

Approved for tabling

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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. George G. Murugara, MP
Tharaka Constituency
Jubilee Party

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. 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 Ogutu**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 Ogutu, a lawyer and Member of the Stanbic Kenya Retirement Benefits Scheme) detailing

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

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.**

eliudogutu

advocate | commissioner for oaths

6th August 2019

The Clerk of the National Assembly,
Parliament Buildings,
Parliament Road,
NAIROBI.

FAO: Chair, Committee on Delegated Legislation

Dear Sir,

Legal Notice Number 88 of 2019 dated 13th June, 2019:
The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019.

I wish to record my objection to the publication of the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (the "Amendment Regulations") which were referred to your Committee by the National Assembly on the 25th June 2019 for consideration.

I am a member of a registered defined contribution pension scheme, the Stanbic Bank Kenya Limited Staff Retirement Benefit Scheme (the "Pension Scheme"), and my rights are adversely affected by the Amendment Regulations.

1. Background

The Cabinet Secretary for the National Treasury and Planning (the "Cabinet Secretary") has, through Legal Notice Number 88 of 2019 dated 13th June, 2019, published the Amendment Regulations which amended the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 (the "Regulations").

2. Effect of the Amendment Regulations

As a member of the Pension Scheme, my vested rights are directly affected by Amendment Regulations in the following manner:-

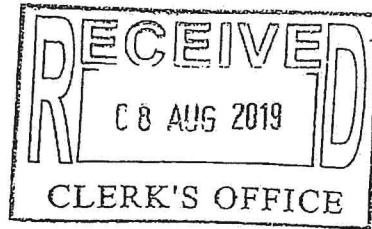
- 2.1 Regulation 19 (5) (a) (ii) of the Regulations has been amended by the Amendment Regulations to now read as follows: "the scheme rules shall provide that: where a member leaves employment after vesting of his benefits but before attaining the specified early retirement age, he may opt for payment of his own contribution where he is a member of a defined contribution scheme."

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② SUSAN
Please deal
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advocate | commissioner for oaths

Prior to the amendment, the Regulation 19 (5) (a) (ii) read as follows: "*the scheme rules shall provide that: where a member leaves employment after vesting of his benefits but before attaining the specified early retirement age, he may opt for payment of his own contribution and fifty per cent of his employer's contribution and the investment income that has accrued in respect of those contributions, where he is a member of a defined contribution scheme.*"

2.2 The effect of this amendment is that where an employee's contract of employment is terminated before the employee has reached the retirement age provided for in the Trust Deed and/or the Pension/Provident Fund Rules:-

1. the employee will no longer be entitled to withdraw fifty (50) per cent of the employer's portion of contributions and the investment income gained from the employer's contributions until the employee attains the retirement age; and
2. the employee will no longer be entitled to the investment income gained from the employee's own contribution.

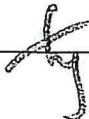
This fundamentally alters the previous position under the Regulations where an employee was entitled to his contribution in full plus fifty (50) per cent of the employer's contribution and the investment income that had accrued from the said contributions. The absurd situation here is that the employee cannot even access the investment income accrued from his own contributions even though he is allowed to withdraw his own contributions!

3. Lack of Public Participation

These amendments to the Regulations are far-reaching and should be subjected to public participation as required by Articles 10 (1) (b) and (c) and 10 (2) (a) of the Constitution of Kenya and Section 5 (1) (2) and (3), 6, 8, 9, and 11 of the Statutory Instruments Act. At no point has the Cabinet Secretary sought the views of the Pension Fund, or other members of pensions schemes at large, before publishing the Amendment Regulations.

The Cabinet Secretary failed to conduct public participation on the Amended Regulations despite the obvious impact of the same on personal financial planning and general well-being of members of pension schemes.

I understand that the Regulations were the brainchild of pension fund managers, ostensibly on the grounds that a lot of retirees leave employment with insufficient pension. However, it is obvious that the pension fund managers are acting out of self-interest since more funds under management means more management fees earned – to my detriment as a member of a pension scheme. These lobbying efforts should be curtailed to ensure that policy-making and legislation is all-inclusive and not aimed at benefiting certain sectors of society.



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4. Prayers

The Committee on Delegated Legislation is mandated to receive representations from affected members of the public in its oversight role to ensure good governance and accountability.

In the premises, it is my prayer that the Committee finds that the Amendment Regulations:-

1. are null and void and legally defective as they are in contravention of both the Constitution and the Statutory Instruments Act; and
2. be set aside, and the Cabinet Secretary be directed to immediately revoke the same.

It is my humble submission that you will favourably consider my prayers to forestall any unnecessary legal challenges by affected members of pension schemes.

Yours faithfully,



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