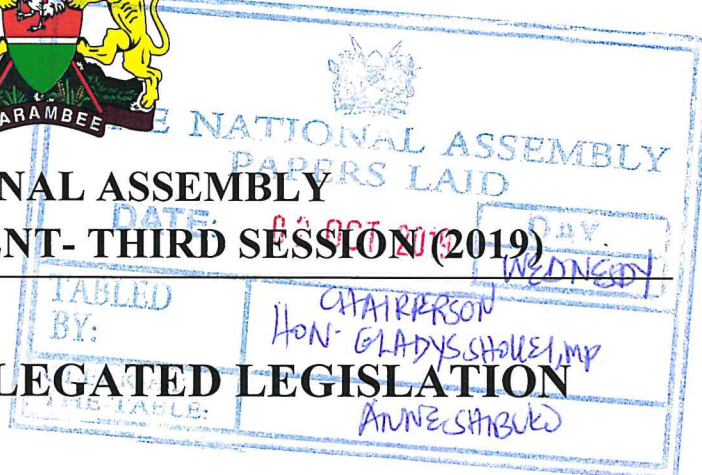


Approved for tabling, *But* SWA
2/10/19



**THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT- THIRD SESSION (2019)**

COMMITTEE ON DELEGATED LEGISLATION



REPORT ON THE CONSIDERATION OF

- i. **The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (*Legal Notice No. 88 of 2019*); and**
- ii. **The Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (*Legal Notice No. 92 of 2019*);**

OCTOBER, 2019

***Directorate of Committee Services
The National Assembly,
Parliament Buildings, Continental House, Room 402
NAIROBI.***

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ABBREVIATIONS

LN	Legal Notice
RMA	Regulatory Making Authority
SI	Statutory Instruments
SO	Standing Order

CHAIRPERSON'S FOREWORD

On the 21st of June, 2019 and 2nd July, 2019, the Principal Secretary for the National Treasury and Planning submitted fourteen (14) statutory instruments relating to the Budget for FY 2019/2020 for tabling in the National Assembly. They were all tabled on 21st June, 2019 and 4th July, 2019 and committed to the Committee on Delegated Legislation for consideration.

The Committee held several meetings to undertake the scrutiny. Pursuant to section 16 of the Statutory Instruments Act, 2013, the Committee invited the regulation making authority to a consultative meeting on 19th and 20th August, 2019 to consider the said statutory instruments which varied in subject matter, ranging from retirement benefits, insurance, public finance management, capital markets, excise duty, value added tax etc.

Having examined the various instruments against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*) Laws of Kenya, the Statutory Instruments Act (*No 23 of 2013*) and the respective laws pursuant to which they are made, the Committee approved twelve (12) of the instruments and recommends to the House the annulment of two (2), for reasons advanced in this Report. These two are **the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations (Legal Notice 88 of 2019)** and **the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (Legal Notice 92 of 2019)**.

For information purposes, the approved instruments are as follows –

1. The Insurance (Valuation of Technical Provisions for Life Insurance Business) (Amendment) Guidelines, 2019 (*Legal Notice No. 82 of 2019*);
2. The Insurance (Capital Adequacy) (Amendment) Guidelines, 2019 (*Legal Notice No. 83 of 2019*);
3. The Tax Procedures (Unassembled Motor Vehicles and Trailers) Regulations, 2019 (*Legal Notice No. 84 of 2019*);
4. The Miscellaneous Fees and Levies (Forms) Regulations, 2019 (*Legal Notice No. 85 of 2019*);
5. The Value Added Tax (Amendment) Regulations, 2019 (*Legal Notice No. 86 of 2019*);
6. The Retirement Benefits (Umbrella Retirement Benefits Schemes) (Amendment) Regulations, 2019 (*Legal Notice No. 87 of 2019*);
7. The Retirement Benefits (Individual Retirement Benefits Schemes) (Amendment) Regulations, 2019 (*Legal Notice No. 89 of 2019*);
8. The Insurance (Policyholders Compensation Fund) (Amendment) Regulations, 2019 (*Legal Notice No. 91 of 2019*);
9. The Insurance (Amendment) Regulations, 2019 (*Legal Notice No. 93 of 2019*);
10. The Excise Duty (EGMS) (Amendment) Regulations, 2019 (*Legal Notice No. 94 of 2019*); and
11. The Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations, 2019 (*Legal Notice No. 95 of 2019*);

I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

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 the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations (*Legal Notice 88 of 2019*) and the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (*Legal Notice 92 of 2019*).**

HON. GLADYS BOSS SHOLLEI CBS MP

1.0 PREFACE

1.1. Establishment and Mandate of the Committee

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.

The Committee is mandated to consider 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

Chairperson

Hon. Gladys Boss Shollei CBS MP
Uasin Gishu County Woman Representative

Jubilee Party

Vice- Chairperson

Hon. Fatuma Gedi, MP
Wajir County Woman Representative
Party for Development and Reforms

MEMBERS

Hon. Waihenya Ndirangu, MP
Roysambu Constituency

Jubilee Party

Hon. Alice Wahome, MP,
Kandara Constituency

Jubilee Party

Hon. Robert Mbui, MP
Kathiani Constituency,

Wiper Democratic Movement -Kenya

Hon. Daniel Maanzo, MP
Makueni Constituency

Wiper Democratic Movement -Kenya

Hon. Muriuki Njagagua, MP
Mbeere North Constituency

Jubilee Party

Hon. Timothy Wanyonyi, MP
Westlands Constituency

Orange Democratic Movement

Hon. Ronald Tonui, MP
Bomet Central Constituency

Jubilee Party

Hon. William Kamoti, MP
Rabai Constituency

Orange Democratic Movement

Hon. Martha Wangari, MP
Gilgil Constituency

Jubilee Party

Hon. Gideon Mulyungi, MP
Mwingi Constituency

Wiper Democratic Movement – Kenya

Hon. William Kassait Kamket, MP
Tiaty Constituency

KANU

Hon. (Dr.) Wilberforce Oundo, MP
Funyula Constituency

Orange Democratic Movement

Hon. George G. Murugara, MP
Tharaka Constituency

Jubilee Party

Hon. Jennifer Shamalla, MP
Nominated

Jubilee Party

Hon. Munene Wambugu, MP
Kirinyaga Central Constituency
Jubilee Party

Hon. Muturi Kigano, MP
Kangema Constituency
Jubilee Party

Hon. Patrick Kariuki Mariru, MP
Laikipia West Constituency
Jubilee Party

Hon. Sammy Seroney, MP
Nominated
Wiper Democratic Movement – Kenya

Hon. Tindi Mwale, MP
Butere Constituency
Amani National Congress

Hon. Alfred W. Sambu, MP
Webuye East
Amani National Congress

Hon. Abdi Koropu Tepo, MP
Isiolo South Constituency
Kenya Patriots Party

1.3 Committee Secretariat

Ms. Susan Maritim
Senior Clerk Assistant (Team Leader)

Mr. Jimale Mohamed
Second Clerk Assistant

Mr. Wilson Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Anne Njeri Kigoro
Research Officer III

Ms. Winnie Kiziah
Media Relations Officer II

Mr. Anthony Wamae
Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Ms. Mary Otieno
Office Superintendent

2.0 CONSIDERATION OF THE INSTRUMENTS

2.1 Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019

2.1.1 Introduction

1. The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 were made by the Cabinet Secretary Treasury pursuant to section 55 of the Retirement Benefits Act (No 3 of 1997).
2. The Regulations were published in the Gazette as *Legal Notice No 88* of 2019 on the 13th of June, 2019, received by the Clerk of National Assembly on the 21st of June, 2019 and tabled before the House on 21st June 2019.¹

2.1.2 Purpose of the Regulations

3. The Regulations seek to amend various provisions of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 (Legal Notice 119 of 2000) with the following implications –
 - (i) To expand the requirements of the contents of the Scheme rules to include **the distribution of reserve funds to exiting members where the scheme maintains a reserve fund**;
 - (ii) While Regulation 19(5)(a)(ii) of the Principal Regulations allows a person who opts to retire early to access his/her own contribution and fifty *per cent* (50%) of his employer's contribution and the investment income that has accrued in respect of those contributions, where he/she is a member of a defined contribution scheme, the amendment **seeks to delete these benefits to a person opting to retire early**;
 - (iii) To limit a reserve fund where one is created, to a **maximum of five per cent of the total value of the scheme fund**.

2.1.3 Summary of the Regulations

4. The Regulations propose to amend the Principal Regulations, i.e. the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 (LN 119/2000) by –
 - (i) inserting the following new paragraph immediately after paragraph (0—
(fa) the distribution of reserve funds to exiting members where the scheme maintains a reserve fund.
 - (ii) deleting the words "and fifty percent of his employer's contribution and the investment income that has accrued in respect of those contributions" appearing in Regulation 19(5)(a)(ii) of the principal Regulations.

¹ Annexure 1: LN 88 of 2019

- (iii) deleting the word "may" and substituting therefor the word "shall" in paragraph (6) Regulation 25 of the principal Regulations.
- (iv) deleting paragraph (2) of Regulation 33 of the principal Regulations and substituting therefor the following new proviso—

Provided that—

(i) a scheme shall not create and maintain a reserve fund that exceeds five percent of the total value of the scheme fund; and

(ii) the Authority may, in writing, require the trustees to adjust the reserve fund to such levels as it may determine.

2.1.4 Scrutiny of the Instrument

5. Pursuant to section 16 of the Act, the Committee held a meeting with the regulation making authority on 18th of August, 2019 in Mombasa where the authority made a presentation to the Committee on the proposed changes to the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000. The Authority further informed the Committee that pension sector stakeholders were consulted prior to amendments to the principal Regulations.
6. The Committee's attention was drawn to a memorandum addressed to the Committee dated 6 August, 2019 by **Mr. Eliud Ogotu**² who cited various violations of his rights as a member of the Stanbic Bank Kenya Ltd Staff Retirement Benefits Scheme. He observed that the amendment will deny him access to investment income accrued from his own contributions. He also cited lack of public participation by the regulation making authority.
7. Members weighed the pros and cons of the impact of the amendment, with some supporting while others expressing concerns that the amendment will frustrate members of pension schemes who wish to exit and use their contributions to increase their incomes or sustain themselves in absence of any other source of income.

2.1.5 Committee Observations

8. The Committee observed THAT –
 - (i) the Regulations were submitted to the National Assembly within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act having been published on the 13th of June, 2019, received by the Clerk of National Assembly on the 21st of June, 2019 and tabled on the 21st June, 2019;
 - (ii) the regulation making authority did not demonstrate sufficient public participation contrary to Articles 10 and 118 of the Constitution and section 5 and 5A of the SI Act on the Regulations. There was a complaint through a memorandum addressed to the Clerk of the National Assembly by a member of the public (Mr. Eliud Ogotu, a lawyer and Member of the Stanbic Kenya Retirement Benefits Scheme) detailing

² Annexure 2: Letter dated 6th August, 2019 by Mr. Eliud Ogotu

lack of public participation and how his rights are adversely affected by the Regulations.

- (iii) the Regulations are likely to impose significant costs on the persons who may opt for early retirement or change schemes hence ought to have been accompanied with a Regulatory Impact Statement within the meaning of Sections 6, 7, and 8 of the Act which should have been notified in the *Gazette* and in a newspaper likely to be read by members of the various occupational retirement benefits schemes under the Act, as required by section 8(1) of the Statutory Instruments Act.
- (iv) contrary to section 13(k) of the Statutory Instruments Act, the Regulations makes rights, liberties or obligations unduly dependent upon non – reviewable decisions.
- (v) contrary to section 13(m) of the Act, the Regulations make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers as most decisions would be by the pension fund managers.

2.1.6 Committee Recommendation

9. Having examined the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations against the Constitution of Kenya, the Statutory Instruments Act (No 23 of 2013), the Retirement Benefits Act (No.3 of 1997 and the Interpretations and General Provisions Act (*Cap 2*) Laws of Kenya, the Committee **recommends that the House annuls in entirety the said statutory instrument** for the following reasons –

- (i) **insufficient public participation contrary to Articles 10 and 118 of the Constitution and section 5 and 5A of the SI Act.**
- (ii) **the Regulations were not accompanied with a Regulatory Impact Statement within the meaning of Sections 6, 7, and 8 of the Act which should have been notified in the *Gazette* and in a newspaper likely to be read by members of the various occupational retirement benefits schemes under the Act, as required by section 8(1) of the Statutory Instruments Act.**
- (iii) **contrary to section 13(k) of the Statutory Instruments Act, the Regulations makes rights, liberties or obligations unduly dependent upon non – reviewable decisions.**
- (iv) **contrary to section 13(m) of the Act, the Regulations make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers as most decisions would be by the pension fund managers.**

2.2 Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019

2.2.1 Introduction

10. The Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 were made by the Cabinet Secretary, National Treasury pursuant to section 18 of the Insurance (Motor Vehicles Third Party Risks) Act.
11. The Regulations were published in the Gazette as Legal Notice No 92 of 2019 on the 13th of June, 2019, received by the Clerk of National Assembly on the 21st of June, 2019 and tabled before the House on 21st June 2019³, being within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act.

2.2.2 Purpose of the Regulations

12. The Regulations seek to amend Rule 3 (1) (a) of the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) Rules, 1999 (L.N. 10 of 1999) which provides for insurance of a motor vehicle used by fare paying passengers such as matatus, buses, taxis, private and public hire and self-drive vehicles. Rule no. 3(1) (d) provides for insurance of motor-cycles and motorized three wheeled used for social, domestic and leisure purposes.
13. Currently, motor vehicles (*boda boda*) and three-wheelers (*tuk tuks*) are the preferred mode of transport especially for low-income citizens. There has been a high rate of accidents occasioned by *boda bodas* leaving the injured fare-paying passengers with no recourse or access to medical services. The proposed amendment is, therefore, intended to entrench in the law the requirement for insurance in respect of *boda-boda* and *tuk-tuk* operators with a view to ensuring compliance and that all passengers, being this parties, are covered in the event of an accident.
14. **The implication is that all motorcycles and three-wheelers ferrying fare-paying passengers will be obligated to take out an insurance cover before they can ferry passengers.**

2.2.3 Scrutiny of the Instrument

15. Pursuant to section 16 of the SI Act, 2013, the Committee held a meeting with the regulation making authority on 19th of August, 2019 where the National Treasury and Planning alongside the Insurance Regulatory Authority (IRA) informed the Committee that it undertook public participation which included formation of a taskforce consisting of members of staff of IRA, Association of Kenya Insurers and National Transport and Safety Authority. The mandate of the taskforce was to find out the risks involved in emerging motorcycle (*boda-boda*) and three-wheeler (*tuk-tuk*) business and the possible ways of mitigating the risks.
16. Other stakeholders that were consulted included the National *Boda-Boda* Association of Kenya, Competition Authority of Kenya, the County Government of Kiambu, the

³ Annexure 3: LN 92 of 2019

Kenya Revenue Authority, the Motorcycles Assemblers Association, the Traffic Police, the National Hospital Insurance Fund and the National Social Security Fund.

2.2.4 Committee Observations

17. The Committee made the following observations –

(i) Statutory Timelines – Section 11 of the SI Act

The Regulations were submitted to the National Assembly within the statutory timeline contemplated under section 11(1) of the Statutory Instruments Act (hereinafter referred to as the Act) having been published on the 13th of June, 2019, received by the Clerk of National Assembly on the 21st of June, 2019 and tabled on the 21st June, 2019;

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

The Regulations contravene Articles 10 and 118 of the Constitution and sections 5, 5A, 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 Report on stakeholders' submissions was not exhaustive thereby demonstrating that the public participation undertaken was insufficient.

(iii) 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 regulation making authority was not required to present a Regulatory Impact Assessment.


2.2.5 Committee Recommendation

18. Having examined the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (*Legal Notice 92 of 2019*) against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*) Laws of Kenya, the Insurance (Motor Vehicles Third Party Risks) Act (*Cap 405*) Laws of Kenya and the Statutory Instruments Act (*No 23 of 2013*), the Committee **recommends that the House annuls in entirety the said statutory instrument** for failing to demonstrate that sufficient public participation was undertaken, contrary to Articles 10 and 118 of the Constitution and sections 5, 5A and the Schedule to the Statutory Instruments Act.

3.0 COMMITTEE RECOMMENDATION⁴

19. Pursuant to Standing Order 210 (4) (b) and section 15 (1) of the Statutory Instruments Act and having examined **the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations (Legal Notice 88 of 2019) and the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (Legal Notice 92 of 2019)** against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*) Laws of Kenya, the Statutory Instruments Act (*No 23 of 2013*) and the respective laws pursuant to which they are made, the Committee **recommends that the House annuls in entirety the said statutory instruments.**

Signed.....
HON. GLADYS BOSS SHOLLEI CBS MP
(CHAIRPERSON)

Date.....

⁴ Annexure 4 – Committee Minutes



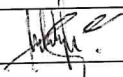
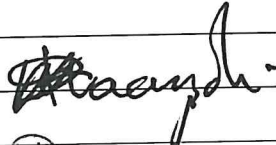

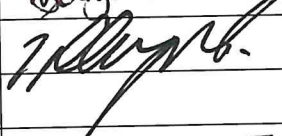



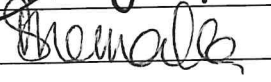

COMMITTEE ON DELEGATED LEGISLATION

ADOPTION LIST

Report on the Consideration of the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (Legal Notice No. 92 of 2019) AND the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (Legal Notice No. 88 of 2019)

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

DATE: 01/10/19

	HON. MEMBER	SIGNATURE
1.	Hon. Gladys Boss-Shollei CBS MP (Chairperson)	
2.	Hon. Fatuma Ali Gedi, MP (Vice Chairperson)	
3.	Hon. Isaac Waihenya Ndirangu, MP	
4.	Hon. Robert Mbui, MP	
5.	Hon. Alice Wahome, MP	
6.	Hon. Daniel Maanzo, MP	
7.	Hon. Muriuki Njagagua, MP	
8.	Hon. Martha Wangari, MP	
9.	Hon. Timothy Wanyonyi, MP	
10.	Hon. William Kamoti Mwamkale, MP	
11.	Hon. Patrick Kariuki Mariru, MP	
12.	Hon. Ronald Kiprotich Tonui, MP	
13.	Hon. William Kassait Kamket, MP	
14.	Hon. Munene Wambugu, MP	
15.	Hon. George Gitonga Murugara, MP	
16.	Hon. Jennifer Shamalla, MP	
17.	Hon. Muturi Kigano, MP	
18.	Hon. (Dr.) Wilberforce Oundo, MP	
19.	Hon. Sammy Seroney, MP	
20.	Hon. Tindi Mwale, MP	
21.	Hon. Abdi Tepo, MP	
22.	Hon. Alfred Sambu, MP	

23. Hon. Cideon Mulyungi, MP

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