running of the Fund.

20. Issues raised by Members in the meeting in Mombasa held on Monday, 1st February, 2021 at Whitesands Resort Hotel, in Mombasa County.

Pursuant to Section 13 (q) of the Statutory Instruments Act, the Committee raised the following concerns—

1) Involvement of Members of Parliament in Oversight of the Fund

The Committee recommended establishment of a Constituency Oversight Committee of the Board to receive and vet applications for the Fund at Constituency level, Members of Parliament to be designated to be Patrons and/or participate in the appointment of members to that Committee.

2) Deletion of requirement of disbursement of funds through Financial Intermediaries

It was resolved that the regulation making authority deletes “financial intermediaries” defined under Regulation 2 to enable the Board to disburse money directly to the proposed Constituency Oversight Committee.

3) Reduction of maximum amount lent

That the maximum amount that may be lent as specified in Regulation 23 as three million shillings (Kshs: 3,000,000) be capped at a lower rate for the purposes of the intended cadre of money directly to be proposed by the Constituency Oversight Committee.

4) **Investment of Idle Funds**

That Regulation 10 (n) and Regulation 24, be deleted as they allow the Administrator to invest funds of the Fund, which are not immediately required for its purposes in Government Securities.

5) **Enactment of a Stand-Alone Legislation**

Pursuant to section 13(c) of the Act, which requires the Committee to consider whether the regulations contain a matter, which should be more properly dealt with in an Act of Parliament, the Committee proposed that Parliament enacts a stand-alone legislation addressing affirmative action on economic empowerment.

6) **Instrument is defective in drafting**

In line with section 13(h) of the Statutory Instrument Act, 2013, the Committee in carrying out scrutiny of any statutory instrument shall consider whether the instrument is defective in its drafting.

A review of Regulation 2 on the Regulations highlights a misnomer in the drafting of the interpretation section by failing to observe the rule of alphabetical arrangement of the terms.

Further, Regulation 26 provides for a fine and a jail term as the alternative of a jail term.

7) **Review of monetary qualifications of various categories of enterprises**

Pursuant to section 13(q) of the Statutory Instrument Act, 2013 which requires the Committee to consider whether the instrument accords to any other reason that the Committee considers fit to examine, the Committee opines that for the Fund to achieve intended objective of supporting economic empowerment of women, youth and persons with disabilities, the definition of a “medium enterprise” “micro enterprise” and “small enterprise” be reviewed to reduce the requirement of the total assets and financial investments from the current provisions of:-

- (i) between fifty million to two hundred and fifty million shillings for medium enterprise (Kshs. 50,000,000 – 250,000,000);
- (ii) not exceeding ten million shillings for micro enterprise (Kshs, 10,000,000); and
- (iii) between 10 million and fifty million shillings for small enterprise (Kshs,10,000,000 – 50,000,000).

8) **Use of percentage or ratios in lending out**

For purposes of any amount lent to a borrower, the Committee proposed that the regulations making authority provides for a percentage or a ratio as opposed to a fixed amount (hard figure).

4.0 THE PFM (UWEZO FUND) (REVOCATION) REGULATIONS, 2021, PFM (WOMEN ENTERPRISE FUND) (REVOCATION) REGULATIONS, 2021 AND THE PFM (YOUTH ENTERPRISE DEVELOPMENT FUND) (REVOCATION) REGULATIONS, 2021

4.1.1 Introduction

21. In exercise of the powers conferred by **section 24(8) of the Public Finance Management Act, (No. 18 of 2012)**, the Cabinet Secretary for the National Treasury and Planning published the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2021 (*LN No.56 of 2021*); the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021 (*LN No.*

57 of 2021); and the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2021 (LN No. 58 of 2021) on 30th April, 2021. The Regulations were submitted for scrutiny and tabled before the House on 13th May, 2021.

4.1.2 Purpose of the Regulations

22. The Regulations seek to wind up the three existing Funds, transfer of outstanding amounts, transition of staff and revocation of Legal Notice No. 21 of 2014 that established the Government Financial Management (Uwezo Fund) Regulations, 2014; Legal Notice No. 147 of 2007 that established the Women Enterprise Fund and Legal Notice No. 167 of 2006 that established the Youth Enterprise Development Fund.

4.1.3 Scrutiny of the Instruments

23. The Committee, at its sitting on 1st September, 2021 considered the Regulations in conformity with the Constitution of Kenya, the Public Finance Management Act (No. 18 of 2012), the Statutory Instruments Act (No. 23 of 2013) and the Interpretation and General Provisions Act, (Chapter 2) which regulate the making, scrutiny and publication of the Regulations.
24. In considering the Regulations, the Committee made reference to pre-publication consultations held with the regulation making authority (The National Treasury) and other concerned Ministries on Wednesday, 1st October, 2020 at Serena Hotel, Nairobi and 1st February, 2021 with The National Treasury & Planning at Whitesands, Mombasa.
25. The revocation Regulations of the three existing Funds, stipulates that employees of the Funds shall serve in the Biashara Kenya Fund after commencement of these Regulation.

5.0 COMMITTEE OBSERVATIONS AND FINDINGS

26. Following comprehensive scrutiny of the Regulations, the Committee made the following findings: – THAT

1) Consultation / Public participation – Section 5 of the SI Act

The Regulations contravene Articles 10 and 118 of the Constitution, sections 5, 5A, 13(a) and (m) of the Statutory Instruments Act which require that the regulation-making authority conducts public participation and sufficient consultation with the stakeholders and persons likely to be affected by the Regulations.

The annexed Explanatory Memoranda to the Regulations indicates that several stakeholders were consulted including the Committee on Delegated Legislation; however, it does not comprehensively demonstrate the details of consultations with the public and responses provided to that effect as required under the Schedule to the Statutory Instrument Act, consultation with relevant stakeholders.

2) Regulatory Impact Statement – Sections 6, 7 & 8 of the SI Act

Sections 6, 7, and 8 of the Act requires the regulatory-making authority to carry out a regulatory impact assessment and submit to Parliament a Regulatory Impact Statement if the proposed regulation has significant cost or impact to the community or a sect of the community. The Biashara Fund Regulations have a huge impact on the community especially the youth, women, persons with disabilities and small

and medium business enterprises. Therefore, the regulatory making authority failed to conduct, gazette and submit a Regulatory Impact Statement with an attendant certificate as required by the Act.

3) Statutory Timelines – Section 11 of the SI Act

The Public Finance Management (Biashara Kenya Fund) Regulations, 2021 were published on 30th April, 2021 vide LN No.55 of 2021 and tabled before the House on 13th May, 2021 being within the statutory timeline contemplated under section 11(1) of the Statutory Instruments Act (*No 23 of 2013*).

4) Penalties – section 13 (k) of the SI Act

The **Public Finance Management (Biashara Kenya Fund) Regulations, 2021** created an offence without attendant penalties and without references to any provisions of the Act making it unimplementable.

5) Rights, liberties or obligations unduly dependent upon non-reviewable decisions (Section 13(k) of SI Act)

The revocation Regulations of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 (*LN No.55 of 2021*); the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2019 (*LN No.56 of 2021*); the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021 (*LN No. 57 of 2019*); and the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2021 (*LN No. 58 of 2021*) Funds, stipulate that employees of these three Funds shall serve in the Biashara Kenya Fund.

6) Conferring with the Regulation Making Authority – Section 16 of the SI Act

Section 16 of the Act requires the Committee, **in so far as it is practically possible** to confer with the regulation-making authority *...for their information and modification where necessary*. The Committee therefore met the regulation-making authority on Thursday, 1st October, 2020 at Serena Hotel, Nairobi, and on 1st February, 2021 and raised pertinent issues in respect to the draft Regulations and resolved in the presence of the regulation-making authority (National Treasury) to have a further meeting. However, contrary to section 16 of the Act, the regulation making authority (Treasury) went ahead to publish the Regulations and submit them to Parliament without addressing the issues raised during the prepublication scrutiny meetings hence ignoring the input of the Committee on the Regulations.

7) Any other reason that the Committee considers fit to examine – Section 13 (q) of SI Act

The Regulations were made pursuant to Section 24 (4) of the Public Finance Management Act 2012 instead of a substantive Act of Parliament, to provide the legal framework for the management, control, regulation, and operations of the new entity.

Further, on transition, the Committee observed that the PFM (Biashara Kenya Fund) Regulations, 2021 do not provide for the transitional provisions in relation to assets and liabilities of the three Funds. The only provision is on transfer of cash balances to the Exchequer for crediting to the National Government.

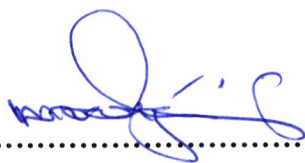
That the collapsing of the three (3) existing affirmative action Funds into Biashara Kenya Fund defeats the purpose for which the three Funds were established in the first place, i.e., to cater for the vulnerable groups (youth, women and PWDs) who may not easily access loans through conventional banks and other lending institutions.

The Committee was also concerned about the initial capital of Kshs 2.5 billion appropriated by Parliament in the 2021/2022 financial year to the proposed Biashara Kenya Fund without an existing legal framework.

6.0 COMMITTEE RECOMMENDATION

Pursuant to Standing Order 210 (4) (b) and section 15 (1) of the Statutory Instruments Act, 2013 and having scrutinised the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 (*LN No.55 of 2021*); the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2019 (*LN No.56 of 2021*); the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021 (*LN No. 57 of 2019*); and the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2021 (*LN No. 58 of 2021*) against the Constitution of Kenya, the Public Finance Management Act (*No. 18 of 2012*), the Statutory Instruments Act (*No. 23 of 2013*) and the Interpretation and General Provisions Act, (*Cap 2*), the Committee recommends that the House annuls in entirety the said statutory instruments for the aforementioned reasons.

Signed.....



Date.....

21/9/2021

HON. KAMKET KASSAIT WILLIAM, M.P.

(CHAIRPERSON)

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 21 SEP 2021	
DAY:	
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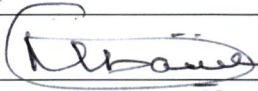
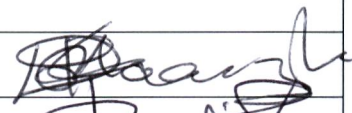
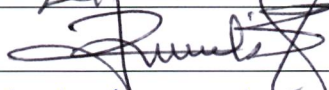
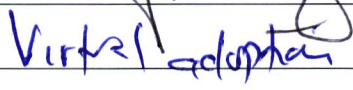

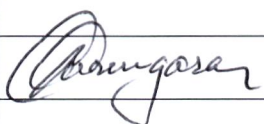
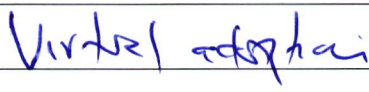

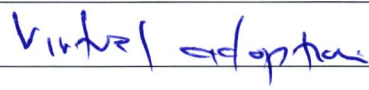
COMMITTEE ON DELEGATED LEGISLATION

ADOPTION LIST

Adoption of the Report on consideration of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 (LN No. 55 of 2021),
 The Public Finance Management (Uwezo Fund) (Revocation) Regulations (LN. No. 56 of 2021);
 The Public Finance Management (Women Enterprise Fund) (Revocation) Regulations (LN. No. 57 of 2021)
 The Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations (LN. No. 58 of 2021)

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

DATE: _____

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

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

PRESENT

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

ABSENT WITH APOLOGY

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

IN-ATTENDANCE

National Assembly Secretariat

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

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

The National Treasury and Planning

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

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

PRAYER AND PRELIMINARIES

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

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

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

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

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

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

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

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

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

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

Plenary discussion

The following issues were raised as follows -

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

Way forward

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

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

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

The Committee considered the following Regulations –

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

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

Committee Resolution

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

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

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

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

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

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

Signed.....

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

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

MINUTES OF THE 1ST SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON MONDAY, 1ST FEBRUARY, 2021 AT 10.00 A.M. IN BARAZA 2 CONFERENCE ROOM AT THE WHITESANDS RESORT, MOMBASA

PRESENT

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

ABSENT WITH APOLOGY

The Hon. William Cheptumo, M.P

IN-ATTENDANCE

National Assembly Secretariat

1. Mrs. Florence Abonyo-Atenyo - Director, Audit, Appropriations & Other Select Committees
2. Ms. Susan Maritim - Senior Clerk Assistant
3. Mr. Mohamed Jimale - Clerk Assistant II
4. Mr. Dima Dima - Principal Legal Counsel
5. Mr. Charles Ayari - Superintendent of Electronics (Audio)
6. Mr. Anthony Wamae - Serjeant-at-Arms
7. Ms. Beatrice Auma - Personal Secretary
8. Ms. Mary Otieno - Office Superintendent
9. Ms. Yvonne Kiprop - Pupil

The National Treasury and Planning

1. Hon. (Amb) Ukur Yattani, EGH - Cabinet Secretary
2. Mr. Geoffrey Malombe - Senior Deputy Director Accountant General
3. Mr. Ronald Inyangala - D/Director, Financial Sectoral Affairs Department
4. Mr. Livingstone Bumbe - Deputy Director/Economist
5. Ms. CPA Isabella Kogei - Asst. Director, Budget/Parliamentary Liaison Officer
6. Mr. Chris Huka - Adviser to the Cabinet Secretary
7. Mr. Paul J. Oyire - Communication Advisor to the CS

Ministry of Devolution and ASALs – State Department for ASALs

1. Hon. Eugene Wamalwa, EGH - Cabinet Secretary
2. Hon. Abdul Bahari - Chief Administrative Secretary
3. Mr. Micah Powon - Principal Secretary, ASAL
4. Mr. James Oduor - Chief Executive Officer, NDMA
5. Mr. Sunya Orree - Director of Technical Services, NDMA
6. Ms. Maria Cheroni - Administrative Secretary, ASAL
7. Ms. Colleta Maweu - Principal State Counsel
8. Mr. Saiyana Lambara - Office of the Director, NDMA
9. Mr. Hashim Ali Adan - Director of Corporate Services, NDMA

Ministry of Public Service and Gender Affairs

1. Hon. Rachel Shebesh - Chief Administrative Secretary (CAS)
2. Mr. Benson Muthendi - Ag. CEO, Youth Enterprise Development Fund
3. Eng. Charles Mwirigi - CEO, Women Enterprise Fund
4. Mr. Peter Lengapiani - CEO, Uwezo Fund
5. Mr. James A. Sangori - Director of Gender Affairs
6. Ms. Anne N. Njau - Head of Loans and Credit, Uwezo Fund
7. Mr. Isaac N. Ngige - Parliamentary Liaison Officer in the Ministry
8. Mr. Denis M. Mutahi - Advisor to the Cabinet Secretary
9. Ms. Stella Kitonga - Personal Assistant to the CAS
10. Ms. Lydia Mathia - Office of Cabinet Secretary

Ministry of ICT, Innovation and Youth Affairs - State Department of Youth Affairs

1. Mr. Julius Korir - Principal Secretary
2. Mr. Raymond Odiang - Secretary, Youth Affairs

Office of the Attorney General

1. Ms. Christine Agimba - Deputy Solicitor-General
2. Ms. Catherine Ochanda - Deputy Chief State Counsel

MIN.NO. /NA/CDL/2021/001

PRAYER AND PRELIMINARIES

The Chairperson called the meeting to order at 10.10 a.m. with the Prayer. A round of self-introductions was conducted before proceeding with the business of the day.

The Chairman reiterated the role of the Committee in scrutinizing statutory instruments, both published and pre-publication scrutiny. He emphasised the importance of pre-publication of instruments. He expressed hope that the concerned Ministries had addressed the concerns raised by the Members in the previous meetings.

He thereafter welcomed Hon. (Amb) Ukur Yattani, EGH, Cabinet Secretary for the National Treasury and Planning to present the draft Public Finance Management (Biashara Kenya Fund) Regulations, 2020.

MIN.NO. /NA/CDL/2021/002 CONSIDERATION OF THE DRAFT PUBLIC FINANCE MANAGEMENT (BIASHARA KENYA FUND) REGULATIONS, 2020

Remarks by Cabinet Secretary – The National Treasury and Planning

The CS highlighted the importance of effective management and accountability of public finances. He further noted the purpose of the merger is to reduce cost of implementation of individual Funds and to improve efficiency in the management of the Funds. The Fund targets the marginalized groups to benefit more from the proposed merging of Uwezo, Women Enterprise and Youth Enterprise Funds. The consolidation of the three Funds into one kitty will help the disadvantaged groups to access credit easily and avoid duplication of roles.

He further noted that the National Treasury will increase funds from the current Ksh2.5 billion to Ksh14 billion to capture more vulnerable groups such as unemployed youth and pastoralists. He then reiterated that the merger will further enhance efficiency, reduce overhead costs and address other issues of concern.

He then welcomed Mr. Geoffrey Malombe, Senior Deputy Director Accountant General who is also the Chairman for the Taskforce on Biashara Kenya Fund Regulations to present an overview of the draft Regulations.

Overview of the Regulations

Mr. Malombe highlighted key issues that the merger of the Funds will address. He informed the Committee that various stakeholders e.g. FIDA, the Kenya Women Alliance, KEWOPA, and Maendeleo ya Wanawake were consulted and all their comments incorporated into the final document.

He further informed the Committee that following the October 2020 meeting with the Committee, the Regulations were amended to remove banks as financial intermediaries. The banks were replaced with Saccos as the only intermediaries that can access the Fund and initiate transactions. He further indicated that the amount through which the financial intermediaries can transact has been reduced from 25% to 20% of the Fund.

Committee Observations

1. Role of Financial Intermediaries

Members were concerned that “financial intermediaries” defined in Regulation 2 would result in unnecessary bureaucracy in disbursement of funds and unnecessary added costs.

Regulation 22 (2) provides that the Oversight Board may vary the interest payable under regulation 21 to a financial intermediary that provides counterpart funding under paragraph (1) to a minimum of one percent. Members were concerned that the variation may be to the disadvantage of the beneficiaries.

2. Involvement of Members of Parliament in management of the Fund

Regulation 8 establishes an Oversight Board to manage the Fund. The Committee was concerned that the Regulations do not provide for involvement of MPs in overseeing the Fund as is the current case with Uwezo Fund.

3. Investment of Idle Funds

Members observed that Regulation 10 (n) and Regulation 24 which allows the Administrator to invest funds of the Fund which are not immediately required for its purposes may be abused by delaying disbursement of funds to the intended beneficiaries so as to earn interest on the funds.

4. Public Participation

Members were concerned that public participation has not been adequately undertaken.

5. Transition

Members were concerned that the merger would result in loss of jobs for some of the employees of the three Funds proposed for merging.

6. Why the Merger?

Several Members expressed their concerns that the merger may disenfranchise some sections of groups that had dedicated funds e.g. Youth and Women and were therefore not in support of the merger.

Way Forward

Members resolved to give the way forward regarding the Regulations at a later sitting.

MIN.NO. /NA/CDL/2021/003

**CONSIDERATION OF THE DRAFT PFM (DROUGHT
MANAGEMENT EMERGENCY FUND)
REGULATIONS, 2020**

Remarks by Cabinet Secretary – Hon. (Amb) Ukur Yattani, The National Treasury and Planning

Hon. (Amb.) Yattani informed Members that the Public Finance Management (Drought Management Emergency Fund) Regulations, 2020 are intended to cushion the drought affected areas and also manage the famine situation in the country. He pointed out that six banks have so

far been identified to operationalize the process to benefit the pastoralists and other Kenyans affected by drought from the Fund.

Remarks by Cabinet Secretary – Hon. Eugene Wamalwa, EGH – Ministry of Devolution and ASALs

Hon. Eugene Wamalwa appreciated the Committee for the engagement and more so giving priority for the consideration of the establishment of the Drought Management Emergency Fund. The CS expressed hope that the Regulations would be gazetted urgently to operationalise the Fund. He added that development partners were ready to provide some of the funds once the Fund is established.

He thereafter invited Mr. Geoffrey Malombe, Senior Deputy Director (Accountant General) in the National Treasury to present an overview of the proposed Regulations which would among others, establish the Drought Management Emergency Fund.

Funds to be allocated as follows:

- 50% - resilience and preparedness
- 40% - response interventions
- 5% - recovery interventions
- 5% - administration

Plenary Discussions

The following matters arose following presentation of the Regulations –

- 1) The role of the MP in disaster management: Members observed that in most instances, Members of Parliament are often the first responders in times of crises. However, the Regulations are silent on the place and role of the MPs.
- 2) Regulation 18 stipulates that the Deputy President will chair the National Steering Committee: Members sought clarification on the rationale behind this citing that the President ought to be the Chair instead.
- 3) Under Reg. 20 on resource mobilization, Members inquired about the scientific facts justifying the allocation of resources to the affected areas in the country.
- 4) Drafting errors contrary to section 13(m) of the Statutory Instruments Act relating to numbering of Regulation 20 and Reg.21 were observed.
- 5) Reg.23 regarding emergencies not handled by the Fund are not clearly defined in Reg.2.
- 6) Exclusion of certain relevant Ministries: Members observed that certain Ministries were excluded as stakeholders on the issue of drought management, for example, the Ministry of Energy and the Ministry of Environment and Natural Resources.
- 7) Accountability: Members observed that there is no clear outline of operationalization of the Fund and more so accountability of the management of the Funds in order to curb improper management of public finances by the persons in charge.


- 8) Counties that are prone to drought have been identified and will benefit from the proposed Fund.

Way forward

The Committee advised the Ministry to ensure that the draft Regulations are further reviewed taking into consideration the deliberations of the meeting and ensure that all concerns raised in the meeting are captured and resubmitted to the Committee for further scrutiny.

MIN.NO. /NA/CDL/2021/004 ADJOURNMENT

The meeting was adjourned at 1.35 p.m. to be reconvened the same day at 2.30 p.m. at the same venue.

Signed..........

Date.....10/21/2021.....

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

MINUTES OF THE 38TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON THURSDAY, 1ST OCTOBER, 2020 AT 7.30 A.M. AT THE SERENA HOTEL, NAIROBI.

PRESENT

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

ABSENT WITH APOLOGY

1. The Hon. Waihenya Ndirangu, M.P.
2. The Hon. William Cheptumo, M.P.
3. The Hon. Gideon Mulyungi, M.P.
4. The Hon. Jennifer Shamalla, M.P.
5. The Hon. Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

1. Ms. Susan Maritim - Senior Clerk Assistant
2. Mr. Mohamed Jimale - Clerk Assistant II
3. Mr. Dima Dima - Principal Legal Counsel
4. Mr. Charles Ayari - Superintendent of Electronics (Audio)
5. Mr. Anthony Wamae - Serjeant-at-Arms

Ministry of Public Service, Youth and Gender

1. Prof. Margaret Kobia - Cabinet Secretary
2. Mr. Julius Korir - Principal Secretary, Youth Affairs
3. Prof. Colleta Suda - Principal Secretary, Gender

4. Mr. Raymond Ochieng - Secretary, Youth Affairs
5. Ms. Lydia Muturi - Advisor, State Department of Youth Gender

The National Treasury and Planning

1. Dr. Julius Muia, CBS - Principal Secretary, Treasury
2. Mr. Geoffrey Malombe - Snr. D/Director Accountant-General & Chairman, Taskforce, Biashara Kenya Fund
3. Mr. Lawrence Muthama - Assist. Director, Budget & Economist
4. Mr. John K. Njera - Director of Planning
5. Mr. Ronald Inyanyali - Senior Ass. Director
6. Ms. Christine Igamba - D/Director, Gender, Office of the Attorney General
7. Ms. Maryanne Ndegwa - Secretary of the President

Ministry of ICT & Innovation

1. Mr. Joe Mucheru - Cabinet Secretary
2. Ms. Rose Mosero - Advisor to the CS, Innovation & Youth Affairs
3. Mr. Livingstone Bumbe - Deputy Director

MIN.NO. /NA/CDL/2020/252

PRAYER & PRELIMINARIES

The Chairperson called the meeting to order at 2.30 p.m. and commenced the meeting with the Prayer. A round of self-introductions was conducted before proceeding with the business of the day.

The Chairman reiterated the role of the Committee in scrutinizing statutory instruments, both published and pre-publication scrutiny. He emphasised the importance of pre-publication of instruments. He expressed hope that the concerned Ministries had addressed the concerns raised by the Members in its Report on the annulment of the Biashara Fund Kenya Regulations in 2019.

He thereafter welcomed Prof. Margaret Kobia, Cabinet Secretary for the Ministry of Public Service, Youth & Gender and Mr. Joe Mucheru, Cabinet Secretary for Ministry of ICT & Innovation, all Principal Secretaries and other officers present.

Remarks by CS, Ministry of Public Service, Youth & Gender

Prof. Kobia conveyed the apologies of Hon. Ukur Yattani, Cabinet Secretary for the National Treasury who was out of the country on official duty. She emphasised the importance of efficiency in management of the affirmative action Funds through merging of the existing Funds to establish the Biashara Kenya Fund.

Remarks by CS, Ministry of ICT & Innovation

Mr. Mucheru thanked the Committee for accepting the invitation to deliberate on the draft Public Finance Management (Biashara Kenya Fund) Regulations, 2020 and hoped for fruitful deliberations. He then welcomed Dr. Julius Muia, CBS, Principal Secretary, National Treasury to present the draft Regulations to the Committee.

Presentation of the Draft Regulations

The PS commended the Taskforce on Biashara Kenya Fund Regulations and went ahead to highlight the issues raised by the Committee in its 2019 Report and the action taken by the Taskforce to address the concerns raised.

	Issued raised by the CDL	How issues raised have been addressed	Remarks
1.	Lack of Regulatory Impact Assessment	Regulation Impact Statement Report was prepared and gazetted vide. Kenya Gazette No. 4468 dated 29th June, 2020	Complied with the recommendations of the National Assembly.
2.	Lack of public consultations	Stakeholders were invited to submit written comments and or memoranda on the Biashara Kenya Fund Regulations and Transition Instruments for the three Funds through various channels including holding virtual meetings with some of the key stakeholders (see detailed policy brief and matrix with comments from stakeholders).	Complied with the recommendations of the National Assembly. 90 pages worth of stakeholder comments received, analyzed and incorporated into the Regulations in so far as possible.
3.	Lack of pre-publication scrutiny of the Regulations by the National Assembly Committee on Delegated Legislation	This is the next step. The Cabinet Secretaries to lead the Pre-Publication Scrutiny of the Regulations engagement with the National Assembly Committee on Delegated Legislation.	This is the next step, upon approval of the Regulations by the Attorney General & Three Cabinet Secretaries and the Attorney General.
4.	Penalties imposed by the regulation that contravenes or are inconsistent with PFMA 2012. Regulation 26 is inconsistent with Section 199 of the PFM Act and contravenes Section 13(a) of Statutory Instruments Act 2013.	The issue was a typo of the “not less than” instead of the Word “not more than” and the matter has been addressed and necessary modification done in the Regulations.	Complied with the Recommendations of the National Assembly.
5.	Lack of Transition provision in relation to Staff, Assets and Liabilities of the three funds targeted for merger.	The transition instruments (Revocation Orders) for the three Funds being merged have captured clearly provisions for transition of staff; assets and liabilities of the three Funds;	Complied with the Recommendations of the National Assembly.

	Issued raised by the CDL	How issues raised have been addressed	Remarks
6.	Regulations are made pursuant to Section 24(4) of PFM Act 2012 instead of Substantive Act of Parliament	The existing policy guides that principal law for establishment of national public funds is the Public Finance Management Act, 2012.	Not complied with due to the existing Government policy and law for establishment of national public funds
7.	The Merge defeats the purpose for which the three Funds were established i.e. to cater for vulnerable groups (youth women and PWDs) who may not easily access loans through conventional banks and other lending institutions	The merger of the three funds will provide one stop shop, eliminate duplications and increase efficiency in the use of public resources, while expanding the reach and equity among the marginalized groups. This is a Government policy initiative to merge the Funds which policy was arrived at through extensive public consultation before the Presidential Taskforce Report recommended the merger.	Not complied with given the reform is intended to increase efficiency, remove duplications and ensure prudent use of public resources.
8.	Concern about initial capital of Kshs 2b without existing legal framework	This concern emanated from a delay by the National Assembly to consider and approve the Regulations in the fiscal year, the Kshs. 2 Billion was budgeted i.e. FY 2017/2018 WHEREAS the report of the Delegated Committed on Legislation of the National Assembly was tabled in the fiscal year 2018/2019	Not Complied with; however, Cabinet Secretary / Finance can approve Kshs. 3.5Billion expenditure approved by Cabinet and regularized in Supplementary I.

Report on Public Participation

The Committee was informed that the following organisations/persons were involved in stakeholder consultations: State Department of Public Service; State Department of Youth Affairs; State Corporation Advisory Committee; Youth Enterprise Development Fund Board; Women Enterprise Fund Board; Uwezo Fund Board; Commission on Revenue Allocation; African Women's Studies Centre; The National Youth Council; Institute of Certified Public Accountants of Kenya; Earnest & Martin Associates; Friends of Good Change Community-Based Organization(Bomet) and Mr. Elisha Oduor.

How Public Consultations have informed Refining the Biashara Kenya Fund Regulations?

Contribution	Rationale	Recommendation
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	Contribution	Rationale	Recommendation
1.	Extending of lending through financial intermediaries as agents of the Fund.	The Fund will leverage on the existing capacities, branch networks, reach more Kenyans, especially in the remote areas, facilitate access to affordable loans, increase the funds' volume through matching funds and address pertinent issues of cultural enclave	<ul style="list-style-type: none"> • The Regulations should provide for on-lending through the financial intermediaries. • The amount to be provided through FI's has been reduced to 20% of the Fund and a maximum loan of Kshs. 3.0 million.
2.	Threshold each target groups under the Fund	This will safeguard the brand image of the various affirmative actions' funds being merged. This was also a recommendation by the stakeholders including Committee on Delegated Legislation.	Set thresholds as follows: - <ul style="list-style-type: none"> ✓ Youth – up to 40%; ✓ Women – up to 30%; ✓ PWD – up to 10%; ✓ MSMS – up to 17%; ✓ Adm. Costs- up to 3%.
3.	Administrator of the Fund	Section 24 (5) of the PFM Act permits the Cabinet Secretary to designate any other person as an administrator of a national public Fund.	Chief Executive Officer, who is also the Head of the Secretariat, be designated as the Administrator of the Fund.
4.	Transition provisions relating to staff, assets and liabilities including outstanding loans	Each transition Instrument has transitioned staff and outstanding loans to the Biashara Kenya Fund.	Transit outstanding loans through transition instruments only. Prepare FAQ to deal with perceptions
5.	3% limit on administration costs vis-à-vis Regulation 207 of the PFM Act.	The three Funds are currently incurring way above the set limit of 3% on administrative expenses. However, eliminating duplications, operational costs among the three Funds will lead to significant savings (rent, cleaning, security, transport, utilities etc.). Therefore, the fiscal rule should hold, with an avenue for additional resources to be availed up to a maximum of 5%.	Fiscal rule should apply of capping administrative costs at 3%. However, the Regulations provide a special provision under extreme circumstance to a maximum of five per centum (5%) with the approval of the Cabinet Secretary/ National Treasury & Planning.
6.	Establishment of the Biashara Kenya Fund Transition Committee in line with Cabinet approval	The BKF-TMC will seamlessly manage transition in two main areas, (i) financial and non-financial assets and (ii) human resource management	The BKF-TMC should be put in place once the draft Regulations have been published to ensure seamless transition of the three Funds.

	Contribution	Rationale	Recommendation
7.	Managing perceptions through “Frequently Asked Questions (FAQ).	There is need for a draft FAQs as part of the communication/ stakeholder management strategy.	The draft FAQs shared with the MPs to facilitate them sensitize the target groups on the reforms.
8.	Inclusion of loan products in the Regulations	Loan products in any financial institution are a matter of policy, flexibility and innovation, and the Board should develop policies & guidelines on loan products through various policies to be approved by the Board.	The Board to develop policies for the Fund.

Capitalisation of Biashara Kenya Funds post-merger

	Description as at 30.06.2020	WEF Kshs.	YEDF Kshs.	Uwezo Fund Kshs.	Total Capital – Post Merger Kshs.
1	Outstanding Loans	3,174,519,676	2,706,309,388	4,192,732,483	10,073,561,547
2.	Bank Balances Available for Loans	713,486,213	301,421,949	1,296,367,669	2,311,275,832
3.	Capital Injection	0	0	0	2,500,000,000
	Total Capital				14,884,837,379

Plenary Discussions

The following matters arose following the presentation –

- 1. Public participation:** Key stakeholders like MPs, FIDA, Kenya Women Alliance, KEWOPA, Maendeleo ya Wanawake etc. were not consulted according to the list provided. In addition, consultations at the County level (grassroots) was not adequately demonstrated since the evidence of public participation not provided. Taskforce members ought not be listed under public participation.
- 2. Reconsider Reg. 4 (3)** which provides that the Board may recommend the variation of the thresholds with the concurrence of the Cabinet Secretary.
- 3. Financial intermediaries – Reg. 19:** Intermediaries will receive the funds at 3% (Reg. 21) and lend at 10% (Reg. 23 (2)) therefore making credit access too expensive for the disadvantaged groups and beating the purpose for which the Funds were established in the first place. WEF/YEDF were established to give easily accessible and affordable credit without going

through the commercial banks. Intermediaries will set conditions that might lock out would-be beneficiaries. Why fix what is already working?

4. **Reg. Reg. 20(1)(g) and 23(2)** and further delegates to the Board powers to issue guidelines as it may consider necessary, contrary to section 13(m) of SIA on inappropriate delegation of legislative powers.
5. Redraft **Reg. 26** on Offenses and Penalties to give the option of fine first before conviction.
6. The Committee's concerns on the rationale for establishment of each of the affirmative action Funds still stands. The proposed merger is likely to lock out marginalized groups from accessing funds since they have to compete amongst each other as opposed to the existing framework where each of the distinct groups are assured access to the funds.
7. PWDs and youth from informal settlements are not adequately catered for in the proposed Regulations.
8. Transition mechanisms are not clear, especially on existing loans.
9. Proposal: consider merging management of the Funds but maintain the separate Funds. Also consider using the CDF-model for allocating funds to the marginalized groups.
10. Rationale for not including the National Government Affirmative Action Fund (NGAAF) is not listed for merging.
11. Mechanism for devolving the proposed Fund to the Counties not provided.
12. The Ministry should provide the status of the Kshs 2B allocated for the proposed merger in 2019. Also provide justification for the additional Kshs. 1.5B in the current FY.
13. **Viability of the Fund:** considering the poor repayment of loans for the existing Funds with outstanding loans at Kshs. 10B, what action does the Ministry intend to take to improve loan repayment.
14. Why bring MSMEs to benefit from public funds earmarked for disadvantaged groups?

MIN.NO. /NA/CDL/2020/253

WAY FORWARD/ CLOSING REMARKS

Remarks by the Cabinet Secretary - Prof Kobia

The Cabinet Secretary thanked the Committee for the comments given and reiterated the importance of consensus building on the Regulations.

Remarks by the CS ICT

The Cabinet Secretary requested the Committee to submit in writing the views of the Committee for further improvement of the draft Regulations. The respective Ministries including the Taskforce will take into account Members' comments and will arrange for another meeting to review the draft Regulations.

He assured the Committee that the Government would leverage on technology to manage the Fund including disbursements through mobile phones in an efficient and transparent manner and also applying for funds directly from mobile phones.

Closing Remarks by the CDL Chairperson

The Committee advised the National Treasury and the Ministries involved to take into consideration the Committee's comments and views into consideration when reviewing the draft Regulations.

MIN.NO. /NA/CDL/2020/254 ANY OTHER BUSINESS

No other business arose.

MIN.NO. /NA/CDL/2020/255 ADJOURNMENT

The meeting was adjourned at 9.40 a.m. The next meeting will be called on notice.

Signed..........

Date.....14/10/2020.....

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

② Head Table and
To arrange Tabung,
register and
accounting receipt
notes
13/5/21.



THE NATIONAL ASSEMBLY
PAPERS LAID
REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

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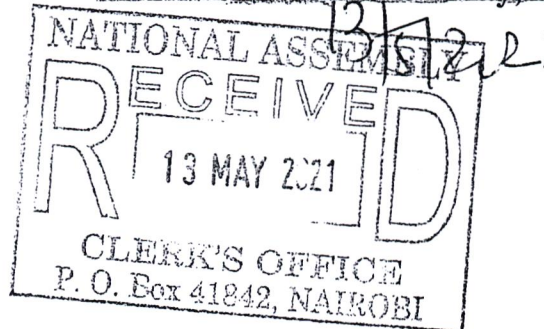
Ref. No: AG. 13/88/VOL II (62)

Mr. Michael Sialai, CBS
Clerk of the National Assembly
Parliament Building
NAIROBI

Dear *Sialai,*

① L
for

TABLED BY: <i>John</i> CLERK-AT THE-TABLE	THE NATIONAL TREASURY P. O. Box 30007 NAIROBI <i>leader of majority party</i> <i>A. Shabaka</i> 6 th May, 2021
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RE: THE PUBLIC FINANCE MANAGEMENT (BIASHARA KENYA FUND) REGULATIONS, 2021, THE ATTENDANT REVOCATION ORDERS AND THE EXPLANATORY MEMORANDUM

The National Treasury & Planning has finalized the following statutory instruments and published them pursuant to the provisions of the Statutory Instruments Act, 2013 for tabling and approval by the National Assembly: -

- i. the Public Finance Management (Biashara Kenya Fund) Regulations, 2021;
- ii. the Public Finance Management (Uwezo Fund) Regulations, (Revocation) Regulations, 2021;
- iii. the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021; and
- iv. the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2021.

Accordingly, the National Treasury and Planning hereby transmits the published Regulations, the above attendant Revocation Orders and the Explanatory Memorandum to facilitate tabling and approval by the National Assembly.

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

Yours

Sincerely,

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

Copy to: **Dr. Joseph Kinyua, EGH**
The Head of Public Service
The Executive Office of the President
State House
NAIROBI

Prof. Margaret Kobia, PhD, MGH
Cabinet Secretary
Ministry of Public Service and Gender Affairs
NAIROBI

Mr. Joe Mucheru, EGH
Cabinet Secretary
Ministry of ICT, Innovation & Youth Affairs
NAIROBI

Hon. (Rtd) Justice Paul Kihara Kariuki, EGH
Attorney General
State Law Office & Department of Justice
NAIROBI

Ms. Wanjiku Wakogi
Secretary
State Corporation Advisory Committee
NAIROBI

LEGAL NOTICE NO. 55

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

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

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

1. These Regulations may be cited as the Public Finance Management (Biashara Kenya Fund) Regulations, 2021. Citation.

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

“Administrator” means the Chief Executive Officer appointed under regulation 11 or any other person designated by the Cabinet Secretary, in writing for that purpose;

“agent” means a microfinance institution, registered non-governmental organisation involved in financing, savings and credit co-operative organisation, registered group or any other institution approved by the Oversight Board;

“borrower” means a person in receipt of a loan out of the Fund;

“Cabinet Secretary” has the same meaning as assigned in section 2 of the Public Finance Management Act, 2012;

“disability” includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities”.

“enterprise” means an undertaking or a business concern, whether formal or informal, engaged in the production of goods, provision of services or trade in goods;

“financial year” means the period of twelve months ending on the 30th June in each year;

“Fund” means the Biashara Kenya Fund established under regulation 3;

“medium enterprise” has the same meaning as assigned in section 2 of the Public Finance Management Act, 2012;

“micro enterprise” means a firm, trade, service, industry or a registered business—

- (a) whose annual turnover does not exceed five hundred thousand shillings;
- (b) which employs less than ten people; and
- (c) whose total assets and financial investment shall be as determined by the Cabinet Secretary from time to time, and includes—
 - (i) the manufacturing sector, where the investment in plant and machinery or the registered capital of the enterprise does not exceed ten million shillings;
 - (ii) the service sector and farming enterprises where the investment in equipment or registered capital of the enterprise does not exceed five million shillings;

“Oversight Board” means the Oversight Board constituted under regulation 8;

“small enterprise” means a firm, trade, service, industry or a business activity—

- (a) whose annual turnover ranges between five hundred and five million shillings; and
- (b) which employs between ten and fifty people; and
- (c) whose total assets and financial investment shall be as determined by the Cabinet Secretary from time to time, and includes—
 - (i) the manufacturing sector, where the investment in plant and machinery as well as the registered capital of the enterprise is between ten million and fifty million shillings; and
 - (ii) service and farming enterprises, where the equipment investment as well as registered capital of the enterprise is between five million and twenty million shillings;

“women” means female persons aged eighteen years and above; and

“youth” has the meaning assigned to it under Article 260 of the Constitution.

PART II — ESTABLISHMENT OF THE FUND

3. There is established a Fund to be known as the Biashara Kenya Fund. Establishment of the Fund.

4. (1) The Fund shall consist of— Sources of the Fund.
- (a) monies appropriated by Parliament for the purposes of the Fund;
 - (b) income-generated from the proceeds of the Fund;
 - (c) income from investments made by the Fund;

(d) grants, donations, bequests or other gifts made to the Fund; and

(e) monies from any other source approved by the Cabinet Secretary.

(2) The proceeds in the Fund shall be apportioned as follows—

(a) an amount not exceeding thirty-five per cent to women;

(b) an amount not exceeding thirty-five per cent to youth;

(c) an amount not exceeding ten per cent to persons living with disability;

(d) an amount not exceeding seventeen per cent to micro, small and medium enterprises; and

(e) an amount not exceeding three per cent to administration costs.

(3) The Board may recommend the variation of the thresholds with the concurrence of the Cabinet Secretary for the time being responsible for gender, in consultation with the Cabinet Secretary for the time being responsible for youth, and approval of the Cabinet Secretary responsible for finance for use in any financial year.

5. (1) There shall be paid out of the Fund payments in respect of any expenses incurred in pursuance of the object and purpose for which the Fund is established.

Expenditure of the Fund.

(2) The expenditure incurred on the Fund shall be on the basis of and limited to annual budget estimates prepared by the Administrator of the Fund and recommended by the Oversight Board to the Cabinet Secretary for the time being responsible for gender affairs for approval and submission to the Cabinet Secretary responsible for finance, at the beginning of the financial year to which they relate.

(3) Any revision of the approved budget estimates, and of any cost estimate, shall be referred to the Oversight Board and the Cabinet Secretary for approval.

6. The initial capital of the Fund shall be 2.5 billion shillings appropriated by Parliament in the financial year 2020/2021 and additional capital of the Fund shall be made in the subsequent financial years' budgets.

Capital of the Fund.

7. The object and purpose of the Fund shall be to—

Object and purpose of the Fund.

(a) expand access of finances in promotion of women, youth and persons with disability enterprises or groups and micro, small and medium enterprises for economic growth towards the realization of the goals of Vision 2030;

(b) provide loans to credible micro-finance institutions, registered non-governmental organizations involved in financing, and savings and credit co-operative organizations for on-lending to women, youth and persons with disability enterprises or groups and micro, small and medium enterprises;

- (c) provide loans directly to women, youth and persons with disability enterprises or groups and micro, small and medium enterprises for entrepreneurship development;
- (d) attract and facilitate investment in micro, small and medium enterprises oriented infrastructure such as business, markets or business incubators that will be beneficial to youth, women, persons with disability enterprises or groups and micro, small and medium enterprises;
- (e) support women, youth and persons with disability enterprises or groups and micro, small and medium enterprises to develop linkages with large enterprises;
- (f) facilitate marketing of products and services of youth, women, persons with disability enterprises or groups and micro, small and medium enterprises in both domestic, regional and international markets;
- (g) facilitate mainstreaming of the interests of the women, youth and persons with disability enterprises or groups and micro, small and medium enterprises in bilateral and international trade, investment and agreements;
- (h) support capacity building of the beneficiaries of the Fund and their institutions through training, incubation, mentorship, start-up support and promotion of innovation and development of products;
- (i) facilitate periodic market surveys and data analysis to identify industry opportunities for women, youth, persons with disability enterprises or groups and micro, small and medium enterprises; and
- (j) promote, develop and facilitate access to government procurement opportunities by women, youth and persons with disability enterprises or groups and micro, small and medium enterprises.

PART III — MANAGEMENT OF THE FUND

8. (1) There shall be a Board to be known as the Oversight Board Oversight Board.
which shall consist of—

- (a) a non-executive Chairperson appointed by the President;
- (b) the Cabinet Secretary to the National Treasury or his representative, designated in writing;
- (c) the Principal Secretary of the State Department for the time being responsible for gender affairs;
- (d) the Principal Secretary of the State Department for the time being responsible for matters relating to youth;
- (e) the Principal Secretary of the State Department for the time being responsible for matters relating to micro, small and medium enterprises; and
- (f) three other persons, not being public officers, of whom one

person shall be nominated by the Cabinet Secretary for the time being responsible for matters relating to youth affairs and the Cabinet Secretary, appointed by the Cabinet Secretary for time being responsible for gender affairs; and

- (g) the Chief Executive Office of the Fund shall be an *ex-officio* member of the Board.

(2) For purposes of paragraph (1)(f), the Cabinet Secretary and the Cabinet Secretary for the time being responsible for matters relating to youth affairs shall each nominate two persons of either gender for consideration by the Cabinet Secretary for time being responsible for gender affairs.

(3) The Cabinet Secretary for time being responsible for gender affairs shall appoint the members of the Oversight Board under paragraph (1)(f) by virtue of their knowledge and relevant experience, gender, disability and regional balance.

(4) The members of the Oversight Board referred to in paragraphs (1)(b), (c), (d) and (e) may, in writing, appoint suitable persons to represent them at the meetings of the Oversight Board.

(5) The chairperson and members of the Oversight Board shall serve for a term of three years but shall, subject to satisfactory performance, be eligible for re-appointment for one further term of three years, for a maximum of two terms.

9. (1) A person shall be eligible for appointment as the chairperson of the Oversight Board under paragraph 8(1)(a) if that person—

Qualifications of members of the Oversight Board.

- (a) possesses a university degree in a relevant field from a university recognised in Kenya;
- (b) has knowledge and experience of not less than ten years in a relevant field, including—
 - (i) strategic management;
 - (ii) enterprise development;
 - (iii) finance;
 - (iv) law;
 - (v) accounting;
 - (vi) engineering; or
 - (vii) economics;
- (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be eligible for appointment as a member of the Oversight Board under paragraph 8(1)(f) if that person—

- (a) has knowledge and relevant experience of not less than five years in relevant fields including enterprise development, capital fund management, financial management, gender and development, youth and development, policy formulation; and

(b) meets the requirements of Chapter Six of the Constitution.

10. (1) The Oversight Board shall—

Functions of the
Oversight Board.

- (a) oversee the administration of the Fund;
- (b) advise the Cabinet Secretary for the time being responsible for gender affairs generally on the operations of the Fund;
- (c) receive reports on the performance of the Fund;
- (d) approve policies to facilitate the attainment of the objects of the Fund;
- (e) review the estimates of annual revenue and expenditure of the Fund and recommend them to the Cabinet Secretary for the time being responsible for gender affairs for approval and submission to the Cabinet Secretary responsible for finance;
- (f) review guidelines on the Fund priorities and criteria for allocation and disbursement of funds to beneficiaries in furtherance of the objects of the Fund;
- (g) monitor and evaluate the programmes and activities under the Fund;
- (h) ensure access to the services of the Fund in all parts of the Republic in accordance with Article 6(3) of the Constitution;
- (i) review the performance of the Fund and make recommendations on the operations of the Fund to the administrator of the Fund;
- (j) review and approve the financial statements of the Fund before submission to the Auditor-General;
- (k) review policy on the management of assets, equipment and all properties under the Fund;
- (l) prescribe other guidelines for use by the Fund;
- (m) mobilize resources for the Fund to be paid into the Fund;
- (n) approve investments of any of the funds of the Fund which are not immediately required for its purposes in government securities in accordance with the provisions of the Public Finance Management Act, 2012; and
- (o) undertake any other activity that in the opinion of the Oversight Board, will promote and facilitate realization of the objects and purposes of the Fund.

No. 18 of 2012.

11. (1) There shall be a secretariat of the Fund, headed by a Chief Executive Officer, who shall be responsible for the day-to-day running of the affairs of the Fund.

Secretariat and chief
executive officer of
the Fund.

(2) The Chief Executive Officer and staff of the secretariat shall be appointed, competitively, by the authorized officer, in consultation with the Public Service Commission.

12. (1) The Administrator of the Fund shall be the Chief Executive Officer appointed under regulation 11 or any other person designated by the Cabinet Secretary, in writing for that purpose.

Administrator of the
Fund.

(2) In administering the Fund, the Administrator shall—

- (a) open and operate a bank account with the approval of the Oversight Board and the National Treasury;
- (b) supervise and control the administration of the Fund;
- (c) develop such policies as may be necessary for the attainment of the objects of the Fund and submit them to the Board for approval;
- (d) consult with the Oversight Board on matters relating to the administration of the Fund;
- (e) cause to be kept books of accounts and other books and records in relation to the Fund of all activities and undertakings financed from the Fund;
- (f) enter into and sign agreements with all successful applicants or agents providing affordable and accessible credit to women, youth, persons with disability enterprises and micro, small and medium enterprises;
- (g) open loan accounts of all successful applicants or agents and maintain a record of the amount disbursed and the balance thereof;
- (h) prepare, sign and transmit to the Auditor-General, in respect of each financial year and within three months after the end thereof, a statement of accounts relating to the Fund and showing the expenditure incurred from the Fund, and such details as the Public Sector Accounting Standards Board may prescribe from time to time, in accordance with the provisions of the Public Finance Management Act, 2012 and Public Audit Act, 2015; and
- (i) furnish such additional information as may be considered proper and sufficient for the purpose of examination and audit by the Auditor-General in accordance with the provisions of the Public Audit Act, 2015.

No. 18 of 2012.
No. 18 of 2015.

No. 34 of 2015.

(3) Every statement of account shall include details of the balance between the assets and liabilities of the Fund, and shall indicate the financial status of the Fund as at the end of the financial year to which they relate.

13. (1) A woman, youth, person with disability and micro, small and medium enterprise shall be eligible to apply for a loan for business purposes from the Fund if—

Eligibility criteria.

- (a) in the case of a group, is registered with the department of social services, Cooperatives or the Registrar of Societies and is running an enterprise or intends to start an enterprise; and
 - (i) at least seventy percent of the membership is aged between 18 and 35 years; or

- (ii) at least seventy per cent of the membership is composed of women aged eighteen years and above; or
- (iii) at least seventy per cent of the membership is composed of persons with disability aged eighteen years and above.
- (b) in the case of women, youth, persons with disability, micro, small and medium enterprises registered under the Registration of Business Names Act, Partnerships Act, Companies Act, 2015 or Co-operatives Act and he or she is running an enterprise or intends to start an enterprise;
- (c) in the case of unregistered business, the person shall have a business permit and a Personal Identification Number issued by the Kenya Revenue Authority and he or she is running an enterprise or intends to start an enterprise; or
- (d) in the case of a natural person, the person shall demonstrate that he or she is running an enterprise or intends to start an enterprise.

Cap. 499.
Cap. 29.
No. 17 of 2015.
Cap. 490.

(2) The Board may prescribe such additional disbursement conditions as it may consider necessary.

(3) Women, youth and persons with disability who are running an enterprise or intend to start an enterprise shall be given a preference while processing loans by the Fund.

14. (1) A person who meets the criteria set out in regulation 13 and wishes to borrow a loan from the Fund shall make an application to the Administrator of the Fund in such a manner as may be prescribed by the Oversight Board.

Loan application
procedure for direct
lending by the Fund.

(2) An application for a loan under paragraph (1) shall be accompanied by—

- (a) in case of a group—
 - (i) certificate of registration;
 - (ii) minutes of the group's resolution to borrow from the Fund, where applicable; and
 - (iii) copies of identification documents of all the group members;
- (b) in the case of an enterprise owned by women, youth, persons with disability, micro, small and medium enterprises registered under the Registration of Business Names Act, Partnerships Act, Companies Act, 2015 or Co-operatives Act—
 - (i) certificate of registration;
 - (ii) an official search document under the Companies Act, 2015 where applicable;
 - (iii) minutes of the resolution to borrow from the Fund where applicable; and

Cap. 499.
Cap. 29 No. 17 of
2015.
Cap. 490.

No. 17 of 2015.

- (iv) copies of identification documents of all the persons who own the enterprise; or
 - (c) in the case of an unregistered business—
 - (i) copies of personal identification documents; and
 - (ii) business permit.
 - (d) in the case of a person who has demonstrated that he or she is running an enterprise or intends to start an enterprise, a national identification document.
- (3) The Administrator of the Fund shall use the following criteria when evaluating a loan application—
- (a) first in first out principle of loan processing;
 - (b) give preference to women, youth and persons with disability enterprises;
 - (c) applicable loan threshold for each category of applicant based on the ratio of the maximum amount applied for to the annual turn-over of the applicant's business or projected annual turn-over for start-ups;
 - (d) compliance with the provisions of paragraph (2);
 - (e) ability to repay the loan within the stipulated loan tenor;
 - (f) an undertaking by the beneficiary that the loan shall only be used for the purpose of the business applied for until the loan is repaid in full by the beneficiary;
 - (g) no borrower shall be eligible for more than one loan at a time from the Fund;
 - (h) an undertaking by the applicant to notify the Secretariat of the Fund of any change in physical address; and
 - (i) any other conditions as may be prescribed by the Oversight Board.
15. (1) The loans from the Fund shall be disbursed to a successful applicant subject to the fulfilment of the following condition—
- (a) all loans from the Fund shall be approved and recorded in the minutes of the Secretariat and a report submitted to the next Oversight Board meeting;
 - (b) all loans from the Fund shall be advanced to the successful applicants and shall be disbursed through the bank account of the successful applicant, or any other appropriate account approved by the Oversight Board;
 - (c) the Administrator of the Fund shall open and maintain loan accounts of all successful applicants and the amount disbursed in each account and the balance thereof; and
 - (d) such other additional conditions as the Oversight Board may impose on a particular successful loan applicant.

Conditions for loan disbursement.

(2) The Administrator shall enter into an agreement with the successful applicant setting out the terms of the loan and loan repayment prior to release of funds through signing a prescribed form by the Oversight Board.

16. (1) The interest payable on a loan advanced to the persons referred to in regulation 13 shall be at the rate of six per cent per annum on a monthly reducing balance.

Loan interest to applicants.

(2) The interest charged under this regulation shall be paid by the borrower.

17. The Administrator may use a maximum of three percent of the approved budget of the Fund to cover its administrative costs.

Administration costs.

18. (1) A loan advanced under these Regulations shall be repaid in full within the prescribed period in the loan agreement.

Loan repayment.

(2) A borrower shall have a three-month grace period before the borrower is required to start repaying a loan advanced under these Regulations.

19. (1) The Fund may give a loan to an agent for on-lending to the women, youth, persons with disability and micro, small and medium enterprises.

Lending through agents.

(2) A microfinance institution, registered non-governmental organisation involved in financing, savings and credit co-operative organisation, registered group or any other institution approved by the Oversight Board that wishes to be an agent of the Fund under paragraph (1) shall apply for the loan and enter into an agreement with the Administrator in the manner prescribed by the Oversight Board.

(3) An application for a loan under paragraph (2) shall be accompanied by—

- (a) a certificate of registration from the relevant regulator;
- (b) a valid license from the relevant regulator;
- (c) an official search document under the Companies Act, 2015, where applicable;
- (d) a valid tax compliance certificate;
- (e) a business permit from the relevant county government;
- (f) the Minutes of a resolution of the Board of the applicant to enter into the partnership with the Fund Board;
- (g) the audited accounts of the applicant for the immediately preceding three years;
- (h) a clean credit reference bureau certificate; and
- (i) any other document as may be prescribed by the Oversight Board.

No. 17 of 2015

(4) The Administrator of the Fund shall use the following criteria when evaluating a loan application under paragraph (2)—

- (a) first in first out principle of loan processing;
- (b) applicable loan threshold for each category of applicant based on the ratio of the maximum amount applied for to the annual turn-over of the applicant's business;
- (c) compliance with the provisions of paragraph 2;
- (d) ability to repay the loan within the stipulated loan tenor;
- (e) ability to on lend to the women, youth, persons with disability and micro, small and medium enterprises;
- (f) an undertaking by the agent that the loan shall only be used for the purpose of on lending to the women, youth, persons with disability and micro, small and medium enterprises;
- (g) no agent shall be eligible for more than one loan at a time from the Fund;
- (h) an undertaking by the agent to provide quarterly reports to the Administrator of the Fund on the beneficiaries of the loan;
- (i) an undertaking by the agent to permit the Administrator to regularly monitor the use of the loan;
- (j) an undertaking by the agent to notify the Secretariat of the Fund of any change in physical address; and
- (k) such other additional conditions as the Oversight Board may impose.

20. (1) Loans advanced under regulation 19 shall be disbursed subject to the fulfilment of the following conditions—

Conditions for loan disbursement.

- (a) the advancement shall be recommended by the Secretariat to the Oversight Board for approval and such approval shall be recorded in the Minutes of the Oversight Board;
- (b) loans disbursed from the Fund shall be to the successful agent and shall be made to the bank account of the successful agent;
- (c) the Administrator of the Fund shall open loan accounts of all successful agent;
- (d) the signing of a loan agreement by the Administrator of the Fund with the successful agent setting out the terms of the loan and loan repayment prior to release of funds upon approval by the Oversight Board; and
- (e) such additional conditions as the Oversight Board may impose on a particular successful agent.

(2) The Administrator of the Fund shall not lend more than twenty per cent of the Fund value through the agents.

(3) The Administrator of the Fund shall not advance more than three percent of the Fund value through an agent.

21. The interest payable on a loan advanced to an agent from the Fund for on lending purposes shall be three percent per annum on a monthly reducing balance. Loan interest to agents.
22. (1) An agent that is entering into an on lending agreement with the Fund may provide matching funding of at least the amount equivalent to the amount advanced by the Fund under regulation 20. Matching funds by agent.
- (2) The Oversight Board may vary the interest payable under regulation 21 to a financial intermediary that provides counterpart funding under paragraph (1) to a minimum of one percent.
23. (1) An agent shall not on-lend to any borrower from the funds received under regulations 18, 19 and 22 an amount exceeding two million five hundred thousand shillings or such other amount specified by the Oversight Board. On lending by agents.
- (2) The interest payable on a loan on-lent by an agent to women, youth, persons with disability enterprises and micro, small and medium enterprises shall be at a maximum rate of ten per cent per annum on a monthly reducing balance.
- (3) An agent shall follow such rules governing insider lending as may be provided in relevant regulatory prudential guidelines on insider lending.
24. All receipts, earnings and accruals to the Fund, and the balance of the Fund at the close of each financial year shall be retained by the Fund for the purposes of the Fund. Retention of receipts and earnings.
25. A person who misappropriates any funds or assets of the Fund, or assists or causes any person to misappropriate or apply the funds otherwise than in the manner provided in these Regulations, commits an offence. Offences and penalties.
26. In the event of winding up of the Fund, the cash balances shall be transferred to the Exchequer while other assets of the Fund shall be transferred to the national government. Winding up.

Made on the 26 March, 2021.

UKUR YATANI,

Cabinet Secretary for the National Treasury and Planning.

LEGAL NOTICE No. 56

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24(8) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE PUBLIC FINANCE MANAGEMENT (UWEZO FUND)
REGULATIONS, (REVOCATION) REGULATIONS, 2021

1. These Regulations may be cited as the Public Finance Management (Uwezo Fund) (Revocation) Regulations, 2021. Citation.

2. The Uwezo Fund established under the Public Finance Management (Uwezo Fund) Regulations, 2014, is wound up. Winding up.
LN 21 of 2014
3. (1) Any amounts remaining in the Uwezo Fund shall be paid into the National Exchequer Account for the credit of the national government. Transfer of
outstanding amounts.
- (2) The Cabinet Secretary shall, with the approval of the National Assembly, pay any deficit in the Fund from funds of the national government in the National Exchequer Account.
- (3) Any outstanding loan between the Uwezo Fund and a beneficiary shall on the commencement of these Regulations, become a loan between the Biashara Kenya Fund established under regulation 3 of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 and the same beneficiary, with the same rights and subject to the same obligations and the loan shall be deemed to be a single continuing loan.
4. (1) In this regulation, unless the context otherwise requires— Transition of staff.
- “Biashara Kenya Fund” means the Biashara Kenya Fund established under regulation 3 of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021.
- (2) Subject to paragraph (4), a person who, immediately before the commencement of these Regulations, was an employee of the national government serving in the Uwezo Fund shall serve in the Biashara Kenya Fund
- (3) Despite paragraph (2), employees of the national government serving in the Uwezo Fund immediately before the commencement of these Regulations shall, upon the commencement of these Regulations, be given an option to serve in the Biashara Kenya Fund and if not appointed be redeployed in the public service.
- (4) Before appointing a person to whom paragraph (2) applies, the authorized officer, in consultation with the Public Service Commission, shall—
- (a) require such person to make an application for employment or appointment to the Fund; and
- (b) using the criteria determined by the Public Service Commission, assess such person’s suitability for appropriate placement in the organizational structure of the Biashara Kenya Fund.
- (5) A person who, immediately before the commencement of these Regulations, was an employee of the Government serving in the Uwezo Fund, who fails to meet the assessment criteria set under paragraph (4)(b), may be deployed in the public service.
- (6) Notwithstanding the provisions of this regulation, and for as long as the authorized officer has not appointed staff to serve in the Biashara Kenya Fund, the staff of the Uwezo Fund shall continue to

perform those functions and their acts shall be deemed to be those of the Biashara Kenya Fund.

5. The Government Financial Management (Uwezo Fund) Regulations, 2014 are revoked. Revocation.
LN 21 of 2014

Made on the 26th March, 2021.

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

LEGAL NOTICE NO. 57

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24(8) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury and Planning makes the following Regulation—

THE PUBLIC FINANCE MANAGEMENT (WOMEN ENTERPRISE FUND) (REVOCATION) REGULATIONS, 2021

1. These Regulations may be cited as the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021. Citation.
2. The Women Enterprise Fund established under the Government Financial Management (Women Enterprise Fund) Regulations, 2007 is wound up. Winding up.
LN 147 of 2007
3. (1) Any amounts remaining in the Women Enterprise Fund shall be paid into the National Exchequer Account for the credit of the national government. Transfer of
outstanding amounts.
 - (2) The Cabinet Secretary shall, with the approval of the National Assembly, pay any deficit in the Fund from funds of the national government in the National Exchequer Account.
 - (3) Any outstanding loan between the Women Enterprise Fund and a beneficiary shall on the commencement of these Regulations, become a loan between the Biashara Kenya Fund established under regulation 3 of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 and the same beneficiary, with the same rights and subject to the same obligations and the loan shall be deemed to be a single continuing loan.
4. (1) In this Regulation, unless the context otherwise requires— Transition of staff.

“Biashara Kenya Fund” means the Biashara Kenya Fund established under regulation 3 of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021.

 - (2) Subject to paragraph (4), a person who, immediately before the commencement of these Regulations, was serving on contract in the Women Enterprise Fund shall, at the commencement of these Regulations, serve in the Biashara Kenya Fund.
 - (3) Subject to paragraph (4), every person who, immediately

before the commencement of these Regulations, was an employee of the national government serving in the Women Enterprise Fund shall serve in the Biashara Kenya Fund.

(4) Before appointing a person to whom paragraph (2) or (3) apply, the authorized officer, in consultation with the Public Service Commission, shall—

- (a) require such person to make an application for employment or appointment to the Biashara Kenya Fund; and
- (b) using the criteria determined by the Public Service Commission, assess such person's suitability for appropriate placement in the organizational structure of the Biashara Kenya Fund.

(5) An applicant who was serving on contract under paragraph (2) who fails to meet the assessment criteria set under paragraph (4)(b), shall be allowed to serve in accordance with the terms and conditions of the contract.

(6) A person who, immediately before the commencement of this Regulations, was an employee of the of the Government serving in the Women Enterprise Fund immediately before the commencement of these Regulations who fails to meet the assessment criteria set under paragraph (4), may be deployed in the public service.

(7) Notwithstanding the provisions of this regulation, and for as long as the authorized officer has not appointed staff to serve in the Biashara Kenya Fund, the staff of the Women Enterprise Fund shall continue to perform those functions and their acts shall be deemed to be those of the Biashara Kenya Fund.

5. The Government Financial Management (Women Enterprise Fund) Regulations, 2007 are revoked.

Revocation.
LN 147 of 2007

Made on the 7th April, 2021.

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

LEGAL NOTICE NO. 58

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24(8) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE PUBLIC FINANCE MANAGEMENT (YOUTH ENTERPRISE DEVELOPMENT FUND) (REVOCATION) REGULATIONS, 2021

1. These Regulations may be cited as the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2021.

Citation.

2. The Youth Enterprise Fund established under the Government Financial Management (Youth Enterprise Development Fund) Regulations, 2007 is wound up.

Winding up.
LN 167 of 2006

3. (1) Any amounts remaining in the Youth Enterprise Development Fund shall be paid into the National Exchequer Account for the credit of the national government.

Transfer of
outstanding amounts.

(2) The Cabinet Secretary shall, with the approval of the National Assembly, pay any deficit in the Fund from funds of the national government in the National Exchequer Account.

(3) Any outstanding loan between the Youth Enterprise Development Fund and a beneficiary shall on the commencement of these Regulations, become a loan between the Biashara Kenya Fund established under regulation 3 of the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 and the same beneficiary, with the same rights and subject to the same obligations and the loan shall be deemed to be a single continuing loan.

4. The Government Financial Management (Youth Enterprise Development Fund) Regulations, 2006 are revoked.

Revocation.
LN 167 of 2006

Made on the 7th April, 2021.

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

**EXPLANATORY MEMORANDUM FOR THE PUBLIC FINANCE
MANAGEMENT (BIASHARA KENYA FUND) REGULATIONS, 2021 AND
THE LEGAL NOTICES ON THE REVOCATION**

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**I. The Purpose of Public Finance Management (Biashara Kenya Fund)
Regulations, 2021**

- i. The purpose of these Regulations is to provide a one-stop shop for targeted groups looking for business loans from Government, to improve effectiveness and eliminate overlaps. The overarching goal is to enhance economic participation of youth, women, people living with disabilities, and micro, small and medium enterprises in creation of jobs and general economic development. The Fund is envisaged to take advantage of economies of scale, leverage on the existing branch networks and other products that were provided by the targeted Funds for merger, while avoiding duplication of functions and efforts.
- ii. Biashara Kenya Fund's mandate will be to provide affordable financing, business support services, affordable commercial infrastructure, and market linkages to enterprises owned by Youth, Women, persons living with disabilities and micro, small, and medium enterprises.
- iii. The Fund's intervention in supporting SMEs is expected to achieve the following outcomes:
 - a. improved household income of the targeted groups;
 - b. expanded access to affordable credit;
 - c. increased capacity building and skills development;
 - d. formalized and mature MSMEs in retail trade;
 - e. strengthened MSMEs industry;
 - f. improved ICT infrastructure, facilities and services;
 - g. expanded market linkages; and
 - h. increased uptake of Access to Government Procurement Opportunities (AGPO).
- iv. To achieve this purpose, the Regulations in particular:
 - i. specify the sources, expenditure, capital, object and purpose of the Fund;
 - j. provide guidance on the administration and management of the Fund;

- k. establish the Biashara Kenya Fund Oversight Board to oversee the Fund and advise the Cabinet Secretary on the proper and effective performance of the Fund;
- l. provide for the withdrawals from the Fund,
- m. specify the loan eligibility criteria, application procedures, conditions for disbursement, interests and loan repayments
- n. provide for investments of the Fund
- o. provides for retention of receipts and earnings of the Fund
- p. provides for offences and penalties
- q. provide for the winding up of the Fund.

II. The Legislative Context:

- v. The National Assembly delegated the duty to establish national public funds to the Cabinet Secretary responsible for finance with the approval of the National Assembly. This is provided for under Section 24 (4) of the Public Finance Management Act, 2012. Towards this end, this Fund is proposed for establishment under this section.
- vi. In addition, these Regulations are intended to operationalize Article 27, 55(b)(c) and 56(b)(c) of the Constitution which provides for affirmative action programmes and other resources in respect to disadvantaged groups and youth aimed at ensuring equitable development of the State.
- vii. Towards this end, the following Funds are proposed for merging into Biashara Kenya Fund:
 - a. **Uwezo Fund** established under the legal Notice No 21 of 21st February 2014 pursuant to the Public Finance Management Act (No 18 of 2012);
 - b. **Youth Enterprise Development Fund** established under Legal Notice No. 167 pursuant to the Government Financial Management Act (No. 5 of 2004). The Fund was then transformed into a State Corporation under the Ministry of Public Service, Youth and Gender Affairs in 2007 and hence operates under two legal regimes.
 - c. **Women Enterprise Fund** established under legal Notice No. 147 of 3rd August 2007 pursuant to the government Financial Management Act (No.5 of 2004).
- viii. Therefore, merging of these Funds will require revocation of the:

- a. legal Notice No. 147 under the Government Financial Management Act, 2012;
 - b. Legal Notice No. 167 under the Government Financial Management Act, 2012 and the Executive Order Legal Notice No. 63 of 2007; and
 - c. legal Notice No 21 under the Public Finance Management Act, 2012.
- ix. The National Treasury also complied with the provisions of the Statutory Instruments Act while preparing these Regulations.

III. Policy Background

- x. The policy foundation for creating Biashara Kenya Fund as the Government's principal Fund for developing MSMEs, especially those owned by Youth, Women and Persons Living with Disabilities, is the Vision 2030. Further, there is a critical link between the Fund, the MSMEs and the socio-economic empowerment agenda of the Government that feeds into the four broad areas: increasing manufacturing share of Gross Domestic Product from 9.2 percent to 15 percent through promoting businesses and enterprises; ensuring food security in the country; building one (1) million housing units; and ensuring 100% health coverage over the next five years.
- xi. The Presidential Taskforce on Parastatal Reforms, 2013, recommended the merger of all Funds and initiatives for supporting, financing and developing SMEs, including the Micro and Small Enterprises Authority, Youth Enterprise Development Fund (YEDF), Women Enterprise Fund (WEF) and the Uwezo Fund to form Biashara Kenya Fund. All these Funds have the same objective of developing micro, small and medium scale enterprises, with a greater emphasis to those owned by youth, women and persons living with disabilities. Therefore, the Regulations are intended to operationalize the Presidential Taskforce on Parastatals Reform Report, which was adopted by Government in 2014.
- xii. The critical role that youth, women, persons with disability enterprises and micro, small, and medium enterprises (SME's) play in the nation's economic development and employment creation is well recognized in Kenya's economic blueprint, the Vision 2030, and the Big Four agenda. The socio-economic empowerment of the marginalized groups is also an important agenda of the Government. Over the past ten years, the Government has been supporting expansion of financial access and inclusion of women, youth, people living with disabilities and other groups through affirmative action Funds.

- xiii. While these initiatives have recorded significant socio-economic impact, their fragmented approach to supporting, financing and developing SMEs, have hindered the incubation and take off of enterprises, particularly those owned and managed by youth, women, persons living with disabilities and other minorities. In addition, the segmented approach has resulted into duplication of roles and challenges in governance among the Funds that have resulted to high repayment defaults.
- xiv. Therefore, the Government intends to merge the affirmative action Funds into one Fund (Biashara Kenya Fund) in order to provide a one-stop shop for targeted groups looking for business loans from Government, to improve effectiveness and to eliminate overlaps. The overarching goal is to enhance economic participation of youth, women, people living with disabilities, and micro, small and medium enterprise in creation of jobs and general economic development. The Fund is envisaged to take advantage of economies of scale, leverage on the branch networks and other products that were established by the proposed Funds for merger, while avoiding duplication of functions and efforts.
- xv. The services offered by the UWEZO Fund, Youth Enterprise Development Fund and Women Enterprise Fund will be accessible to the beneficiaries through the Biashara Kenya Fund once they are wound-up. Biashara Kenya Fund will be larger and will prioritize enterprises owned by the youth, women and persons living with disabilities. This is important, especially to the youth who are largely not organized into 'groups' (as is the case for women), as they can access the Fund as sole proprietors.

IV. Public Consultations

- xvi. Extensive consultations were done while preparing the Public Finance Management (Biashara Kenya Fund) Regulations, 2021 with key stakeholders and their input taken into account before finalization of these Regulations. Some of the key stakeholders' consulted include the National Assembly's Committee on Delegated Legislation, Kenya Women Parliamentary Association (KEWOPA), Mandeleo Ya Wanawake, Federation of Women Lawyers, Boards and Staff of the Funds being merged, National Youth alliance, professional institutions and the general public among others, through the following channels:
 - a. physical meetings with the Hon. Members of Parliament through the National Assembly's Committee on Delegated Legislation and KEWOPA;

- b. members of the general public through a publication vide Kenya Gazette Notice, No. 4468, dated 29th June, 2020;
 - c. members of the general public through a public notice on the National Treasury Website, www.treasury.go.ke on 22nd June, 2020;
 - d. members of the general public through advertisements in newspapers of national wide circulation, the Standard and the People Daily, MyGov pullout, dated 23rd June, 2020 and 30th June, 2020; respectively;
 - e. online virtual meetings hosted by the Taskforce with stakeholders including Centre for Women Studies on 21st July, 2020 and the National Youth Council on 30th July, 2020; and
 - f. Boards and Staff of the three Funds to be merged, the respective Principal Secretaries (who are the Administrators), and the State Corporations Advisory Council.
- xvii. It is important to appreciate that different stakeholders had different views especially on the mode of implementation of the Biashara Kenya Fund, but largely agreed on the need to provide a one stop shop.

V. Guidance

- xviii. The Ministry of Public Service and Gender Affairs, the Ministry of Information Communication Technology, Innovations and Youth Affairs and the National Treasury and the Administrator of the Fund will sensitize stakeholders including Parliament, accounting officers of National and County governments and the general public, on the process of accessing the Biashara Kenya Fund, the accountability mechanism, the monitoring and evaluation mechanism and the need to ensure regular reporting to both Houses of Parliament.

VI. Performance Monitoring and Evaluation of the Biashara Kenya Fund

- xix. The Ministry of Public Service & Gender, the Ministry of Information Communication Technology, Innovations and Youth Affairs and National Treasury shall monitor the application of the Biashara Kenya Fund resources. This will be done through quarterly reports submitted by the Administrator of the Fund. In addition, the Fund Secretariat shall be responsible for implementing the Fund and will also carry out regular monitoring and evaluation of the specific programmes, projects and initiatives funded through the Fund.

VII. National Treasury Contact Person.

- xx. The contact person at the National Treasury is the Cabinet Secretary, Hon. (Amb.) Ukur Yatani, EGH or the Principal Secretary, Julius Muia, PhD, CBS.



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

Date.....12/05/2021.....