



② JIMARE
Please note
For
12/11/21



③ D/L R P
The Regulation
Should be
Tabled in
the House
for referral
to relevant
Committee
12/11/21

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
Finance - Nairobi
FAX NO. 310833
Telephone: 2252299
When Replying Please Quote

TABLED BY: _____
CLERK AT THE TABLE: _____

Ref: TNT/PPPU/1/5 TY

④ DAY: 11/11/21
⑤ SI register and response
⑥ Ms. Mado
please deal as in (4) above.
Date: 8th November 2021
16/11/2021
11/11/21

Mr. Michael Sialai
Clerk of the National Assembly,
The National Assembly,
Nairobi, Kenya

Dear Clerk

REF: THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021

We refer to the above captioned subject and to your letter dated 16th August 2021, Ref: NA/DAA&SC/CDL/CORR/2021/056, from the Clerk of the National Assembly to the Principal Secretary National Treasury, inviting the National Treasury for a pre-publication scrutiny meeting to consider the draft Public Finance Management (National Toll Fund) Regulations, 2021, on Wednesday 1st September 2021 in Mombasa.

The National Treasury honored the invitation, attended the meeting as scheduled and presented the draft Regulations. Following the presentation, Committee members sought for clarifications on certain aspects and proposed some amendments to the Regulations. We confirm that the specific recommendations from the Committee on additional amendments were taken into account, and required explanations provided as per the matrix attached herewith as **Annex 1**.

These Regulations were gazetted on 3rd November 2021, all issuance protocols having been observed in line with the Statutory Instruments Act, 2013. Pursuant to Section 11 of the Statutory Instruments Act, 2013, we now lay the published Public Finance Management (National Roads Toll Fund) Regulations 2021, Legal Notice No.222 of 2021 dated 3rd November 2021, before the National Assembly.

To this end, please find the following documents attached to this letter as **Annex 2**:

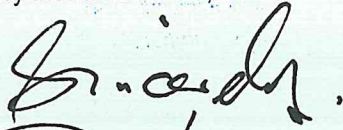
- a) The Public Finance Management (National Roads Toll Fund) Regulations 2021 (Legal Notice No.222 of 2021), dated 3rd November 2021;
- b) The Explanatory Memorandum; and



c) Evidence of Public Participation

We appreciate the support that the National Assembly has accorded to us in the development of the Regulations and look forward to receiving notification of the grant of your approval as required under the Statutory Instruments Act, 2013.

Yours



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


Copy to: **Dr. Julius Muia, Ph.D, CBS**
Principal Secretary
The National Treasury
NAIROBI

Mr. Kennedy Ogeto, CBS
Solicitor General
State Law Office and Department of Justice
Sheria House
NAIROBI

Mr. Christopher Kirigua
Director General
Public Private Partnerships Unit
NAIROBI

SPECIAL ISSUE

Kenya Gazette Supplement No. 201

 THE NATIONAL ASSEMBLY PARTNERSHIP	
DATE: 16 NOV 2021	DAY: 1553
3rd November, 2021	
TABLED BY:	MKT. WTHP
CLERK-AT TABLE	FINLEY

LEGAL NOTICE No. 222

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 (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021

1. These Regulations may be cited as the Public Finance Management (National Roads Toll Fund) Regulations, 2021. Citation.
2. In these Regulations, unless the context otherwise requires— Interpretation.
 - “Act” means the Public Finance Management Act, 2012; No. 18 of 2012.
 - “authorized toll collector” means a toll collector appointed as such under section 4 of the Public Roads Toll Act; Cap. 407.
 - “budget framework” means the national government budget process under the Act;
 - “business day” means a working day and excludes weekends and public holidays;
 - “Cabinet Secretary” means the Cabinet Secretary responsible for finance;
 - “carrying capacity of the Fund” means the ability of the Fund to meet new funding obligations being imposed as a consequence to the admission of new project roads into the Fund’s liability portfolio, relative to obligations already existing under the Fund; No. 15 of 2013.
 - “Committee” means the Oversight Committee established under regulation 8 of these Regulations;
 - “contracting authority” has the meaning assigned to it under section 2 of the Public Private Partnership Act, 2013;
 - “financial year” has the meaning assigned to it under Article 260 of the Constitution;
 - “Fund” means the National Roads Toll Fund established under regulation 5 of these Regulations;
 - “Fund Secretariat” means the Fund Secretariat established under regulation 16 of these Regulations;
 - “independent expert” means a person or organisation with substantial experience in the development of traffic forecasts, toll

revenue projections and road project agreements appointed to support the Officer Administering the Fund in the preparation of quarterly and annual inflow and outflow projections;

“inflows” means all payments into the Fund;

“Officer Administering the Fund” means the officer designated as such under regulation 12 of these Regulations;

“outflows” means payments out of the Fund to meet eligible expenditure under the Fund;

“Public Private Partnership Project Facilitation Fund” means the Fund established under section 68 of the Public Private Partnerships Act, 2013;

“PPP unit” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“private party” includes a service provider or a toll operator appointed as an authorised toll collector under a project agreement to perform services related to a toll road in Kenya;

“project agreement” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“project company” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“project road” means a road declared as toll road under section 3(1) of the Public Roads Toll Act and for which a project agreement obligates service or other payments from the Fund;

“Projected Fund Ratio” as at a particular future date, means the ratio of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date, calculated for twelve forward rolling months:

Provided that this ratio shall, at a minimum, be computed taking into account arrears, amounts invoiced but not settled and not yet classified as arrears, and other amounts that will become due over the forecast period;

“projected shortfall” means the Projected Fund Ratio which is less than 1.3 in any projection period;

“projected surplus” means existing Projected Fund Ratio exceeding 1.3 in any projection period and where actual cash balances, excluding projected future inflows, within the Fund are the basis for determining the Projected Fund Ratio;

“road toll” means a user charge levied on road users in accordance with the Public Roads Toll Act;

“road users” means the categories of vehicular traffic subject to pay a prescribed toll;

“service payments” means scheduled payments due to and invoiced by a private party pursuant to a project agreement and in accordance with these Regulations;

“service provider” means a private party or project company that enters into a project agreement with a contracting authority to provide a project road, as detailed under a project agreement;

“Short-Term Liquid Instruments” means any marketable financial security having short-term maturity, readily convertible into cash, including fixed income instruments such as treasury bills, commercial paper and certificates of deposit as may from time to time be approved in accordance with these Regulations; and

“toll operator” means a private party appointed as an authorised toll collector under a project agreement by a contracting authority to establish, administer and operate a toll system.

3. The objects and purposes of these Regulations are—

Objects and
purpose of
Regulations.

 - (a) to establish a centralized Fund into which all revenues collected pursuant to these Regulations shall be paid and administered;
 - (b) to provide for the oversight and administration of the Fund;
 - (c) to prescribe the processes by which money is paid into and out of the Fund;
 - (d) to provide investors in and financiers of project roads, as well as the general public, necessary information on the status of the Fund to support investment decisions; and
 - (e) to make provision for purposes connected with and incidental to the foregoing objects and purposes.
4. There shall be imposition of road tolls which shall be set in accordance with the Public Roads Toll Act.

Imposition of
tolls. Cap. 407.
5. There is established a fund to be known as the National Roads Toll Fund, which shall be operated under the budgeting, accounting, reporting and auditing framework of the Act.

Establishment of
the Fund.
6. The sources of the Fund shall consist of the following—

Sources of the
Fund.

Cap. 403.

 - (a) road tolls levied on road users for access to and use of project roads;
 - (b) fees or charges imposed on road users accessing project roads with overloaded axles levied in accordance with Part III of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, section 58 of the Traffic Act and section 21 of the East African Community Vehicle Load Control Act, 2016;
 - (c) monies appropriated by Parliament or otherwise paid into the Fund by the Government for the purposes of the Fund;
 - (d) grants and donations made to the Fund;
 - (e) any earnings, accruals or income generated from moneys held within the Fund;
 - (f) proceeds from levies on roadside developments including road side stations which form part of the scope of works for

project roads, as well as proceeds from any access fees and advertisements along the project roads levied in accordance with Part II of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 and any other applicable framework as from time to time adopted in this regard;

- (g) penalties arising from any breaches by a private partner under an agreement entered into under section 4A of the Public Roads Toll Act;
- (h) insurance proceeds payable to a contracting authority under a project agreement applied as reimbursement intended to make good a loss occasioned to and suffered by a contracting authority for an action of a private party only where the loss suffered by the contracting authority, and linked to an insured event, have been met from the Fund; and
- (i) money from any other source approved by the Cabinet Secretary.

Cap. 407.

7. Payments out of the Fund shall comprise the following—

Payments out of the Fund.

- (a) payments certified by a contracting authority as being due to a service provider or a toll operator under a project agreement and in accordance with these Regulations, excluding—
 - (i) compensation for political risks as specified under a project agreement;
 - (ii) termination payments; and
 - (iii) any other large, unscheduled one-off payments arising under a project agreement which have not been or cannot be accommodated under the payment mechanism under a project agreement;
- (b) the approved annual operating budget of the Fund; and
- (c) any other eligible expenditure incurred in pursuance of the object and purpose for which the Fund is established:

Provided such costs are directly linked to the underlying projects supported under the Fund, and they are necessary and essential components of meeting the liabilities of the Fund under Project Roads.

8. (1) There is established a committee to be known as the Oversight Committee which shall consist of—

Establishment of Oversight Committee.

- (a) the Principal Secretary for the time being responsible for matters relating to finance, who shall be its chairperson;
- (b) the Principal Secretary for the time being responsible for matters relating to roads;
- (c) the Principal Secretary for the time being responsible for matters relating to planning and statistics;
- (d) the Attorney-General or his representative;

- (e) three other persons being non-public officials drawn from technical, financial services, social services, life sciences, consumer rights and legal professions appointed competitively by the Cabinet Secretary; and
- (f) the Officer Administering the Fund, who shall be Secretary to the Committee.

(2) The Committee may from time to time admit a representative of a contracting authority for the time being having a project road, a representative of the PPP Unit, the Accountant-General or any other public official it deems fit into its sittings and participate as an *ex officio* member.

9. A person shall be qualified to be appointed under regulation 8(1)(e) as a member of the Committee if that person— Qualifications for appointment.

- (a) holds a degree in the relevant field from a university recognized in Kenya;
- (b) has proven fund management or other relevant professional experience;
- (c) has served in a position of senior management for a period of at least 6 years;
- (d) meets the requirements of Chapter six of the Constitution; and
- (e) has no convictions resulting from integrity related matters or civil liabilities.

10. (1) The functions and powers of the Committee shall be to— Functions of the Committee.

- (a) review and approve the annual work programme and budget of the Fund;
- (b) authorise allocations in accordance with approved budgets as prescribed under these Regulations;
- (c) approve annual reports of the Fund before submission to the Cabinet Secretary and inform the Cabinet Secretary of the annual funding requirements of the Fund;
- (d) approve the opening of bank accounts of the Fund by the Officer Administering the Fund;
- (e) make recommendations to the Cabinet Secretary on the declaration and use of projected surpluses;
- (f) authorise withdrawals from the Fund of projected surpluses upon approval by the Cabinet Secretary in accordance with these Regulations and any guidelines it approves for this purpose;
- (g) approve the systems for the control and oversight of the operation of the Fund;

- (h) approve the recruitment and the terms and conditions of staff of the Fund;
- (i) appoint independent advisors to provide it with expert opinion on any matter falling within its mandate that is deemed to require such expertise, and require the Officer Administering the Fund to meet the costs, if any, attendant on such experts or advisors;
- (j) establish the Fund's investment policies with respect to surplus cash;
- (k) approve annual financial statement of accounts prepared by the Officer Administering the Fund;
- (l) oversee the performance of the Officer Administering the Fund;
- (m) oversee the performance of the Fund; and
- (n) perform any other function necessary to promote the objects and purpose of the Fund and consistent with these Regulations.

(2) The Committee shall, in discharging its functions under these Regulations—

- (a) take such measures and make such recommendations to the Cabinet Secretary as it shall be necessary to guarantee, sustain and improve the governance framework for toll road programmes with the view to promoting the long-term financial integrity and sustainability of the Fund with respect to the purposes for which it has been established;
- (b) meet regularly, and at least once a quarter, to consider the affairs, status and operation of the Fund; and
- (c) adopt such procedures as shall be necessary to organize the conduct of its business including the methods by which meetings shall be convened and the frequency and quorum thereof, the keeping of records, co-option of persons with such skills as the Committee may require to better discharge its duties under these Regulations, the formation of any sub-committees as the business of the Committee may demand, and for such other matters as the Committee shall deem fit and necessary to support its operational and functional efficiency and effectiveness.

11. (1) A vacancy shall arise under regulation 8(1)(e) where the member—

Vacation and filling of office.

- (a) dies;
- (b) resigns from office, by notice in writing addressed to the Cabinet Secretary;
- (c) is adjudged bankrupt or otherwise declared to be insolvent;
- (d) abandons the business of the Fund or fails to attend three consecutive meetings of the Committee without a valid reason; or

(e) is convicted of an offence involving dishonesty or fraud or moral turpitude and sentenced to imprisonment.

(2) The Cabinet Secretary shall appoint the person to fill the vacancy in the Committee in accordance with regulation 8(1)(e).

(3) The Cabinet Secretary shall, within seven days of appointing a person under regulation 8(1)(e) notify such appointment by notice in the Gazette.

12. Pursuant to section 24(5) of the Act, the Cabinet Secretary shall designate a person to be the Officer Administering the Fund.

Officer
Administering the
Fund.
Functions of
Officer
Administering the
Fund.

13. (1) The Officer Administering the Fund shall control the administration of the Fund, for which purpose it shall cause to be established proper systems for the operation of the Fund.

(2) The systems to be established under sub-regulation (1) shall include the following—

- (a) financial management systems;
- (b) audit control systems;
- (c) documentation and records systems;
- (d) human resource management systems;
- (e) assets, stores and supplies; and
- (f) reporting systems.

(3) The Officer Administering the Fund shall have the following key functions—

- (a) the preparation of work programme and budget of the Fund, and for this purpose shall—
 - (i) make preparation of the Fund's annual budget and work plans, and submit the same to the Committee for approval; and
 - (ii) address projected shortfalls in the Fund through the budget framework in accordance with the Act and these Regulations;
- (b) financial control over the administration of the Fund, which shall include the following—
 - (i) opening of a bank account and any sub-accounts of the Fund in a financial institution approved by the Cabinet Secretary;
 - (ii) making payments out of the Fund in accordance with these Regulations;
 - (iii) causing to be kept proper books of account and all records of the Fund;
 - (iv) specifying all forms and prepare all funding documentation required under these Regulations; and

- (v) ensuring that there are held within the Fund sufficient funds to meet the quarterly and annual obligations of the Fund;
- (c) reporting to the Committee on the operations and performance of the Fund, which shall include—
 - (i) annual financial accounts and reports of the Fund in accordance with the Act;
 - (ii) quarterly reports, on a rolling 12-month basis, of the projected inflows and outflows of the Fund and of the Projected Fund Ratio, and for any projected shortfalls or projected surpluses and make recommendations to the Committee for their approval;
 - (iii) quarterly reports, on a rolling 12-month basis, on the projected inflows and outflows of the Fund and of the Projected Fund Ratio, as well as statements on how any projected shortfalls are intended to be addressed which reports shall be submitted to contracting authorities and service providers, within 45 business days of the end of each quarter, following approval by the Committee;
 - (iv) quarterly and annual non-financial reports on the performance of the Fund in accordance with the Act; and
 - (v) preparation, signature, and with the approval of the Committee, transmission to the Auditor-General in respect of each financial year a statement of account relating to the Fund in such form and within such timelines as the Public Sector Accounting Standards Board established under section 192 of the Act may from time to time specify in accordance with the Act, a copy of which statement of account shall be filed with the National Treasury:

Provided that—

- (aa) for the purpose of paragraphs (c)(i) and (c)(ii), the Officer Administering the Fund, in making projections for the purpose of determining surpluses or addressing shortfalls, shall take into account such macroeconomic forward-looking assumptions derived from recognised and reputable independent sources for macroeconomic forecasts, to the extent these are available, such assumptions to be used both to produce traffic and revenue forecasts as well as to forecast future service payments, and may retain advisors for this purpose; and
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- (bb) the Officer Administering the Fund may recommend to the Committee, and the Committee may issue, such guidelines on conditions to be met before surpluses are declared and or withdrawn, taking into account the liabilities of the Fund, as may be necessary for the better carrying out of the objects of this regulation;
- (d) implement the Fund's investment policies with respect to declared surpluses as established by the Committee, which shall include—
 - (i) recommendations on the declaration of projected surpluses and their usage or application;
 - (ii) investment of surplus cash in approved Short-Term Liquid Instruments; and
 - (iii) raising additional resources for the Fund;
- (e) human resource management within the Fund, which shall include—
 - (i) recommendations on the appointment of Fund Secretariat staff to the Committee;
 - (ii) appointment of required, suitably qualified, independent experts or advisors, to prepare or advise on the preparation of the traffic and toll revenue projections supporting the estimates of inflows, and the estimates of payments to be made under project agreements supporting the estimates of outflows, and consult with the contracting authorities and service providers as necessary;
 - (iii) meeting the costs of advisors appointed by the Committee; and
 - (iv) performing any other function that the Committee may, consistent with these Regulations, delegate and require to be undertaken.
- (4) Subject to the approval of the Committee, the Officer Administering the Fund may outsource some of its functions to agents or experts and advisors it may appoint for that purpose, which appointment shall be in writing, and time-bound.

(5) The act of outsourcing the performance of a function of the Officer Administering the Fund to an appointed agent, expert or advisor shall not divest the Officer Administering the Fund of the responsibility to ensure that the function is effectively and efficiently performed in the public interest or on behalf of public service as set out in these Regulations.

14. For the better implementation of the obligations under regulation 13(3)(c), (d) and (e), the Officer Administering the Fund shall—

Addressing
shortfalls in the
Fund.

- (a) calculate the Projected Fund Ratio for each quarter of the immediate subsequent 12-month period with the view to determining whether the Fund shall realize a Projected Shortfall or Projected Surplus for the forecast period;
- (b) upon the establishment of the Fund, and for as long as toll revenues lead to the realization of projected shortfalls in the Fund, where the Projected Fund Ratio is less than 1.3, cause to be appropriated such budgetary allocations as shall be adequate to cover the projected shortfall, that is, bring the Projected Fund Ratio to at least 1.3; and
- (c) make recommendations to the Committee on the carrying capacity of the Fund, and the Committee shall advise the Cabinet Secretary on the advisability and implications of admitting new project liabilities into the Fund.

15. (1) Projected shortfalls in the Fund shall be evidenced by—

Determining shortfalls in Fund.

- (a) contracted obligations under project agreements; and
- (b) quarterly estimates of inflows and outflows of the Fund prepared by the Officer Administering the Fund, as prescribed under Regulation 13(3)(c).

(2) For purposes of sub-regulation (1), the Officer Administering the Fund shall, at the start of the Fund, prepare and submit to the Committee for approval a detailed methodology for the determination of the quantum of projected shortfalls, as the basis for resolution of such projected shortfalls within the annual budget framework.

(3) The methodology referred to under sub-regulation (2) shall be subject to such periodic reviews as the Committee shall determine, taking into account actual experiences observed from the tolling programme.

16. The Officer Administering the Fund shall appoint such staff, in consultation with the Committee, as shall be deemed necessary to constitute the Fund Secretariat for the purposes supporting the discharge of the functions of the Officer Administering the Fund under these Regulations.

Fund Secretariat.

17. Disbursements out of the Fund shall be bound by the following broad principles—

Eligibility of disbursements out of Fund.

- (a) disbursements to service providers and toll operators shall be on the basis of contracted obligations of a contracting authority under a project agreement, as included in the approved annual budget of the Fund and shall be against proper documentation as detailed in regulation 18; and
- (b) disbursement of projected surpluses shall be subject to formal approval of the Cabinet Secretary as detailed in these Regulations.

18. (1) The Officer Administering the Fund shall satisfy himself or herself, with respect to every payment instruction received from a contracting authority—

Payment procedure by the Officer Administering the Fund.

- (a) that each payment instruction is made in writing and authenticated by the certificate of the contracting authority as to the payment amount, the nature of services rendered or the compensation due against which the payment instruction is submitted and the payment recipient;
 - (b) that the payee's account is the same one indicated in the project agreement or where appropriate the payee's account pursuant to the provisions of the lender's direct agreement, unless an alternative payee has been communicated in writing to the Officer Administering the Fund by a contracting authority in accordance with a project agreement or a lenders' direct agreement entered into between the relevant contracting authority, service provider or the toll operator and project's financiers, as the case may be, payments to which alternative payee shall amount to complete and final discharge of the Fund and the contracting authority to the service provider and all its financiers for that particular invoice; and
 - (c) that the payment processes of the Officer Administering the Fund, including the execution of the powers reserved for him or her under these Regulations shall be completed and payments made no later than the time stipulated for such payments under a project agreement.
- (2) The Officer Administering the Fund shall specify forms and documents to be used by contracting authorities in submitting payment requests to the Fund, in accordance with the requirements of a project agreement.
- (3) All payment requests to the Fund shall be submitted to the Fund not later than twenty one Business days before the due date for such payment, without prejudice to any larger period to the extent such is provided for under a project agreement.
- (4) Any application for payment under this regulation shall, without prejudice to any provision in these Regulations, be supported by such documents as may be required under a project agreement, including the following—
- (a) the name and address of the payee;
 - (b) the bank account details of the payee;
 - (c) an invoice from the contractor or other eligible contract party;
 - (d) any certificate required from a contracting authority and any independent expert under the terms of a project agreement;
 - (e) a certified payment voucher, with all material fields duly populated and vetted; and
 - (f) any other information as may be specified by the Officer Administering the Fund under sub-regulation (2) of this regulation.

19. The Officer Administering the Fund shall, where it establishes that the requirements in regulation 18 have not been met in any material particular, have the right to request for clarification and rectification from the contracting authority, and the power to withhold disbursements against invoices until such matters are resolved.

Right to question and withhold payment instruction.

20. (1) The Officer Administering the Fund shall cause to be opened in the name of the Fund such bank accounts for the Fund in a bank or banks approved in accordance with section 28 of the Act, as may be necessary for the purposes for which the Fund is established.

Opening of accounts, and equality of Fund liabilities.

(2) All liabilities relating to contracted obligations of the Fund shall be settled in the manner prescribed under this regulation.

(3) The Officer Administering the Fund shall open sub-accounts in the name of each project road supported under the Fund, and into which sub-account shall be remitted all toll revenues realized from the said project road by a private party pursuant to these Regulations.

(4) Funds within a project sub-account shall be applied to the following purposes in the following order, and for which reason the Officer Administering the Fund shall establish a cash waterfall –

- (a) payments for the toll operator;
- (b) payments for the service provider;
- (c) proportional payments to meet the costs of the Officer Administering the Fund;
- (d) any professional fees incurred in the proper discharge of obligations under the Regulations by the Officer Administering the Fund and the Oversight Committee:

Provided such fees shall be proportionally met out of the various project sub-accounts where the advisory relates to a portfolio-wide matter, and allocated to a specific project sub-account, where the advisory relates to issues on that individual project road;

- (e) any other payment declared to be eligible and directly linked to the project road supported under the Fund.

21. The Officer Administering the Fund shall ensure that no bank accounts of the Fund are overdrawn.

Fund not to be overdrawn.

22. (1) Further to regulation 14 and upon the establishment of the Fund, and until toll revenues collected on annual basis attain such a scale that the Projected Fund Ratio is equal to or exceeds 1.3 times annual obligations of the Fund, the Officer Administering the Fund shall cause to be appropriated such budgetary allocations as shall be adequate to meet the Fund's projected shortfall, and this shall be an ongoing duty until such a time as toll revenues attain a Projected Fund Ratio of 1.3 or more.

Procedure for prefunding the Fund.

(2) The Officer Administering the Fund shall, for purposes of this regulation, observe the budget process for national government entities as prescribed in the Act.

23. (1) Where, and pursuant to regulation 13(3) (c) and (d), there is a projected surplus, the Committee, on the advice of the Officer Administering the Fund, may recommend to the Cabinet Secretary the declaration of a projected surplus in the Fund, subject to sub-regulation (2) of this Regulation.

Declaration and use of surplus Funds.

(2) A projected surplus may only be declared where the Projected Fund Ratio is derived against actual cash balances held within the Fund and not projected inflows.

(3) Subject to sub-regulation (4) of this regulation, and regulation 13, projected surpluses may be paid out of the Fund into the National Exchequer Account, provided such withdrawal does not exceed the amount of the projected surplus and does not lead to a projected shortfall.

(4) Where projected surpluses are taken out of the Fund under the terms of these Regulations, the surpluses shall be paid into the National Exchequer and applied to such purposes as shall be determined by the Cabinet Secretary within the national budget framework.

24. All receipts, savings and accruals of the Fund and the balance of the Fund at the close of each financial year, shall be retained for the purpose for which the Fund is established.

Moneys to be retained in Fund.

25. The Officer Administering the Fund shall ensure the administration costs of the Fund are managed within the framework permissible under the Act.

Administrative costs.

26. The Officer Administering the Fund shall establish systems, protocols and procedures necessary to ensure that –

Superintendence of Fund expenditure

- (a) the Fund's expenditure is controlled and is monitored, on an annual basis, against the Fund's approved revenue and expenditure plan;
- (b) withdrawals from the Fund are only for the purposes of payment of approved expenditure in accordance with these Regulations; and
- (c) the records of expenditure relating to the Fund are kept and maintained in accordance with the provisions of the Act and Regulations made thereunder.

27. In furtherance of its mandate under these Regulations, the Officer Administering the Fund shall have power –

Access to information.

- (a) to access any project related data that he or she may need from contracting authorities in furtherance of his or her functions with respect to invoice settlement;
- (b) to call for such additional information with respect to requests for payments out of the Fund as are necessary to satisfy the requirements of regulation 18;
- (c) to issue financial management guidelines upon approval of the Committee relating to the purposes and objects of these Regulations; and

- (d) to publish at the start of each financial year, on its website, the following information –
- (i) amount and source of money received into the Fund as at the close of the previous financial year;
 - (ii) clear credit balances of available funds for the current financial year;
 - (iii) quantum of committed eligible expenditure for the current financial year;
 - (iv) total number of projects and other eligible activities supported under the Fund for the current financial year; and
 - (v) such other information that Fund stakeholders may reasonably request, and approved by the Committee, from time to time.

28. The existing government financial and procurement Regulations shall, to the extent they relate to the administration of public funds established under the Act, apply in the administration of the Fund.

Government
financial
Regulations.

29. The Officer Administering the Fund shall prepare and submit to the Committee and the Cabinet Secretary, within three months after the end of each financial year, an annual Fund performance report relating to the previous financial year, detailing the extent to which the Fund met its regulatory and development objectives in the period under review, and highlighting challenges, threats and opportunities for the enhanced effectiveness of the Fund in promoting the public interests secured under these Regulations.

Submission of
annual
performance
reports.

30. The provisions of the Act relating to offences by public officers, including financial misconduct, shall apply to these Regulations.

Misconduct of
public officers.

31. (1) The Cabinet Secretary shall at the elapse of ten years from the date of commencement of these Regulations cause a review to be conducted of the performance of the Fund in accordance with the requirements of the Act.

Review of
performance of
the Fund.

(2) The review shall determine whether the Fund has met the objectives for which it was established.

(3) The report on the review shall be submitted to the Cabinet for approval.

(4) The review of the performance of the Fund under this regulation 31 shall be without prejudice to the obligations of the Oversight Committee and the Officer Administering the Fund prescribed under these Regulations for the more frequent reviews of the Fund's performance, in particular under Regulations 5, 10, 13, 14, 15, 22, 23, 26 and 29.

32. (1) The Cabinet Secretary may, subject to the approval of the National Assembly, wind up the Fund where the Cabinet Secretary

Alternative
Arrangements and
Winding Up.

considers that the Fund has successfully completed the specific objectives for which it was created, or where it is demonstrated the Fund has irredeemably failed to meet such objectives.

(2) Despite the provisions of sub-regulation (1), the Cabinet Secretary may wind up the Fund if—

- (a) the Fund no longer has obligations to eligible parties under these Regulations, or where such obligations exist, upon demonstration that alternative arrangements agreed with all project participants have been put into place to meet such obligations; and
- (b) the Committee has made its recommendations supporting such winding up or the set up of such alternative arrangements, and which opinion shall have taken into account any views and representations of any project participant supported under or through the Fund; and
- (c) the Cabinet has considered and approved the recommendation of the Cabinet Secretary to wind up the Fund or to set up such alternative arrangements, and Cabinet grants approval for such winding up to be moved before the National Assembly.

(3) On the winding up of the Fund –

- (a) the Officer Administering the Fund shall call on the contracting authorities to request from the respective service providers or toll operators or other project parties or their agents financial statements to confirm that there are no valid outstanding obligations to service providers or toll operators or other involved project parties and commitments for payment;
- (b) subject to paragraph (a), the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the national government;
- (c) the Cabinet Secretary shall pay any deficit in the Fund, and shall meet any residual liabilities of the Fund at the time of such winding up from the funds of the national government in the National Exchequer Account with the approval of the National Assembly;
- (d) assets other than cash of the Fund shall be transferred to the National Treasury; and
- (e) the Fund Secretariat shall be disbanded.

(4) The Officer Administering the Fund shall prepare, and the Cabinet Secretary shall submit to Parliament and to the Auditor-General, a final statement of accounts for audit within nine months from the date of the decision to wind up the Fund.

33. The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 made under the Public Roads Toll Act are hereby revoked.

Revocation of L.N
No.307/1986.

Made on the 29th October, 2021.

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

LEGAL NOTICE No. 223

THE TAX PROCEDURES ACT

(No. 29 of 2015)

IN EXERCISE of the powers conferred by section 112 of the Tax Procedures Act, 2015, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE TAX PROCEDURES (UNASSEMBLED MOTORCYCLES)
(AMENDMENT) (NO. 2) REGULATIONS, 2021

1. These Regulations may be cited as the Tax Procedures (Unassembled Motorcycle) (Amendment) (No. 2) Regulations, 2021. Citation.

2. Regulation 14 (1) of the Tax Procedures (Unassembled Motorcycle) Regulations, 2020, is amended— L.N. 112/2020.

(a) by deleting paragraph (c) and substituting therefor the following new paragraph—

(c) pillion handle bar or pillion or grip set; and

(b) in paragraph (f), by deleting the words ‘side stand, kick stand and prop stand’ and substituting therefor the words “side stand, kick stand or prop stand”.

Dated the 29th October, 2021.

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

ANNEX 1

MATRIX OF RESPONSES TO THE COMMENTS FROM THE COMMITTEE ON DELEGATED LEGISLATION on the PFM (NATIONAL ROADS TOLL FUND) REGULATIONS 2021, DRAWN FROM THE MEETING HELD AT WHITESANDS HOTEL IN MOMBASA ON 1ST SEPTEMBER 2021

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Resolutions by the National Treasury
1	General point	The Regulations appear to apply to 'National Roads'. This may lead to inequity for other roads ie KeNHA and KERRA roads.	The Public Roads Toll Act (Cap 407) is the principal legislation on tolling and deals with all public roads regardless of location. Section 6A of this Act establishes the National Roads Toll Fund and requires that it be established under the PFMA, 2012. The Act has a framework on how public roads and structures can be declared toll roads by the sector. The present Regulations therefore fulfil the mandate under the Public Roads Toll Act by establishing the Fund.
2	Regulation 3	The purpose of the Fund appears unclear. When does it stop operating?	<p>The objects and purpose of the Fund are outlined under Section 6A(3) of the Public Roads Toll Act and Regulation 3 of the draft PFM(National Roads Toll Fund Regulations) as follows:</p> <p><u>Section 6A(3) of the Act: "The purpose of the Fund shall be to provide funds for the –(a) proper functioning of toll roads and toll stations; and (b) development, repair or maintenance of roads as the Minister may direct, taking into account regional balancing.</u></p> <p><u>Regulation 3 of the draft Regulations</u> provide that the purpose of the Fund is to:</p> <ul style="list-style-type: none"> a) to establish a centralized Fund into which all revenues collected pursuant to these Regulations shall be paid and administered; b) to provide for the oversight and administration of the Fund; c) to prescribe the processes by which money is paid into and out of the Fund; d) to provide investors in and financiers of project roads, as well as the general public, necessary information on the status of the Fund to support investment decisions; and e) to make provision for purposes connected with and incidental to the foregoing objects and purposes.

ANNEX 1

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Resolutions by the National Treasury
3	Regulation 7	The Regulation deals with payments out of the Fund. What are 'political events'. Why do we compensate for political events, and how do we pay for them? Why not use the terminology 'political risks'?	'Political Events' are a closed list of risks specified in the Project Agreement and attributable to Government. To avoid possible confusion with the use of 2 distinct references ie 'political risks' in the Regulations and 'political events' in the Project Agreements, there is no additional definition in the Regulations
4	Regulation 8(1)(e)	Deals with the establishment of the Oversight Committee and the appointment of non-public officers (private sector representatives). This should be done through a competitive process.	Agreed. Regulations have been amended to incorporate the requirement for a competitive recruitment process.
5	Regulation 11(1)(e)	The Regulation deals with Vacation of Office of a non-public officer on the Oversight Committee and permits an officer to remain on the Committee if the conviction is less than six months. Conviction on account of dishonesty or moral turpitude, regardless of the severity of punishment or sanction, should be the trigger for termination of appointment.	Agreed. The six-month condition has been deleted.
6	Regulation 12	Deals with the appointment of the Officer Administering the Fund. The OAF appointment procedure should be competitive, and there should be a formal appointment procedure declared in the Regulations. Need to also include minimum qualifications.	The designation of the OAF is based on Section 24(5) of the PFMA, 2012 which provides that the Cabinet Secretary shall designate a person to administer every national public fund established under subsection (4). The precedent therefore with other Regulations under the PFMA (eg the PFM (Strategic Food Reserve Trust Fund) Regulations, 2015 and the PFM(State Officers House Mortgage Scheme Fund) 2015), has been to replicate the provisions of the parent statute and provide for the "designation" of the Officer Administering the Fund rather than have an appointment process.
7	Regulation 14	Regulation 14 appears to be a tacit subsidization of laziness and poor project selection. Why should shortfalls arise if the Feasibility	Toll revenue failure is not really linked to poor project selection or laziness but has everything to do with the social acceptability of tolls,

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#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Resolutions by the National Treasury
8	Regulation 26	<p>Study was adequate, so the taxpayer need not carry this cost? Only commercially viable projects should progress.</p> <p>Regulation 26 on superintendence of Fund expenditure gives the Officer Administering the Fund (OAF) room to make other guidelines. It therefore appears the OAF has power to do things that border on further issuance of regulations: OAF role should be definitive and express, to curb abuse.</p>	<p>and potentially permutuation in traffic volumes in future. It is a necessary provision for the bankability of the NRTF Regulations</p> <p>The concern is addressed through the systems, protocols and procedures that the OAF must establish under this part, which are overseen by the Oversight Committee. To reinforce the oversight function, Regulation 10(1)(e) provides that the Committee shall approve the systems for the control and oversight of the operation of the Fund.</p>
9	General	Which Principal or Cabinet Secretary does the Oversight Committee report to? In which Ministry is the Fund domiciled?	The Principal Secretary, National Treasury is the Chairperson of the Committee. The Cabinet Secretary, National Treasury and Planning also has an important role under the Regulations, including authorising withdrawals of projected surpluses from the Fund; ensuring sustenance of the governance framework of the tolling framework with the view to promoting the long-term financial integrity of the Fund; approving the financial institution where the Fund shall be administered; appointing non- public officers to the Committee; amongst other key roles
10	General	Will the Regulations amount to double taxation since people will pay fuel levy as well as the proposed tolls?	Tolling does not amount to double taxation. RMLF only funds maintenance which is not adequate for the entire road network of 160,876km. The maintenance requirement for the entire network is KES 40B against an annual collection of 25B. This clearly depicts the funding gap and the outstanding maintenance backlog for paved roads only which is estimated at 400B to date. Therefore, tolls will be used to develop and maintain the specific project roads and it will be a portion of savings realized by road users because of improved levels of service. Toll roads will not receive any allocations from the RMLF.
11	General	There is a fuel levy fund administered by the Kenya Roads Board. Are we not establishing too many funds for the roads sector?	The RMLF is a fund purely dedicated to road maintenance. The proposed National Roads Toll Fund Regulations will only deal with tolling of roads

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12	General	There are several others already existing. What impact will this Fund have? The full architecture of who will collect the tolls and how is not clear from the Regulations.	The main purpose of the Regulations is to establish a centralised Fund. Details on how the tolls will be collected is outlined under the provisions of the Public Roads Toll Act (Cap 407).
13	General	On public participation in the making of the regulations, Treasury should table actual evidence of public participation, not just a summary.	Agreed. The file containing the evidence of public participation is available for review
14	General	The National Treasury needs to coordinate civic education on the tolling structure and sensitize Kenyans to understand the process and where the tolls will be effected.	This is ongoing in liaison with KeNHA.
15	General	Toll stations operate elsewhere. Pick examples to benchmark against. Highlight success stories and explain the legal framework under which they are established. Is it through a statute, rules and regulations?	A good example within Africa is the N4 Highway, which links the economic heartland of South Africa (Gauteng Province) to Maputo Port in Mozambique. The rehabilitation and tolling of the 571-kilometer highway is considered a major success and demonstrates the power of political cooperation between neighbouring countries and the benefits of PPP deals to the private and public sectors. In terms of the legal frameworks there are several parallels that can be drawn to the Kenyan scenario including: the commencement of the tolling process through a National Tolling Policy; the establishment of the Road Fund under the National Roads Act; the exclusivity of the use of the tolls collected such that they are only spent on funding, development and operations of toll roads and do not go to the general fiscus.
16	General	There should be a provision for suspension of Oversight Committee members and the Officer Administering the Fund upon the commencement of formal investigations.	Since the PSC Act 2017 only prescribes suspension by an authorised officer in situations where the officer has been charged with a serious criminal offence, these provisions would apply to the OAF who is a public servant.