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**THE PUBLIC FINANCE MANAGEMENT (BIASHARA KENYA FUND)  
REGULATIONS, 2020**

**ANALYSIS AND RECOMMENDATIONS (PART II)**

**Submitted To**

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## SECTION II

### 1. INTRODUCTION

**T**his brief, which should be read together with SECTION I (previous one already submitted) of this report, clarifies certain aspects the Task Force on the Public Finance Management (Biashara Kenya Fund) Regulations, 2020 (hereafter BKFR) wished to know following its virtual engagement with the African Women’s Studies Centre (AWSC) on Tuesday, 21 July 2020. It also raises one matter that the AWSC considers important for the Task Force (TF) to note having now had the benefit of reviewing the documents concerning the BKFR to which its attention was drawn by the TF.

The two issues that the TF wished to know from the AWSC are:

1. Proposals regarding the Selection Process to be Utilised by the Cabinet Secretary in respect of Members under Regulation 8(F) of the above stated Regulation; and
2. An Analysis of the Transition Instruments on the National Treasury Website for:
  - i. The Youth Enterprise Development Fund (YEDF);
  - ii. UWEZO Fund; and
  - iii. The Women Enterprise Fund

### 2. SELECTION PROCESS

**Proposals regarding the Selection Process to be Utilised by the Cabinet Secretary in respect of Members under Regulation 8(F) of the above stated Regulation; and**

Regulation 8(f) of the BKFR provides that the Advisory Board of the Fund shall comprise among others, *“four other persons, not being public officers, appointed by the Cabinet Secretary for time being responsible for gender affairs.”*Evidently, the Cabinet Secretary (CS) is vested with the discretion of selecting the four persons. In this regard, the AWSC wishes to raise two key points:

- i. Firstly, and as already stated in our previous brief, it is of utmost importance that Regulation 8(f) states particularly that the four persons will be drawn from among the beneficiary categories which in this case are women, youth, persons with disability and micro, small and medium sized enterprises. This will enable articulation of the issues concerning the beneficiary categories from a point of relevance; will promote a sense of ownership of the BKF and its products by the beneficiary categories; and will provide a necessary linkage between the BKF and its constituencies.

- ii. Secondly, from past experience in similar situations, the process of identification of independent members of boards/councils to be drawn from constituencies can be fraught with problems arising from the method of arriving at the said persons. Given AWSC's suggestion in (i) above that the four persons be drawn from constituencies of the beneficiary categories, AWSC wishes to propose that in so arriving at the select four persons, the CS do convene caucuses with the recognised organisations championing the respective issues of the beneficiary categories. Within this space, it is suggested that the CS facilitates the formulation of a cogent criteria for selecting the representative of the respective caucus and thereafter the execution of the selection process. The AWSC considers this suggested route to be advantageous because of the consultative process that would necessarily be undertaken in arriving at the said representative who would have broad acceptance from their peers within the respective category. It would also avoid the bias that would immediately be created where the CS unilaterally selects four persons with no explanation as to why they were selected and possibly being persons that are unpopular among the respective beneficiary categories thus poisoning the chances of the BKF getting off onto a good start.

Where any of the four persons becomes rogue or ceases to be a useful member of the BKF Advisory Board, the AWSC would state that the pathways for removal of such a person, whether by the CS or on the instigation of the other members of the Advisory Board, already exist and are quite clear in the prescriptions laid out in Mwongozo.

### **3. TRANSITION MECHANISM**

#### **An Analysis of the Transition Instruments on the National Treasury Website for: The Youth Enterprise Development Fund (YEDF), Uwezo Fund and the Women Enterprise Fund.**

To address the above, some parameters of the Transition instruments have been compared in the following table to highlight any similarities or differences in process. In particular, the instruments are:

- i. The Public Finance Management (Uwezo Fund) Regulations, (Revocation) Regulations, 2020;
- ii. The Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2018; and

iii. The Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2020

S/NO.	PARAMETER	UWEZO	YEDF	WEF	REMARKS
1.	<b>Mode of Dis-Establishment</b>	Upon enactment of these Regulations, the Immediate winding up of the Fund by the CS, National Treasury and Planning in exercise of powers granted under the Public Finance Management Act	Upon enactment of these Regulations, the Immediate winding up of the Fund by the CS, National Treasury and Planning in exercise of powers granted under the Public Finance Management Act	Upon enactment of these Regulations, the Immediate winding up of the Fund by the CS, National Treasury and Planning in exercise of powers granted under the Public Finance Management Act	The three funds are all scheduled for immediate dissolution upon the enactment of the respective Regulations.
2.	<b>What happens to the monies in the Fund upon its dissolution?</b>	Shall be paid into the National Exchequer Account for the credit of the national government.	Shall be paid into the National Exchequer Account for the credit of the national government.	Shall be paid into the National Exchequer Account for the credit of the national government.	All three Funds shall surrender any existing funds as at the time of dissolution to the National Exchequer
3.	<b>What happens to the assets of the Fund upon its dissolution</b>	No express provision	No express provision	No express provision	It remains unknown what will happen to the assets and this should not be left to conjecture.
4.	<b>What happens to any deficits in the Fund upon dissolution?</b>	CS NT to pay from funds of the national government in the National Exchequer Account upon approval of national assembly	CS NT to pay from funds of the national government in the National Exchequer Account upon approval of national assembly	CS NT to pay from funds of the national government in the National Exchequer Account upon approval of national assembly	Evidently the liabilities of the three Funds will be picked up by the National Exchequer
5.	<b>What happens to the loans between beneficiaries of this fund upon its dissolution?</b>	Becomes a continuing loan with BKF with the same rights and obligations as already existed under this fund.	Becomes a continuing loan with BKF with the same rights and obligations as already existed under this fund.	Becomes a continuing loan with BKF with the same rights and obligations as already existed under this fund.	Clearly, the BKF will wholly become the successor of the three Funds upon their dissolution with loan beneficiaries continuing their relationship with the BKF.
6.	<b>What happens to the staff of</b>	They become the staff of the BKF	Not provided for.	1. Those serving on contract	The staff of the three Funds have

S/NO.	PARAMETER	UWEZO	YEDF	WEF	REMARKS
	<b>this fund upon its dissolution?</b>	following the administration of the requisite employment procedures by the Administrator of the fund. Those staff wishing to exit the BKF or those who do not meet the vetting criteria may be re-deployed or deployed respectively.		<p>shall continue to do so for the unexpired term provided they meet the vetting criteria.</p> <p>2. Government employees shall be treated in the exact same way as prescribed in the adjacent Uwezo Revocation Regulations.</p> <p>3. Upon dissolution of the WEF, its staff immediately become the staff of BKF pending the formal appointment of staff to the BKF</p>	been treated differently upon dissolution of the Fund. However, it is clear that immediately upon the BKFR coming into force the staff of the WEF shall perform the functions of the BKF pending further appointment of others. Notably, no information is provided regarding what will happen to the staff of the YEDF and hence the historical information of the YEDF.

#### 4. REMARKS BY AWSC

For the AWSC, the most notable element from the above table is the manner in which the existing funds will be transitioned into the BKF that will subsume them upon the enactment of the BKFR and the dissolution of the three Funds. The AWSC is well aware that provided the three Funds have been run effectively and efficiently and provided also that the BKF will have equally, if not more effective and efficient mechanisms to administer it, then the transition process should provide no cause for alarm. Indeed if the ultimate objectives of the three existing Funds can be met through the one super structure of the BKF with the benefits of the merger realised, then this would be cause for celebration. However, the fact is that there have been challenges experienced in the administration of the three existing Funds that were outlined in our previous paper. For this reason, one may wish to exercise caution and prudence in the transition process. The following are some considerations:

- i. If the date of commencement of the BKF coincides with the date of dissolution of the three existing Funds, to what extent will the BKF have learnt from the key lessons inherent in the administration of the three existing Funds? It would appear prudent that these dates be staggered in order for the BKF not to carry over all the weaknesses of the three existing Funds in one fell swoop which would without a doubt sow seeds of failure

in the BKF at its advent. Upon its inauguration, it would be advisable for the BKF to focus on building systems and structures that incorporate the lessons learnt from the weaknesses of the other three Funds.

- ii. All three Revocation Regulations propose that any monies in these Funds revert to the National Exchequer while the Exchequer offsets any deficits apparent. The AWSC welcomes this because it provides a clean slate for the BKF to start and build from without the encumbrance of any existing liabilities. The AWSC would however propose that the annual funding of the BKF be based on a stated ratio that should be legislated in the appropriate instrument e.g. x% of the National Consolidated Fund. In this way when the Consolidated Fund goes up, the BKF monies are concomitantly increased.
- iii. It would be useful to understand why the staff of the three existing Funds are treated differently upon the dissolution of the Fund and particularly why the staff of the YEDF are not carried over to the BKF in the same way as those of the WEF and UWEZO Fund. There would be a clear loss of the historical knowledge from the YEDF where none of the staff are carried over.
- iv. The AWSC welcomes the vetting of staff of the existing Funds transitioning on to the BKF so as to avoid the carry-over of any elements of incompetence, corruption or mismanagement that could have been noted.
- v. The AWSC notes that whereas the Micro and Small Enterprises Authority Fund is also supposed to be collapsed along with the three Funds mentioned above to form the Biashara Kenya Fund, no mention is made about the process of collapsing this Fund and its transition into the BKF. It would be useful to know what arrangements are in place to wind up the Micro and Small Enterprises Authority Fund and the transition mechanism into the BKF as well as what will be carried over into the new Fund.
- vi. It is not certain what will happen upon dissolution of the three Funds to the pre-existing partnerships entered into between them and third parties during the course of their business. This needs to be clarified because there may be partnerships that were formed which are unique to each of the beneficiary categories that should be maintained for the benefit of those persons.

## 5. SUMMARY OF RECOMMENDATIONS

Clause	Regulation	Provisions of the Regulation	Rationale for Amendment & Recommendation	Proposed Amendment to the Regulation
8(f)	Public Finance Management (BiasharaKenya Finance-BKF)Regulations, 2020	<i>“four other persons, not being public officers, appointed by the Cabinet Secretary for time being responsible for gender affairs”.</i>	<p>A representation of the beneficiary categories in the Management of the Fund will enable articulation of issues from a point of relevance; promote a sense of ownership of the BKF and its products by the beneficiary categories; and provide a necessary linkage between the BKF and its constituencies</p> <p>It would also avoid the bias that would immediately be created where the CS unilaterally selects four persons with no explanation as to why they were selected and possibly being persons that are unpopular among the respective beneficiary categories thus poisoning the chances of the BKF getting off onto a good start.</p>	<p>The Regulation 8(f) should state that the four persons will be drawn from among the beneficiary categories which in this case are women, youth, persons with disability and micro, small and medium sized enterprises.</p> <p>The CS to convene caucuses with the recognized organizations championing the respective issues of the beneficiary categories.</p> <p>CS facilitates the formulation of a cogent criteria for selecting the representative of the respective caucus and thereafter the execution of the selection process</p>
2	<p>The Public Finance Management (Uwezo Fund) Regulations, (Revocation) Regulations, 2020;</p> <p>The Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations, 2018;The Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2020</p>	<p>Mode of de-establishment: <i>Upon enactment of these Regulations, the Immediate winding up of the Fund by the CS, National Treasury and Planning in exercise of powers granted under the Public Finance Management Act;</i></p>	<p>There have been challenges experienced in the administration of the three existing Funds and therefore there is need to exercise caution and prudence in the transition process.</p>	<p>Staggering of dates in order for the BKF not to carry over all the weaknesses of the three existing Funds in one fell swoop which would without a doubt sow seeds of failure in the BKF at its advent</p> <p>BKF should focus on building systems and structures that incorporate lessons learnt from the weaknesses of the other three funds upon its inauguration.</p>
4	Regulations (WEF and UWEZO)	<p>Upon dissolution of the WEF and UWEZO, its staff immediately become the staff of BKF pending the formal appointment of staff to the BKF.</p>	<p>While the transition of the UWEZO and WEF staff have been provided for, no information is provided regarding what will happen to the staff of the YEDF and hence the historical information of the YEDF is likely to be lost.</p>	<p>Staff of the three existing Funds should be treated equally and transitioned to BKF to avoid a loss of historical knowledge.</p>



			To avoid the carry-over of any elements of incompetence, corruption or mismanagement that could have been noted.	Vetting of staff of the existing Funds transitioning on to the BKF
	PFM(BKF) Regulations 2020	Whereas the Micro and Small Enterprises Authority Fund is also supposed to be collapsed along with the three Funds, no mention is made regarding the process of collapse and its transition into BKF		It would be useful to know the arrangements in place to wind up the Micro and Small Enterprises Authority Fund and the transition mechanism into the BKF as well as what will be carried over into the new Fund.
	PFM(BKF) Regulations 2020	All three Revocation Regulations propose that any monies in these Funds revert to the National Exchequer while the Exchequer offsets any deficits apparent	This provides a clean slate for the BKF to start and build from without the encumbrance of any existing liabilities	The annual funding of the BKF should be based on a stated ratio that should be legislated in the appropriate instrument e.g. x% of the National Consolidated Fund. In this way when the Consolidated Fund goes up, the BKF monies are concomitantly increased.
	PFM(BKF) Regulations 2020	What will happen upon dissolution of the three Funds to the pre-existing partnerships entered into between them and third parties during the course of their business	There may be partnerships that were formed which are unique to each of the beneficiary categories that should be maintained for the benefit of those persons	This needs to be clarified for easier transition into the BKF.
	PFM(BKF) Regulations 2020	There is a lack of Clauses that Entrench Affirmative Action Principles Intrinsicly	<p>To avoid conflation of the needs of the vulnerable persons in need of affirmative action measures and those of micro, small, and medium enterprises, it is necessary that the Regulations and general legal framework are inherently built with affirmative action clauses</p> <p>To avoid the competition that would no doubt arise between vulnerable persons and micro, small and medium enterprises over resources that are finite.</p>	<p>BKF should be allocated 2.5% of the Consolidated Fund in the same way that the Constituency Development Fund is funded;</p> <p>There be a clear delineation of how much of the BKF will go towards affirmative action measures targeted at the beneficiary categories of women, youth and persons with disability. AWSC proposes that 70% of the fund is put towards lending of persons in the aforementioned groups</p> <p>That the BKF be demarcated over the 47 Counties of Kenya so that all persons in the beneficiary categories from the entire country can have access to the Fund. Following from the proposal in (b) above, this would mean that of the 70% (Kes. 2.45B) that would be allocated for vulnerable categories, then it would be divided equally across the 47 counties or in any other way deemed just and equitable.</p>

BKFR 7  7 (a); 13 & 14	Object and purpose of the Fund  The implementation of the recommendations by the Presidential Taskforce on Parastatal Reforms of 2013. The Taskforce recommended merger of all Funds and initiatives for supporting, financing and developing SMEs, including the Micro and Small Enterprises Authority Fund, Youth Enterprise Development Fund (YEDF), Women Enterprise Fund (WEF) and the Uwezo Fund to form Biashara Kenya Fund. All these Funds have the same objective of developing Micro, Small and Medium Scale Enterprises, with a greater emphasis to those owned by youth, women and persons living with disabilities.	Questions as to whether the objectives of the BKF with respect to the category of women, youth and persons with disability can be met as the BKFR currently exist.  The implication of the above statement is to lump two un-alike entities together namely persons who are vulnerable among women, youth and PWDs, together with micro, small and medium sized enterprises. Notably, there is no strict appreciation of the difference between these two groups of beneficiaries in the BKFR	The criteria for lending to vulnerable persons among women, youth and PWDs be completely separated from that of micro, small and medium enterprises. The reason for this is that vulnerable persons are unlikely, and may even be completely unable, to meet the eligibility criteria for lending as described in Regulations 13 and 14.
3	There is established a Fund to be known as the Biashara Kenya Fund	Appropriateness of the Name of the Fund – ‘Biashara’ to the Affirmative Action Categories.	The AWSC would propose the name ‘Jitegemee Fund’ to replace the word Biashara because it connotes empowerment which is acceptable across the board.

**Submitted by:**

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**Signature:**



**Date:** 2<sup>nd</sup> August 2020

**Director, African Women Studies Centre**