

KO/PIN/L.2015/016

Wednesday, April 1, 2015

Mr. Jeremiah .M. Nyegenye
Clerk of the Senate,
P.O Box 41842 - 00100,
Parliament Buildings
Nairobi

REF: MEMORANDUM TO THE SENATE COMMITTEE ON DELEGATED LEGISLATION ON THE PUBLIC FINANCE MANAGEMENT ACT REGULATIONS, 2015

The Parliamentary Initiatives Network (PIN) is a forum for non-state actors in Kenya with a programmatic interest in Parliament. PIN brings together seventeen organizations including professional associations, think tanks, research institutions and civil society organizations that focus on affecting Parliamentary business from a technical perspective. PIN supports the legislature in reviewing policies and drafting legislation. It also provides support and research in the areas of oversight, legislation and representation as well as developing tools to assist Parliament monitor implementation of its decisions and laws. To this end, the Network supports enactment and implementation of enabling policy incidental to the realization of its objectives.

In the matter of consideration of the **Public Finance Management (County Government) Regulations, 2015**, PIN makes the following observations on sections that require amendment:

i) Section 6: On openness and accountability

The section provides for the means of ensuring public participation and demands for openness and accountability when it comes to providing the public with financial information. PIN opines that the first clause in that section that reads “**Subject to national security considerations**, the public shall be provided with full access to financial information in a timely manner in a timely manner...” should be expunged. Limiting of rights that are already clearly defined by the Constitution (Article 35) adds no value to the Regulations and is unconstitutional. The Constitution provides elaborately under Article 24 for when limitation of a right or fundamental freedom may occur and it is unnecessary to redefine that in county regulations.

The sub-sections under **Section 6 (1)**, listed from (a) to (d) seemingly separates the different means of providing the public with full access to financial information by using the conjunction “**or**”, which makes the application of those subsections alternate. Instead, PIN proposes that the word ‘or’ is replaced with “and”, since the ideas espoused are non-contrasting and ought to apply jointly.

For purposes of clarity, PIN proposes that Section 6 (1) (b) which reads, “...making information available to the media” be amended by inserting the words “**with county-wide reach**” after media.

ii) Section 7: on the Requirement for the County Executive Committee to publish process and Procedures for Public Participation

PIN proposes that this section is amended to read “The County Executive Committee member shall notify the general public through a notice in the gazette or at least two newspapers of county-wide circulation on the venue ‘**and**’ manner of submitting written submissions. Substitute the word ‘or’, previously used, for ‘and’, then delete the word written since the submissions need not only be written.

Section 7(3) of the Regulations currently reads, “The document submitted to County assembly and any other published documents shall be published and publicized within 7 days of presentation”. This section should be amended to include documents that were submitted to the Assembly and all other relevant government organs. Subsequently, the term “...any other published document...” should be deleted, since its meaning is ambiguous.

Section 7 (4) makes reference to a responsibility statement that is to be issued by a County Executive Committee member discussing the extent to which the county was consulted on the County Strategy paper and Sector Working Groups. Subsequent sections of the Regulations also refer to the term ‘**responsibility statement**’. PIN proposes that this be defined under the interpretation section, to give a uniform understanding of the intended meaning of the term. Further, there should be clarity on which members of the public were consulted, what feedback they gave and how the County Government responded to the feedback given.

iii) Section 25: On Fiscal responsibility principles at the County

Section 25 reads in part that in addition to the fiscal responsibility principles set out under section 107 of the PFM Act, the County Executive Committee member with the approval of the county assembly shall set a limit on county government expenditure on wages and benefits of its public officers. **Subsection (b)** then provides **that the limit earlier**

prescribed under paragraph (a) shall not exceed thirty five (35) percent of the county government's total revenue.

The requirement that counties spend no more than 35% of their revenues on wages is not realistic at this time. We attach two tables showing the problem. The first table is from the COB Annual Report 2013/14, showing actual spending on personal emoluments by county against actual total expenditure. The average county spent 46% of their budget on wages and many counties, particularly former provincial headquarters, inherited wage costs that were even higher.

Sheet 2 shows that over 30 counties would not have met the 35% cutoff in 2013/14. This may unfairly represent the position of counties because they may have had to spend on personnel in 2013/14 but been unable to fully spend other parts of their budget, creating an appearance of higher wage expenditure as a share of total expenditure than is really likely to be the case going forward. PIN has also looked at wage expenditure in 2013/14 against the full 190 billion that counties got from the equitable share, and the 26 billion they raised in own revenues, which is a more realistic estimate of their budgets. Using this estimate in Sheet 1, average wage/revenue ratio is 36%, but 19 counties are still above the 35% cutoff.

In summary, without further efforts to deal with rationalization as a national issue and/or without a transition period of at least several years, it is not realistic to expect all counties to reach the 35% threshold envisioned under this section.

Other minor amendments under section 25

25 (g) delete the words 'if' and 'actual'

25 (h) this sub-section should be referring to G) above as opposed to (f)

iv) Section 26 on the County Fiscal Strategy Paper

26 (6) Reads " The ceiling for the development expenditure and personnel and personnel spending of the county government budget shall be approved by the County Assembly and **be binding for the next two budget years**" PIN finds no rationale for requiring that this ceiling be binding for two years and proposes that the entire sub-section be deleted. Besides, the ceilings are set by the PFM Act, making the revision by county governments unnecessary.

Section 26 (7) of the Regulations provides that the County Treasury shall include *a statement* explaining any deviations to the expenditure ceilings specified in the fiscal framework. PIN proposes that this section be clarified with regards to when this statement will be included. It should be amended to read "**The County Treasury shall include a**

statement in the budget estimates explaining any deviation to the provisions of sub-section 4”, which provides that the County Fiscal Strategy Paper once adopted shall serve as the basis of expenditure ceilings specified in the fiscal framework.

v) Section 197: on Criteria for the Establishment of a County Public Fund

This section establishes a county public fund and sets the minimum requirements for how it shall be set up. Sub-Section 197(1) (d) provides that the administration costs of the fund shall not exceed three (3%) of the approved budgets of the fund. PIN opines that the prescription of what constitutes the administration costs should be defined clearly in this section to avoid loss or misappropriation of money the administering body.

Section 197(e) provides that the County Executive Committee member responsible for the county government entity functions shall confirm in writing that the establishment and continued existence of the fund will not depend on annual financing from the county exchequer. This begs the question, where are these funds coming from? To address this, the regulations should refer to section 116(n) of the PFM Act which provides that funds going to the county should be published and publicized.

vi) Section 198: on Management and winding up of a County public fund

This section provides that the County executive Committee member shall provide for the management, operation and winding up procedure guidelines which shall be in accordance with the PFM Act and Regulations. PIN holds that these procedures ought to be set out in these regulations as opposed to being further delegated to separate guidelines.

vii) Section 209: on the Role of County Budget and Economic Forum

This section makes provision for the role of the County Budget and Economic forums (CBEF), established under section 137 of the PFM Act. Sub-section (1) (a) provides that the CBEF shall consult on National and County Government policies and legislation relating to planning and financial matters affecting county government interests. PIN proposes that this should be amended to the effect that the CBEF shall focus on the **County Budget process from formulation to implementation**, in line with the PFM Act.

Sub-section (2) provides that the forum shall meet at least twice a year, to discuss an agenda that shall be set by the Governor. To this provision, PIN proposes an amendment that the Forum shall meet at times consistent with the relevant stages of the budget cycle from formulation through implementation, and that the agenda shall be linked to the budget cycle.

Sub-section (5) requires the County Treasury to provide secretarial services to the forum for the effective performance of its functions. PIN notes that the Commission on Revenue

Allocation (CRA) developed guidelines to clarify the establishment of the CBEF, provide the administrative guidance, breakdown its functions and provide for mechanisms of operationalization of the forum. Per the guidelines, CRA holds that the Office of the Governor should provide the secretarial services for the CBEF which shall, under the guidance of the CBEF Secretary, implement the decisions of the Forum and facilitate its functioning. Cognizant of these guidelines, PIN proposes to have section 209 (5) amended to read “...The Office of the Governor shall provide secretarial services to the Forum for effective performance of its functions.”

PART (II)

THE PUBLIC FINANCE MANAGEMENT ACT, GUIDELINES ON THE ADMINISTRATION OF THE EQUALIZATION FUND

Article 204 of the Constitution of Kenya establishes the Equalization fund as one half per cent of all revenue collected by the national revenue each year calculated on the most recent audited accounts of revenue received as approved by the National Assembly. It prescribes that the equalization fund should go towards providing basic services in the most marginalized areas and specifically includes provision of water, roads, health facilities and electricity. With regards to the guidelines, PIN makes the following proposals for consideration:

i) PART IV-Management of the Fund

This section establishes the Equalization Fund Advisory Board as an incorporated Board to advise the Cabinet Secretary on the proper and effective performance of the Fund. As it stands, there is no representation from Counties. The composition should be restructured to include County government representation.

There should be more deliberate focus on the plan on how to administer the fund. As per the current state of the guidelines, money may be dispersed to projects without a clear focus on the strategy or objectives to be met and this will ultimately leave the question of marginalization unresolved.

Section 4(2) (b) provides that “The Board may from time to time co-opt other members as it may deem necessary for the proper and efficient discharge of the functions of the Board” PIN proposes that this section should be amended to read “... the Board shall liaise with

county structures in the marginalized areas for the proper and efficient discharge of its functions”

Section 4(1)(h) On the composition of the Equalization fund advisory Board, other than the Principal Secretaries from the relevant named Ministries, sub-section (h) provides for “...four other members of either gender appointed by the cabinet secretary...”. It is not clear what the appointment of these four members is based on.

PIN proposes to have the four members be drawn from the Commission on Revenue Allocation, County Assemblies Forum, Council of Governors and the Private sector

PIN recommends that the fund shouldn't be spread too thin. It should be based on a reasonable number of projects with an actual impact. Projects under the equalization should be funded entirely under the fund, and not partially from other sources. This will ensure that the projects do not stall midway and the objectives of the fund are actually met.

PART (III)

THE PUBLIC FINANCE MANAGEMENT ACT: DECLARATION OF THE NATIONAL GOVERNMENT ENTITIES (STATE ORGANS)

The declaration of the National Government Entities is done pursuant to section 4 of the PFM Act and the PFM (National Government) Regulations, 2015.

PIN raises concerns over a few institutions that have been listed as government entities, but which are currently running County Government functions. These include:

- a) Lake Victoria South Water Service Board
- b) Northern Water Services Board
- c) Rift Valley Water Services Board
- d) Tana Water Services Board
- e) Tanathi Water Services Board
- f) Coast Development Authority
- g) Ewaso Ngiro North Development Authority
- h) Ewaso Ngiro South Development Authority
- i) Kerio Valley Development Authority
- j) Lake Basin Development Authority

k) Tana and Athi Rivers Development Authority

Broadly, these entities have the mandate to provide water and sanitation services. Part 2 of the fourth schedule which provides for the distribution of functions between the National and County Governments, categorically provides that water and sanitation services are a function of County Governments.

CONTACT INFORMATION:

**The Secretariat
Parliamentary Initiatives Network
C/o Institute of Economic Affairs (IEA-Kenya)
5th Floor-Block D, ACK Garden House
Tel: +254-20-2721262 Mobile: 0724256510
P.O Box 53989-00200
NAIROBI**