



4 November 2013

**MEMORANDUM  
COMMENTS ON KENYA'S PFM ACT 2012 REGULATIONS**

In this memorandum, the International Budget Partnership offers some comments and suggestions related to the recently released "4th Zero Draft Regulations" (dated 10 October 2013) to implement the Public Finance Management Act 2012. The memo first highlights the major areas of concern and omissions. An annex then provides further detailed comments on the regulatory language.

The analysis here builds on previous work by IBP and partners focused on the PFM Act 2012, including the following publications, all of which are available on our website ([www.internationalbudget.org/kenya](http://www.internationalbudget.org/kenya)):

*Budget Brief 13: Bringing Kenya's Budget Law Into the Light*

*Budget Brief 15: Drafting Regulations for Kenya's PFM Act 2012: Concerns related to transparency*

*Public Participation Under Kenya's New Public Financial Management Law and Beyond* (with TISA, IEA, NTA, MUHURI, Haki Jamii, Clarion, Kenya Lands Alliance, Africog and Twaweza)

In line with our mission, we emphasize in particular concerns related to transparency and public participation in financial management.

**MAJOR AREAS OF CONCERN**

- 1. The regulations contain good general provisions related to transparency of financial information.** The regulations use general language that encourages transparency, such as Section 9(1): "the public shall be provided with full access to information concerning the development plans, budgets, fiscal out turn reports, performance against predetermined objectives, and financial reports..." Sections 9(2) and 9(3) also provide for information to be put on websites and for regular production of citizens budgets. This language suggests that there is a bias in favor of disclosure of financial information throughout the financial year.
- 2. Nevertheless, the regulations fall short in specifying that access to information must be timely, which has often been a problem in the past in Kenya.** Budget information is critical at certain times of the year when decisions are being considered and citizens can potentially influence those decisions. If information is not made available in a timely fashion, citizens are not able to actually use that information to participate in debate.

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3. **There should be both general language in the regulations stating that access to information must be timely, and also specific timelines for different documents.** A good general rule is that all documents should be made available to the public (on website, through media, etc.) on the day they are presented to others or at most within a week of presentation.

4. **While the regulations provide good general language in favor of transparency, they fall short at the level of specific documents.** For example, there is still no requirement that the budget estimates be made available to the public when they are tabled in Parliament by 30 April. It has been a serious challenge for members of the public to access the full budget estimates before the budget is read in June, and often before it is approved. This makes it impossible for the public to provide meaningful inputs into the budget hearings. Further examples:

- There is no specific mention of making the August 30 Treasury circular available to the public, even though it is supposed to contain information about opportunities for public participation in the budget process (and it has generally not been easy to get in the past).
- There is no mention of a timeline for release of the Budget Policy Statement. The PFM Act allows this to be released within 15 days, while Parliament must approve it within 14 days. This means it is possible that the BPS is approved before the public sees it. The regulations do require that the BPS be published online after it is approved (as well as the County Fiscal Strategy Paper, the analogous paper at county level), but this is not helpful for purposes of debate prior to decision-making.
- There is still no requirement to make the supplementary budget available to the public in a timely fashion. The regulations do require that both regular budget estimates and supplementary estimates be made available to the public within 2 months of being approved (Section 40A), but this is not timely. Both sets of estimates should be made available as they are being discussed in Parliament and no later than one week after approval. Moreover, the PFM Act already requires approved estimates to be made available within 21 days of approval at national level, so this makes the regulations less stringent than the law.
- There is no requirement to make public financial statements related to spending from the Contingencies or Emergency Funds (Section 69).

5. **While the regulations also provide good general language in favor of public participation at national and county level, they add no substance to the meaning of public participation beyond what is in the Act.** Both the Constitution and the PFM Act require public participation in public finance, but nowhere is this defined. The Act creates County Budget and Economic Forums at the county level but does not explain in detail how these will work. The regulations are silent on this matter as well. Moreover, while there are principles available to inform public participation without prescribing exactly what government must do, these principles were not incorporated into the regulations. Last year, a number of civil society organizations proposed some principles that could guide public participation in public finance in Kenya. These are:

- Public consultations should be open to all citizens and taxpayers, without discrimination.
- Safeguards should be established to prevent consultative forums from being dominated by any one political group, organized interest, or politician.
- Public consultations must have clear and specific purposes.

- The timeline and venues for public consultations should be made known at least two weeks in advance of the consultation.
- Public consultations must set aside dedicated time for public feedback and questions.
- Public participation in the planning and budget process should occur at all stages in this process.
- The public must have access to all relevant plan and budget documents in a timely fashion.
- All plan and budget documents should contain an executive summary and a narrative.
- Citizens should be able to provide input into public consultations through direct participation, through representatives, and through written comments.
- There should be a feedback mechanism so that citizens know their inputs were considered.

Source: <http://internationalbudget.org/wp-content/uploads/PFM-Brief-.pdf>

These principles are still relevant and should be incorporated into the regulations.

**6. The regulations could do more to ensure that Kenya meets international best practice for disclosure of information on budget implementation.** Kenya does not typically release 2 of the 8 key budget documents that international best practice suggests should be released throughout the budget cycle. Both of these documents are reports on budget implementation: the “Mid-Year Review” and the “Year End Review” of the budget. Unfortunately, the PFM Act does not require the government to produce documents that would meet international standards for these documents. However, the Kenyan government would not need to make radical changes to meet these standards, and the regulations could ensure that these small changes were made.

**7. The analysis required by the regulations in Section 60 could be slightly modified, and regulations could ensure distribution to the public, in order for this report to meet the definition of a Mid-Year Review.** International good practice requires a Mid-Year Review to be released after the first six months of budget implementation. The Review should be made available within three months after the end of the first half of the year (by end of March). A Mid-Year Review is primarily a chance to update the entire budget. A budget is based on economic assumptions related to economic growth, inflation and so on. These assumptions lead to expectations for spending and revenue. However, they are inherently uncertain and therefore budgets may need to be revised. This is why many countries allow for a supplementary budget during the year to make adjustments. In order to ensure that there is clarity about the challenges that have led to the need for changes in the budget, good practice is to issue a Mid-Year Review, often at the same time as the supplementary budget.

The main requirements of the Mid-Year Review are: an assessment of actual expenditure and revenues against targets for the first six months; a comprehensive review of the macroeconomic assumptions and an explanation of why these assumptions may have been incorrect; revised budget estimates for the rest of the year that take account of the changing economic context.

Section 60 of the regulations requires that a statement be prepared by the national or county treasury that includes:

- (i) broad performance of the budget for the financial year and the outlook to the end of the financial

year;

(ii) justification for any changes in budgetary provisions; and

(iii) revised estimates of each vote in the format prescribed in the budget guidelines.

The estimates are to be tabled by March 15 each year in the National Assembly with the supplementary budget.

If this list were expanded to include a review of macroeconomic assumptions and the implications for the rest of the budget year, if it was required annually even if the anticipated changes in the budget do not require a supplementary budget, and if the document was released to the public when it was tabled in Parliament (mid-March), it could meet the definition of a Mid-Year Review.

**8. The regulations should ensure that Kenya also produces a Year-End Report that meets international standards.** A Year-End Report provides information on actual expenditures for the year compared to the initial and supplementary estimates. While Kenya provides some information on actual versus estimates, the government should provide a comprehensive review of why actuals vary from estimates, and this should be sufficiently disaggregated (down to at least the programme level for expenditures, though ideally sub-programmes, and broken down by source for revenue). A comprehensive Year-End Report avails this information, but also includes a review of the macroeconomic assumptions and any deviations, and narrative explanations of all variations in spending and revenues, as well as the impact on non-financial indicators, such as beneficiaries. The Organization for Economic Cooperation and Development (OECD) recommends that such a report should be publicly released within six months of the end of the financial year.

**9. The quarterly implementation reports regulated by Section 177(2) should provide information down to at least the programme level, and ideally the sub-programme level.** For oversight bodies and the public to know whether spending is happening the way it was intended, budget implementation data needs to be disaggregated as much as possible. Section 177(2) only requires expenditure information down to the vote level. Best practice is to provide this information down to at least the programme level.

**10. There is some language in the regulations that may be unconstitutional.** For example, section 88(g) seems to suggest that the Equalisation Fund might be used for spending beyond what is envisioned in the Constitution.

“(g) make recommendations to the Cabinet Secretary for provision of other basic services not explicitly covered under regulation 86 that could be financed from the Equalisation Fund”

Section 146C limits the services that may be funded through the Vote on Account to services already funded, whereas the Constitution only says that the funding should be up to half of the current year’s estimates, which could include new programmes. It appears unconstitutional for the regulations to limit the discretion of Parliament in this way.

**11. The regulations appear to be attempting a kind of framework for conditional grants, but this framework is inadequate and probably requires a separate**

**document.** Section 171A discusses conditional grants, referring to a “conditional grant scheme.” It is not clear why this is being referred to as a scheme, as conditional grants are part of the constitutional framework. The section suggests ways in which conditional grants may be used. It is not clear whether the intention is to limit the use of conditional grants to the listed possibilities, or what the rationale is for this list, which is quite constricted. For example, at sector level, only water, sewerage and power seem to be contemplated. Why?

Moreover, a proper conditional grants framework should engage with a number of issues that are not even touched upon here. For example, a proper framework should consider both the content of grants, but more importantly the use of different modalities of distribution (e.g., matching funds, in-kind contributions, etc.), distributional considerations (how should such grants be shared among counties in a way that is fair and practical?), financing limits (for example, should total conditional grants ever exceed the unconditional funding to counties?), when to use a conditional grant as opposed to an unconditional grant, how to ensure that conditional grants are complementary rather than competing with each other, or undermining the policy objectives of other funding sources, and so on.

## **ANNEX OF DETAILED COMMENTS BY LINE**

### DEFINITIONS SECTION

1. Reference to sub-programmes in the definition of estimates of expenditure is good. This year’s budget did not have sub-programmes for all programmes.
2. It is not clear why the revised estimates refers to the supplementary budget estimates. What is the proper term for the original estimates after they have been amended by Parliament?

### OTHER SECTIONS

3. What is a “focal point” referred to in Section 9(2)? Is this intended to be an access to information desk at Treasury? Can we spell this out? General use of term “focal point” in legislation is imprecise.
4. Section 21C(d) is not clear. Is it internal control of national expenditure? Or internal control and audit of spending control at county level? What is internal control of spending control? National Treasury should not have a role in internal control of county spending? Audit of control systems makes sense.
5. Sections 32(b) and 32(c) should also include the word “timely.”
6. It is not clear from Section 33 that strategic plans should align with County Integrated Development Plans and other development plans. There also seem to be too many plans. Do we need annual plans and annual strategic plans? If these plans are the same or they overlap, then why do the regulations use different names?
7. Section 36 should specify the public release of the document and advance it over the law (which allows 15 days).
8. Sections 36(3) and 36(4) should clarify that ceilings are to be for consistent administrative units (consistent with estimates)
9. Section 38(2) b is not clear. What is meant by “ten”?
10. Sections 45 & 46 should clarify public availability of chart of accounts (or this could be in Section 12, public availability of full financial management manual at county and national level)
11. Section 47 implies that Sector Working Groups are established at county level. What is basis for this?
12. Section 54(5)a is good but can it be verified?

13. Section 55: can a single chart of accounts be used across counties with different administrative structures? May be a need to ensure that the national chart of accounts is flexible enough to allow for different structures at county level.
14. Section 69(1): these reports should be made available to the public as well
15. Section 83C should ensure that the determination of limits for tax exemptions is published.
16. 84C(3) is vague: will participants be able to vote or otherwise determine final outcomes?
17. 84D(v) is vague; what is the purpose of the Consultative Forum?
18. 87 It seems that the CRA, which is required to be consulted on any bill authorizing expenditure from the Equalisation Fund, should sit on the Board proposed to deal with the EF.
19. Alternatively, 88(e) must explicitly require consultation with the CRA on these matters
20. 127(2) is poorly worded...I believe the reference is to "gilt-edge" securities...is the regulation that any idle cash balances shall be invested in gilt edge securities AND kept to a minimum?
21. 143 and 144 do not seem to require that all transactions be done through the financial management system.
22. 146C should say "if" National Assembly "authorizes" ; it is not a normal or regular occurrence but should only happen under certain circumstances
23. 146C(4): what is the meaning of "stifling" and "non-contentious" in this section?
24. 147A: where is confidential expenditure defined? This clause can be abused unless there is reference to specific types of expenditure that should be included here
25. 149A is critical and must be maintained, but it should also apply to the CS requests to his/her accounting officer
26. Likewise 149B should require a written "repeat" of request, otherwise no proof that it was the CS that ordered the payment
27. 166B(2): these reports shall also be made available to the public; same for 166C
28. 166G(2): should say "has exhausted" not "has not exhausted"
29. 167: refers to "such transfers and subsidies." Does this mean all transfers and subsidies or what is the limitation of "such"?
30. 179: If the CS has 4 months to release information to Auditor, and Auditor has 3 more months to review, this could be as much as 7 months. But Constitution says audit report must be finished within 6 months.
31. 183(4): should specify publication rather than arguing it is "deemed to be publicized."
32. 198G may require timeframes for oral submission and follow on written submission of losses
33. Is 249:4 consistent with prior mention of debt limit? Earlier mention of debt calculated at Net Present Value...not clear what is intended here.
34. 255: government should make this debt paper publicly available
35. 266(4): 'sufficiently' should be defined further
36. 277e is not clear and should be reworded for further clarity
37. 277; 278 & 278A seem to overlap
38. 286 should require making public of annual financial statements
39. 294(5) should also make reference to making available information on donor funds and estimates of service delivery cost data