

# Tax Alert

## The Housing Fund Regulations, 2018

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The Cabinet Secretary for Transport, infrastructure, Housing, Urban Development and Public Works (“CS”) gazetted the Housing Fund Regulations, 2018 (“Regulations”) on 21 December 2018. The CS had previously (in November 2018) issued draft Regulations for stakeholder input and we note a number of proposals from stakeholders have been taken into account in the final Regulations.

The housing levy was to have taken effect from the date that the Regulations were gazetted but this has been forestalled by a court order which has temporarily suspended the implementation of the levy.

### What has changed in the final Regulations?

#### Definition of key terms

The definition of a ‘dependent’ has been amended to read as follows:

*“dependent” - a ‘dependent’ is a relative of the deceased or a person who survives the deceased and who was at the time of death a spouse, child or a nominated beneficiary.*

Previously, the draft Regulations contained a restricted definition of the term where a child to the deceased was only considered a dependent if they were below twenty-five years of age. In addition, any other relative needed to have been wholly or substantially dependent on the deceased to be considered a dependent.

In addition, some additional definitions have now been included in the interests of clarity such as:

1. “**employee**”- meaning assigned as per Section 2 of the Employment act 2007 which defines an employee to mean a person employed for wages or a salary and includes apprentice and indentured learner.
2. “**employer**” – meaning assigned as per Section 2 of the Employment Act, 2007 which defines an employer as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

### New category of affordable housing schemes

The categories of affordable housing schemes have been expanded to include employees earning more than KES 100,000 per month.

The introduction of the ‘middle to high income housing’ category means that all workers are now eligible for affordable housing and they can enjoy other facilities such as low interest loans from the Fund.

The updated categories of the affordable housing schemes are as shown below:

Category of Income (per month)	Housing Scheme
Up to KES 19,999	Social housing
Between KES 20,000 and KES 49,999	Low cost housing
Between KES 50,000 and KES 149,999	Mortgage gap housing
KES 150,000 and above	Middle to high income housing

In addition, the Regulations now provide clarification regarding which scheme a member belongs to when they have moved from one category to another due to receiving annual salary increments over time. The relevant provision states that:

A member's affordable housing scheme entitlement will be determined based on their monthly income as at the date of application for a loan, housing or any other benefit or entitlement from the Housing Fund.

#### Foreign nationals now exempted from levy

In response to concerns raised by various stakeholders, the Regulations now exempt foreign nationals working in Kenya from contributing to the Fund.

#### Requirement for the Fund to notify the employers and employees to register

The provision requiring the Housing Fund to inform employers and employees of the requirement to register under the Regulations has been dropped. This implies that all employers and employees need to understand the registration requirements under the Regulations and ensure compliance.

#### Access to contributions after five years dropped

The provision permitting members to access their contributions after five years of making uninterrupted contribution for purposes of offsetting housing loans, security for mortgages or for housing developments has been deleted. Therefore, members will only access their contributions if they qualify for affordable housing or where they withdraw their contributions after 15 years of contributing or upon retirement.

#### Key regulations which have not changed

##### Contribution rates

The rates remain the same for employers and employees at 1.5% of the employee's monthly basic salary with the combined contribution capped at KES 5,000 per month.

Voluntary members are still required to contribute a minimum of KES 200 per month, with KES 100 going towards the Fund's maintenance costs and the other KES 100 accruing to the member's account.

##### Members' benefits from the scheme

Members who qualify for the affordable housing scheme are still entitled to use the contributions which have accrued to them to finance the purchase of a home under the scheme. They can also apply for loans from the Corporation at an interest rate of up to 7% p.a. (or other rate gazetted by the Corporation from time to time). The expectation is that the Corporation will charge a rate of interest which is lower than the commercial bank rates to encourage the members/contributors to borrow from the fund.

Members who do not qualify for the affordable housing scheme i.e. do not meet the eligibility criteria under the Regulations can withdraw their contributions after 15 years of making contributions or upon retirement (whichever is earlier). At that point, the contributor may transfer his/her contributions plus return on investment to a pension scheme, a dependent or to another person eligible for affordable housing, or they can withdraw it in cash and be subjected to tax.

#### Unmet expectations and Issues requiring further clarification

The Regulations have failed to address some issues raised by various stakeholders and which impact the implementation of the fund.

- Voluntary members are still required to make a monthly contribution of KES 100 towards the Fund's maintenance costs. This creates inequity as employees are not required to make a similar payment. This may discourage voluntary membership, especially in the informal sector.
- The penalty for misappropriation of funds has been retained at a maximum fine of KES 10,000 or to imprisonment for a term of two years or both. The fine is unlikely to be an effective deterrent. We were hoping that the penalty clause would be enhanced to give confidence to members that their funds will be safe.





- “Income” (for purposes of determining which affordable housing scheme one qualifies for) has not been defined in the Regulations hence it is not clear whether it refers to basic salary only or whether it includes non-cash benefits as well.
- There are still no specific tax incentives provided to employers under the Regulations. Given that the Federation of Kenya Employers (“FKE”) is opposed to the implementation of the levy and the levy is expected to increase cost of employment one would have expected some incentives to be granted to employers.
- The Regulations do not appear to contemplate corporate employers, as they limit those who are registrable as employers to citizens of Kenya who are at least 18 years of age.
- The Regulations specify that where a member dies, their contributions are to be paid to their dependents directly, without forming part of the deceased’s estate. This fails to take into account cases where the dependents are minors who are not able to receive the contributions directly.

In addition, there seems to be a departure from the Government’s Delivery Framework, the Development Framework Guidelines and other

government documents on the affordable housing scheme (collectively referred to below as “the policy documents”). More specifically, the following issues arise:

- The policy documents depict the Fund as a provider of long term financing through a National Tenant Purchase Scheme. This role is not properly articulated as the Regulations depict the Fund as a regular lender.
- The policy documents also depict the Fund as an off-taker of affordable housing units in a bid to reduce the risk to developers and encourage the building of more affordable housing. This has not been clearly addressed by the Regulations.
- The establishment of the Kenya Mortgage Refinancing Company (the “KMRC”) was expected, in the policy documents, to rein in the mortgage interest rates. Its role, and that of commercial banks in the affordable housing scheme has not been addressed by the Regulations.
- The affordable housing units are to be purchased on allocation. There needs to be clarification on the allocation procedure that will be used.
- The policy documents contemplate three different methods of acquisition of affordable housing

available to a qualifying person: cash, mortgage, and Tenant Purchase Schemes. None of these have been properly articulated in the Regulations.

### **Suspension of implementation of the Fund**

The Employment and Labour Relations Court through an interim order dated 19 December, 2018, suspended the implementation of Section 31A of the Employment Act, 2007, which creates the National Housing Development Fund (NHDF) Levy.

The case which was lodged by the Central Organisation of Trade Unions (COTU), challenges the constitutional and legal validity of the imposition of the NHDF levy.

The initial hearing was set for 21 January, 2019 and we understand from the legal team involved that the next hearing date will be 26 February 2019 and that additional parties have been enjoined to the case (including the Kenya Private Sector Alliance (KEPSA)).

According to media reports, the CS has indicated that the parties to the suit are now in agreement and that he expects the housing levy to take effect from 1 March 2019.

**Kindly reach out to any of our experts or your usual PwC contact for further information on this tax alert.**