MINISTRY OF TRADE, INVESTMENTS AND INDUSTRY

REGULATORY IMPACT ASSESSMENT

FOR THE STANDARDS (STANDARDS LEVY) ORDER, 2023

JULY 2023

This Regulatory Impact Assessment (RIA) has been prepared by the
Cabinet Secretary - Ministry of Trade, Investments and Industry
Section 6 and 7 of the Statutory Instruments Act (No. 23 of 2013)

Table of Contents

Chapter 1: INTRODUCTION

1.1 : Regulatory-Making Authority and the Legal Mandate

KEBS is the National Standards Body in Kenya established under the Standards Act, Chapter 496 of the Laws of Kenya. KEBS mandate can be summarized as trade facilitation, standards and provision of technical services. This mandate is provided through: development of standards for use by the industry, provision of testing and calibration facilities, product and system certification, undertaking educational work in standardization and practical application of standards, and maintenance and dissemination of International System of Units (SI) of measurements.

KEBS facilitates trade by setting standards for various classes of goods with the aim of ensuring that such commodities are safe for consumers and the environment and subsequently acceptable to the local, regional and international market. The standards setting is rigorous consensus and technical process with stakeholders, to ensure fair trade practices while protecting the health and safety of consumers and the environment.

Consumers have a right to goods and services of reasonable quality, and protection of their health, safety, and economic interests as entrenched in chapter 46 of the constitution. KEBS delivers this obligation on behalf of government by inspecting commodities coming into the Kenyan market, issuing permits to local manufacturers and conducting random market surveillance to ensure that products in the market comply to the set standards and are safe for consumption and that imported products meet the same stringent standards of locally manufactured goods for fair trade.

KEBS is recognized regionally and internationally as the National Standards Body in Kenya, Mutual Recognition Agreements negotiated between KEBS and counterpart Standardization Bodies in various countries ensure the acceptance of Certification Marks issued by KEBS to local manufacturers. This facilitates trade by ensuring free movement of goods across regions.

MSEs are the biggest hope for Kenya's Industrial Development. KEBS subsidizes MSEs to the tune of KES225 Million annually through conformity assessment support. From 1990 to date, Standards Levy has helped Kenyan industry to grow from 1,200 to over 19,000 companies, with at least 12,000 companies having grown from MSEs to large firms since 1990 due to Standards Levy.

Section 10B (1) of the Standards Act provides that *"The Cabinet Secretary may make standards levy order for the purpose of giving effect to proposals submitted by the Council and approved by the Cabinet Secretary. Further, the order may provide for the amendment of a previous standard levy order and may make different provisions in relation to different classes* *or description of industry."*

In exercise of the above powers therefore, the Minister (now referred to as "Cabinet Secretary") prepared the Standards Levy Order, 1990 which came into operation on 1st July 1990. In 1999, a minor amendment was made to increase the maximum of levy payable from KES. 200,000 (Kenya Shillings Two Hundred Thousand) to KES. 400,000 (Kenya Shillings Four Hundred Thousand). This 1990 Order has been applied in Kenya for over 30 years. Given the dynamic nature of the manufacturing industry, and rights in the constitution of Kenya promulgated in 2010, some of its provisions of the levy order 1990 have become obsolete. There is therefore need to revise the order for relevance and alignment with the current needs that are very dynamic.

In consideration of the above, the Cabinet Secretary relying on proposals submitted by the Council has prepared the draft **Standards (Standards Levy) Order, 2023** (proposed Order). This is a statutory instrument which seeks to boost the practice in Standardization, Metrology and Conformity Assessment (SMCA). It is likely to impose costs to manufacturers who play a key role in Kenya's economic development.

1.2 : Requirements of the Statutory Instruments Act

The Statutory Instruments Act, No. 23 of 2013 is the legal framework governing the conduct of RIA in Kenya. Sections 6 and 7 require that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, prior to making the statutory instrument, prepare a RIA about the instrument. The Act further sets out certain key elements that must be contained in the RIA namely:

(a) a statement of the objectives of the proposed legislation and the reasons;

(b) a statement explaining the effect of the proposed legislation;

(c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;

(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and

(e) the reasons why the other means are not appropriate.

Section 5 of the Act requires a regulation-making authority to conduct public consultations drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ensuring that persons likely to be affected by the proposed statutory instrument are given an adequate opportunity to comment on its proposed content. The Cabinet Secretary now undertakes public consultations and prepares this Regulatory Impact Assessment (RIA) in partial fulfilment of the requirements of the Statutory Instruments Act.

1.3 : What is a Regulatory Impact Assessment?

RIA is a systematic policy tool used to examine and measure the likely benefits, costs and effects of new or existing regulation. It is an analytical report to assist decision makers. As an aid to decision making RIA includes an evaluation of possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected regulatory approach provides the greatest net public benefit. Typically, the structure of a RIA should contain the following elements: title of the proposal, the objective and intended effect of the regulatory policy, an evaluation of the policy problem, consideration of alternative options, assessment of all their impacts distribution, results of public consultation, compliance strategies, and processes for monitoring and evaluation[1].

RIA is usually conducted before a new government regulation is introduced to provide a detailed and systematic appraisal of the potential impact of a new regulation in order to assess whether the regulation is likely to achieve the desired objectives. RIA promotes evidence-based policy making as new regulations typically lead to numerous impacts that are often difficult to foresee.

From a societal viewpoint, RIA should confirm whether or not a proposed regulation is welfare-enhancing, in that, the benefits will surpass costs. RIA therefore has objectives of improving understanding of the real- world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation; and enhancing governmental accountability.

[1] Regulatory Policy Division Directorate for Public Governance and Territorial Development: Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers. OECD, 2008

Chapter 2: PURPOSE AND OBJECTS OF PROPOSED STANDARDS (STANDARDS LEVY) ORDER 2023

2.1: Scope

The scope of the proposed Order covers:

i. Interpretation;
ii. Manufacturer's liability to pay levy or their discharge of that liability;
iii. The levy payable;
iv. Manner of payment of Standards Levy;
v. Registration and classification of manufacturers;
vi. Issuance of a levy compliance certificate;
vii. Consequences of non-compliance to Standards Levy order requirements;
viii. Considerations for waiver of penalties;
ix. Maintenance of records and sharing of information;
x. Revocation of the 1990 Order; and
xi. Schedules of applicable forms

2.2: Objective

The Proposed Order aims to enumerate provisions to give effect to Section 10B of the Standards Act.

2.3: Specific objectives

Specifically, the implementation of the Standards Levy Order is intended to:

(a) specify the evidence by which a manufacturer's liability to the levy or their discharge of that liability may be established;
(b) identify manufacturers that are exempt to payment of the levy;
(c) Specify the manner of recovery of unpaid levy;
(d) provide for notification of intention to manufacture;
(e) registration of manufacturers including the classification of their respective industries;
(f) procedure for the issuance and renewal of a levy compliance certificate;
(g) maintenance of levy records by manufacturers;
(h) procedure for consideration of the waiver of penalties imposed;
(i) obligation to publish and publicize levy related information; and
(j) provision to save any authorization, charge, fee, certificate or proceedings issued or commenced under the 1990 Order;
(k) format for the standard levy notification form; and
(l) format for standards levy return form.

2.4: An Overview of the Proposed Order: Salient Features

This overview is intended to assess whether the proposed Order is clear, consistent, comprehensible, and comprehensive enough to address the identified problem. The rules should be understood by persons likely to be affected by the proposed order, and to that end KEBS has taken steps to ensure that the text and structure of proposed order are as clear as possible.

The structure of the proposed Standards Levy Order is as follows:

1—Citation.
2—Interpretation.
3—Levy.
4—Application.
6—Waiver of Penalty.
7—Notification
8—Register of manufacturers
9—Levy Compliance Certificate
10—Maintenance of records by manufacturers
11— Revocation

First Schedule — Forms

i. SL1 Notification Form
ii. SL2 Levy Return Form
iii. Levy Compliance Certificate

Second Schedule

i. Classes on industry

Chapter 3: BACKGROUND AND CONTEXT

3.1: Policy Background

United Nations Sustainable Development Goals (SDGs)

Goal 8 addresses decent work and economic growth. It entails achieving higher levels of economic productivity through diversification, technological upgrading and innovation and increasing aid for trade support for developing countries through the Enhanced Integrated Framework for Trade-Related Technical Assistance. Further **Goal 9** on building resilient infrastructure, promoting sustainable industrialization and fostering innovation entails increasing the access of small-scale industries and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets. These ideals are achievable with enhanced manufacturing where standards development plays a critical role. The Proposed Order is intended to support standards development which will in effect power the manufacturing sector.

Africa Agenda 2063

One of the key aspirations of Africa Agenda 2063 is **"**A Prosperous Africa, based on Inclusive Growth and Sustainable Development". One of the goals under this aspiration is Transformed Economies whose priority areas are:

- Sustainable and inclusive economic growth
- Science Technology and Innovation (STI) driven Manufacturing / Industrialization and Value Addition
- Economic diversification and resilience

Technology and innovation is considered a key driver of the manufacturing sector. KEBS will need to continuously develop standards in line with developing technologies. This exercise comes with a cost implication which the Proposed Order seeks to address.

African Regional Organization for Standardization (ARSO)

Among the fundamental mandates of ARSO is to develop tools for standards development, standards harmonization and implementation of these systems to enhance Africa's internal trading capacity, increased Africa's product and service competitiveness globally, and uplift of the welfare of African consumers as well as standardization forum for future prospects in international trade referencing. In carrying out its mandate, ARSO seeks to:

- Harmonize national and/or sub-regional standards as African Standards and issue necessary recommendations to member bodies for this purpose.
- Initiate and co-ordinate the development of African Standards (ARS) with references to products which are of peculiar interest to Africa.
- Encourage and facilitate adoption of international standards by member bodies.
- Promote and facilitate exchange of experts, information and co-operation in training of personnel in standardization activities.
- Co-ordinate the views of its members at the ISO, IEC, OIML, Codex and other international Organizations concerned with Standardization activities.
- Create appropriate bodies in addition to the organs of the organization for the purposes

of fulfilling its objectives.
KEBS is Kenya's National Standardization Body mandated to develop standards for utilization by the industry. ARSO plays it's role through national standardization bodies such as KEBS. KEBS role in standards development therefore needs support for KEBS to actively participate in standards harmonization activities under ARSO to aid local products to access the regional market.

Kenya's Vision 2030

The Vision identifies manufacturing as being a key enabler for driving the country to a globally competitive and prosperous country with a high quality of life by the year 2030. The goal is to generate an additional KES. 30 billion to GDP by producing consumer goods that compete with imports. Quality consumer goods cannot be manufactured without establishment of standards.

The Kenya National Trade Policy, 2016

The Policy outlines its mission as to facilitate Kenya's transformation into a competitive export led economy, enhance regional integration and widen participation in both domestic and international trade. It enumerates one of its objectives as creation of an enabling environment for trade and investment to thrive. KEBS plays a critical role in facilitating trade through development of standards that are used by the industry to support production of quality products that can compete effectively in the local and international market.

The Draft National Quality Policy, 2021

The draft Policy recognizes that quality infrastructure is required for the effective operation of domestic markets, and quality infrastructure's international recognition is important to enable access to foreign markets. Further, it is a critical element in promoting and sustaining economic development, as well as environmental and social wellbeing. The National Quality Infrastructure (NQI) system comprises of Standardization, Metrology, Accreditation, Conformity Assessment and Market Surveillance. In addition, to overcome technical barriers to trade, Kenya needs to adopt and implement the internationally recognized and accepted quality standards of international markets. The specific objectives of this policy are to: enhance capacity within NQI, strengthen the NQI skills and technical expertise, create understanding and awareness on NQI, provide a conducive legal and regulatory framework. The Draft Policy acknowledges that KEBS is the designated National Standards Body as well as National Metrology Institute.

KEBS supports manufacturing, commerce and trade which are key drivers to the growth of the Kenya's economy and contribute greatly to the country's Gross Domestic Product, employment creation as well as linkages to other sectors requiring SMCA services. Manufacturing is thus a critical component to the country's development and its impact is felt nationally, regionally and globally.

The Bottom-up Economic Transformation Agenda (BETA) is anchored on 5 pillars Micro, Small and Medium Enterprise (MSME) Economy being one of them. BETA has been designed to address the current challenges facing the country's economy, stimulate economic recovery and bolster resilience. It places special emphasis on priorities that target reduction in the cost of living, creation of jobs, achievement of more equitable distribution of income, enhancement of social security, expansion of the tax base and increase of foreign exchange earnings. This necessitates a review of the levy order to contribute to this course.

3.2: Domestic Context

KEBS plays a central role in consumer protection and trade facilitation. The Standards Levy Order is a key component in financing KEBS activities. It sets out the provisions that specify the amounts of levies payable to KEBS by the manufacturers. For an effective model, the Standards Levy Order should have legal status and should be capable of enforcement so that all manufacturers can fully comply with it.

Standards Levy Order provides minimum and maximum levies that manufacturers should remit to KEBS at prescribed timelines. This levy supports KEBS activities, hence, facilitation of trade and protection of health and safety of consumers. Further, the Standards Levy Order provides general information as well as specific information such as the scope and classification of the eligible manufacturing sectors and provisions of refund for overpayments among others.

The current Standards Levy Order came into operation on 1st July 1990. The Order was revised in 1999 to increase the ceiling of levy payable from KES. 200,000 to KES. 400,000. The1990 Order has been applied in Kenya for over 30 years.

By way of an overview, the Proposed Order provides for the process of application for registration of a manufacturer, it defines the period within which the levy must be paid and provides grounds for penalties. The Order further prescribes the issuance of a Standards Levy Compliance Certificate to the entities who have demonstrated compliance.

3.3: International Context

KEBS operations and services are aligned and contribute to the delivery of Africa Agenda 2063 and United Nation's Sustainable Development Goals (SDGs). KEBS participates in the implementation of the Standardization, Quality Assurance, Metrology and Testing (SQMT) strategy in the East African Community (EAC), where it plays a key role in the harmonization of standards, measurements and conformity assessment regimes for regional integration. KEBS is an active member of the Africa Organization for Standardization (ARSO) and other international standards bodies such as International Organization for Standardization (ISO), International Electrotechnical Commission (IEC), Bureau International des Poids et Mesures (BIPM) and Codex Alimentarius. KEBS is the National Enquiry Point (NEP) in support of the WTO Agreements on Technical Barriers to Trade (TBT) and facilitates trade in accordance with the Common Market for Eastern and Southern Africa (COMESA) treaty.

Further, the East African Community Standardization, Quality Assurance, Metrology and Testing Act, 2006 provides in Section 21 that each Partner State shall appoint public regulatory authorities to administer compulsory standards whose duties shall inter alia be to collect fees and levies payable in respect of products, and processes to which a compulsory standard applies. KEBS is the institution charged with this role in Kenya.

Chapter 4: EVALUATION OF THE PROBLEM

This chapter states the pain points, problems and challenges of KEBS with the 1990 Order as it stands by giving evidence of its nature and magnitude and explaining why these challenges have arisen.

4.1: Outdated Standards Levy Order 1990

The current order was gazetted vide legal notice number 267 of 1990 and came into operation on 1st July 1990. The Order was revised in 1999 to increase the maximum levy payable from KES. 200,000 to KES. 400,000. Inflation, time value for money and the current forex exchange rates are an indicator that the maximum amount currently paid cannot support the functions for which the levy was established.

4.2. Fails the Principle of equity in taxation

The current Order fails the constitutional principle of equity in taxation. The current order provides that levy is paid at the rate of 2% of the turnover subject to a maximum of 400,000 annually and a minimum of KES1000 per month. This implies that Large manufacturers pay a maximum levy of KES 400,000 while micro and small pay KES 12,000 annually. Example: This implies that a Large manufacturer with multiple branches and a wide range of products with an annual turnover of Kes 30,000,000, 000 pays 0.0013% of standards levy while micro enterprise with a turnover of KES 250 000 pays 4.8% for standards levy . This leads to unfair commodity pricing base and has the potential to make goods produced by smaller manufacturers cost more.

4.3: Inability to guarantee the protection of consumers from harmful goods

The right to goods and services of reasonable quality and the right to protection of health and safety sees KEBS tests an average of 60,000 products annually to determine suitability for consumption and use; health, safety and consumer protection. Testing is an expensive exercise where a full test per product cost on average KES 25,000 which translates to KES 1.5 Billion per year. The annual budget for Metrology is currently KES. 385 Million for replacement of metrology Equipments while the annual budget for Testing is KES. 325 Million for replacement of Testing Equipment. Companies have grown product ranges increased and with devolution industries are diversifying away from the Capital City to county level. Supply chains have changed dramatically and as such goods are sold much deeper into almost all areas. This requires that market surveillance sampling is intensified, robust and diverse to cater for the needs to protect the consumers against poor quality goods and exposure to health and safety hazards. KEBS Regional offices are currently located in only 7 of the 47 counties. Establishment of offices with testing and metrology services across all counties is in the KEBS Strategic plan and requires financing.

4.4: Inability to support MSE to produce quality goods and access markets

Product Certification is a requirement for all goods offered for sale in Kenya and for export in the region. MSEs are the biggest hope for Kenya's Industrial Development. KEBS subsidizes MSEs to the tune of KES 225 million annually. This means KEBS cannot sustain the cost of supporting MSEs through product certification, which are positioned to be the hope for Kenya's Industrialization goal. The current Levy Order caps the maximum levy amount payable at KES. 400,000 per annum. This amount was set in the Revised edition of 1999. The cost of sampling testing, maintaining the quality infrastructure and developing capacity of staff given the evolving industries, has escalated over time due to the expanded and evolving industry demands. KEBS currently has a work force of 1041 with a staff budget of 91 Billion. To increase staff capacity and infrastructure across the regions to support the product certification scheme requires an increased base of the levy payers.

Additionally, inflationary pressure over time and rapid change in exchange rates affects ability to replace testing equipment, which are not locally made. For instance, the US Dollar Exchange rate in 1990 was approximately KES 23. Currently, the exchange rate is at KES 146.

Further, KEBS is a self-funding public institution which means that KEBS does not receive any funding appropriated by Parliament be it through the Consolidated Fund, Equalization Fund or any other public fund. Revenue generation as a public entity has its fair share of challenges especially where certain fixed revenue streams have to be continually operational taking into regard dynamic business environment in which KEBS operates. The Standards Levy is a critical component in KEBS Appropriation in Aid (A in A) because it ensures that KEBS realizes its revenue income and therefore sustains its operations. Further, as provided in Section 8 of the Standards Act, the levy is utilized towards executing KEBS mandate.

4.5 Enforcement Challenges

4.5.1 Lack of classification of industries

Section 10B of the Act empowers the Cabinet Secretary to identify classes of industry for which the order applies. The Standards Levy Order 1990 has not identified classes of industry which makes it difficult for identification and registration of manufacturers and as a result a compromise on compliance and enforcement. The definition of the term manufacture in the Standards Act is broad and not well understood in the industry, hence, the need for classification for clarity.

4.5.2 Use of the terminology "ex-factory price"

The basis for assessing levy payable in the 1990 order is "ex-factory price". The term 'factory' connotes a physical factory setting such as a facility or building that literally *houses* *a factory in it*. The net effect of this interpretation is that manufacturers who operate outside a “physical factory” setting consider that the levy order is not applicable to them.

4.6 High cost of doing business for Micro Enterprises and need to reduce costs

The Standards Levy Order, 1990 exempts manufacturers whose annual turnover is below KES. 200,000 from paying levy. This figure is considerably low and therefore bring most micro enterprises within the scope of payment of standards levy. The net effect is that it increases the cost of doing business for Micro enterprises which is not in tandem with incentivizing Micro enterprises as outlined in the Governments strategic blueprint - Bottom-up Economic Transformation Agenda (BETA).

4.7 Lack of incentives for manufacturers

The Standards Levy Order, 1990 has no incentives to manufacturers to encourage compliance. It is considered that components such as issuance of compliance certificates, waiver of penalties and rolling over of payments made in excess would go a long way to encourage future compliance and ease the cost of doing business by relieving manufacturers of penalties.

4.9 Variant statutory obligations compliance dates and need to harmonize

The Standards Levy Order, 1990 requires levy payments to be made on or before the 30th day of the succeeding month. Notably, the levy is collected by Kenya Revenue Authority on behalf of KEBS through the KRA itax system. The prescribed timeline for paying Standards Levy appears to be outside the customary practice of filing certain statutory returns, on or before 20th day of the succeeding month, such as the VAT returns provided for under the Value Added Tax Act. It is observed that this has contributed to low compliance rates because manufacturers reiterate that they would prefer to file monthly returns at once. As such hence the date needs to be reconsidered.

Based on the shortcomings above, the proposed Order intends to repeal the Standards Levy Order, 1990 and to give way to a new Order that solves the problems identified above.

4.10 Lack of mechanism for address penalty waivers

The Standards Act CAP 496 stipulates that failure to pay the standards levy by way of amount and the date due shall be subject to a penalty of 5% for every month for which the amount remains due. Whereas the compliance and enforcement is foreseen, and that penalty is a deterrent, there may be unforeseen and unavoidable circumstances that may make this compliance obligation not met. The order does not provide any mechanism or process for the assessment and grant of waiver on penalty.

Chapter 5: LEGAL AND POLICY FRAMEWORK FOR THE PROPOSED STANDARDS LEVY ORDER. 2023

An evaluation of the legal and policy framework related to Standards Levy Order is intended to answer the question whether there a legal basis for developing the proposed Order. It is also intended to bring out the context and legal environment within which the proposed Order is being developed. Statutory instrument proposals should be structured so that all regulatory decisions rigorously respect the principles of 'rule of law' that is, there must be explicit responsibility demonstrating that a proposed Statutory Instrument is authorized by the respective Act of Parliament and is consistent with the Constitution as well as any treaty or international convention obligations that Kenya has acceded to. In addition, a proposed Statutory Instrument must complement other legal requirements and be in statutory harmony with the entire statute book.

5.1 : Regional Legislation

The East African Community Standardization, Quality Assurance, Metrology And Testing (SQMT) Act was enacted in 2006 with the objective of making provision for ensuring standardization, quality assurance, metrology and testing of products produced or traded in the Community in order to facilitate industrial development and trade; to make provision for ensuring the protection of the health and safety of society and the environment in the Community and to establish the East African Standards Committee and the East African Accreditation Board. Pursuant to Section 6, KEBS is the designated National Standards Body and National Metrology Institute. To discharge the mandates as enumerated, KEBS needs to enhance its quality infrastructure.

5.2 Constitutional Basis

Article 46 of the Constitution of Kenya, 2010 has robust provisions on consumer protection. All consumers have a right to quality goods and services, access all information necessary to derive full benefit of the goods and services; and protection of their health, safety as well as that of the environment.

Article 201 has robust provisions on the principles of public finance which are enumerated as follows:

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—
  - i. the burden of taxation shall be shared fairly;
  - ii. revenue raised nationally shall be shared equitably among national and county governments; and
  - iii. expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

(a) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations; and

(b) public money shall be used in a prudent and responsible way.

Article 209 of the Constitution empowers the national government to impose any tax or duty while **Article 210** requires that any tax or licensing fee imposed, waived, or varied is provided for in a Legislation.

5.3 Standards Act, Chapter 496

Section 4 of the Standards Act stipulates the mandate of KEBS which encompasses development of standards for use by the industry, provision of testing and calibration facilities, product and system certification, undertaking educational work in standardization and practical application of standards, and maintenance and dissemination of International System of Units (SI) of measurements.

Section 10B of the Standards Act empowers the Cabinet Secretary to make a standards levy order for the purpose of giving effect to proposals submitted by the Council and approved by the Cabinet Secretary and the order may provide for the amendment of a previous standard levy order and may make different provisions in relation to different classes or description of industry.

5.4 Public Finance Management Act No. 18 of 2012

The Act defines "national government revenue" to mean all taxes imposed by the national government under Articles 206(1)(a) and (b) and 209 of the Constitution, excluding county government revenue.

Standards levy is therefore considered a national government revenue in the context of the Act. The Act further requires that public finances are managed according to the principles laid down in the Constitution.

5.5 Statutory Instruments Act, No.23 of 2013

The Act defines a statutory instrument to mean any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued. The Standards levy Order is therefore a statutory instrument under the Standards Act, cap 496.

Where the proposed statutory instrument is likely to impose significant costs on the community or a part of the community, Section 6 of the Act requires the regulation making authority to prepare a regulatory impact statement about the instrument prior to the enactment of the instrument.

Chapter 6: PUBLIC CONSULTATIONS

6.1: Legal requirements relating to public participation and consultation

Participation of the people, inclusivity, transparency, and accountability are constitutional requirements whenever a state or public officer applies the Constitution, enacts any law, or makes or implements public policy. This requirement is premised on the sovereignty principle which vests all sovereign power to the people of Kenya. This power entitles the people to unfettered access to the process of making public decisions through their involvement.

Further, the values and principles of public service requires the involvement of the people in the process of policymaking and participation, transparency and provision to the public of timely and accurate information.

With regard to the subsidiary legislation making process, the Statutory Instruments Act requires that the regulation making authority shall make consultations before making the statutory instrument in question in particular where the proposed Order is likely to have a direct, or a substantial indirect effect on business or restrict competition. The Act provides that in determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to all relevant matters, including the extent to which the consultation:

(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

The Statutory Instruments Act further requires that the persons to be consulted should either directly or by advertisement through representative organizations be invited to make submissions by a specified date, which should not be less than 14 days or be invited to participate in public hearings concerning the proposed instrument.

Article 1: Sovereignty	All sovereign power belongs to the people of Kenya and may be exercised by them directly or through their elected representatives.
Article 10: National Values and Principles of Governance	10(2) (a) —The national values and principles of governance Include — … participation of the people
Article 27: Equality and Non-Discrimination	Public participation should ensure equality and non-discrimination

Article 33: Freedom of Expression	Public participation should respect the freedom of expression of all participants
Article 35: Access to Information	35 (1) (a) —Every citizen has the right of access to information held by the State. 35 (3) – The state shall publish and publicize important information
Article 232: Values and Principles of Public Service	232 (1) (d) —The values and principles of public service include the involvement of the people in the process of policymaking.

6.2: The Process of public consultation

The review process began in September of 2022 to comply with the Statutory Instruments Act No.23 of 2013) on enactment of Statutory Instruments.

An internal committee was constituted to review and consolidate challenges regarding implementation on the current order and to develop a draft order and roadmap for implementation. Approval to proceed with the draft order based on the road map was given by the management.

The draft levy order was presented to senior management on 26th June 2023 and the committee reviewed and incorporated the comments on 10th July 2023

The draft levy order was presented to the technical committee of the Council on 27th July 2023. and the full Council on 16th August 2023. Physically consultations were held in Nairobi, Nakuru, Mombasa, Garissa, Nyeri, Eldoret and Kisumu. As per annex 1. Virtual sessions were held between 18th -22nd September 2023. The criteria for the identification of stakeholders depended on their interest, contribution, and their role in the implementation of the Order. The committee consulted key stakeholders including manufacturers, associations representing manufacturers, Government agencies, the private sector, professional associations, and other persons likely to be affected by the proposed Order for their input and views from the broad categories listed below:

1. Ministry of Trade, Investments and Industry,
2. Ministries, Departments and Agencies
3. Micro, Small and Medium Enterprises
4. Large Manufacturing Enterprises
5. County Governments
6. Universities/Research Institutions
7. Kenya Private Sector Alliance
8. Kenya Association of Manufacturers
9. Non-Governmental Organizations
10. Consumer Associations
11. Other Industry associations

6.3: Public Notice and awareness

KEBS issued put up a public notice of the proposed levy order of 29th August 2023 on My GOV being a newspaper with wide circulation. The notice contained:

i) a statement summarizing the levy order;
ii) ways in which the documents relating to the levy order shall be accessed;
iii) invitation for the public to submit written comments or representations;
iv) mode of conducting public participation;
v) venue, date, and time; and
vi) KEBS Contacts.

The public had until 22nd September 2023 to share any comments or written memorandum regarding the proposed order. This was considered adequate notice given that is was more than 21 days notice. To ensure the widest reach, the notice was also circulated via social media, websites, emails and hardcopy letters to key stakeholders.

6.4: Public participation forum

All public participation forums were open to all members of the public who desired to participate and were allowed to contribute personally or through representatives.

In conducting public participation, KEBS ensured that:

1) All participants, including their representatives and all respondents, were courteous, respectful and civil during public participation processes.
2) No disruptive individuals were encountered during the sessions
3) Freedom of expression was limited to the subject matter although other unrelated concerns were noted for actioning to relevant departments.
4) All reasonable measures were taken to facilitate the participation of persons with disabilities in the forum including having sign language interpreters.
5) English was the language widely used but Kiswahili was also used when need arose to ensure that all participants present at the forum were adequately communicating.

6.5: Analysis and Feedback

KEBS will ensure that,

a) all responses are carefully and independently analyzed;
b) the final decision on the levy order is made widely available to the public through KEBS website and/or interactive fora, including the reasons for the decisions taken; and
c) the disclosure of reasons for the public to understand and evaluate the decision made.

6.6: Credibility and integrity of the Process

To ensure that the process of public participation will be credible and will pass the integrity test, KEBS will:

1) not engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or discrimination and avoid relationships or actions, which could be legitimately interpreted as a conflict of interest; and,
2) take into consideration the social and economic status, religious beliefs, ethnicity, and other social diversities of those engaging in public participation.

Complaints arising from public participation process shall be referred to the Director through the Cabinet Secretary for resolution.

Chapter 7: COST-BENEFIT ANALYSIS

7.1.: Costs and Benefits Generally

The analysis of the expected costs and benefits of the proposed Order in this part seeks to answer the question whether the benefits justify the projected costs. This would enable KEBS to estimate the total expected cost and benefit of every aspect of the Order. This will in turn inform the decision makers since the cost of government action should be justified by its benefits before action is taken.

However, given the nature of SMCA and the available information, the costing will be both qualitative and quantitative. The task of comparing the benefits and costs associated with the proposed Levy Order and determining whether, and to what extent, there would be a net benefit associated with its adoption is a difficult one.

The approach taken in this section is to draw together the discussion of benefits and costs, indicate the relative magnitude of these where possible and draw conclusions as to the likely overall impact of the proposed Levy Order where possible.

Table1: Benefits and Costs arising from the new features of the Standards Levy Order, 2023

PROBLEM	PROPOSED REFORM	BENEFITS	COST
Outdated Standards Levy Order 1990	To enact a new Standards Levy Order in line with Section 4 (e) of the Statutory Instruments Act	Alignment to the current business environment in the context of the current economic realities based on the time value for money and the attendant costs, of delivering services. Micro and Small Enterprises as defined by MSEA will be discharged of the liability to pay levy as the order increases the exemption bracket from KES. 200,000 to KES.5,000,000	Large manufacturers will have an increase cost on payment of 0.2% less taxes and discounts up to KES. 6,000,000 up from the maximum of KES 400,000 annually less taxes and discounts
Failure of the principle of equity in taxation	Remove the minimum payable levy of KES 1000 per month as well as exclude excise duty in the calculation of levy	Additional 9,000 MSE will have approximately 37,000,000 by way of levy exemption to inject into their business All manufacturers will pay levy equitably and fairly based on the 0.2% of turnover large medium and small manufacturers Some products are subject to excise duty while others are not therefore creating a costing burden to others leading to unfair pricing landscape.	Large manufacturers who have been paying lower than 0.2 % will have an increase costing factor on their products. This will see additional 1.8 Billion revenue to KEBS Although this seems a greater price burden to the consumers it has far reaching benefits on the principle of fair taxation

PROBLEM	PROPOSED REFORM	BENEFITS	COST
Inability to protect the consumers due to lack of funds	Clarify the classes of industry to widen the levy paying bracket, Increase the levy collection by increasing the ceiling to KES. 6,000,000	KEBS will have additional 1.8 billion from this increase an amount that will enable KEBS expand and equipe the offices in the regions. KEBS will be able to carry out robust market surveillance sampling and testing. KEBS will be able to double the number market surveillance tests for current 60,000 to 1,200,000	Large manufacturers who have been paying lower than 0.2 % will have an increase costing factor on their products. Although this seems a greater price burden to the consumers it has far reaching benefits on the principle of fair taxation
Inability to support MSE to produce quality goods and access markets:	Increase the cap of maximum KES 6,000,000 annually levy payable	KEBS will have additional 1.8 billion from this increase, an amount that will support the standardization activities including subsidizing additional 9000 MSE each year to produce quality products and meet local and export market requirements. KEBS will be able to conduct robust market surveillance activities for fair trade	Large manufacturers who have been paying lower than 0.2 % will have an increase costing factor on their products.
Enforcement challenges: Lack of classification of industry	Introduce schedule to give clarity on the classification of industries to whom the Standards Levy Order applies.	Enhanced compliance to the Standards Act. Enhanced enforcement through clarity of interpretation by stakeholders To provide adequate information to manufacturers for their decision making. Reduced litigation costs in time and money	Some manufactures who through their interpretation did not think they fall within the definition will start paying standards levy thus increasing the cost of doing business

PROBLEM	PROPOSED REFORM	BENEFITS	COST
Enforcement challenges: Use of the terminology " ex-factory price" as the basis upon which levy is paid	Use of the term 'turnover' which is simpler to comprehend to enable all manufacturers understand the basis of paying levy as volume of sales	Enhanced compliance to the Standards Act. Enhanced enforcement through clarity of basis of levy calculation Reduced litigation costs in time and money	Some manufactures who through their interpretation did not think the fall within the definition of manufacturers due to use of the ex-factory price will start paying standards levy thus increasing the cost of doing business
High cost of doing business to MSME and the need to reduce cost of business for MSMEs	To increase the lower limit of manufacturers who are subject to standards levy from annual turnover of KES. 200,000 to KES. 5,000,000.	Additional 9,033 firms will be exempted from paying levy this will be in support of the Bottom-Up Economic Transformation Agenda (BETA). The net effect is reducing the cost of doing business for MSMEs and spur industrial growth and creation of jobs	KEBS will loose approximately KES 37 Million revenue which was collected from the MSMEs to an already annual budget shortfall of KES 4 billion There could increase the financial pressure on other sources of revenue thus making the costs of doing with KEBS higher in product testing or product certification
Lack of incentives for manufacturers	Incentivize levy compliant manufacturers through recognition by providing levy compliance certificates	Manufacturers will be encouraged to comply with the standards levy order	This will require digitization of the system to enable efficiency for application and issuance of the certificate.

PROBLEM	PROPOSED REFORM	BENEFITS	COST
Need to harmonize statutory obligations compliance dates	Change the levy payment date from thirtieth of the succeeding month to twentieth of the succeeding month	Harmonized return filing system for increased convenience to manufacturers. Enhanced compliance and reduction on penalties.	None, Time saved
Lack of mechanism for address penalty waivers	Introduce the criteria and process for requesting, evaluation and granting waivers for penalty accruing from unpaid levies	For justifiable reasons manufacturers may not be able to pay levy at a point in time for example during pandemics or other natural disasters. Whereas the manufacturer may want to comply, the penalty levied may lead to closure of business. Clear process of assessing and granting waiver will enhance compliance and widen the levy bracket	None

7.2.: Consideration of Alternatives to the Levy Order

This Part considers the question whether the proposed Order is the best form of government action. The Statutory Instruments Act requires a regulator to carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy measures, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

The options considered under this part are the following:

7.2.1. Option one: Maintenance of the Status Quo

Maintaining the status quo means retaining the current Standards Levy Order, 1990 with all its attendant inadequacies. These include:

a. Outdated provisions in the Standards Levy Order 1990
b. Failure to uphold the principle of equity in sharing the burden of taxation
c. Inability of KEBS carry out its mandate in trade facilitation and protection of consumers
d. Enforcement and compliance challenges resulting from interpretation challenges
e. High cost of doing business for MSMEs and the need reduce cost of doing business
f. Lack of mechanisms for addressing penalty waivers
g. Lack of incentives for manufacturers
h. Need to harmonize statutory obligations compliance dates.

7.2.2. Option two: Administrative measures.

Use of administrative measures to implement Section 10B of the Standards Act would be against the letter and spirit of Article 201 and 209 of the Constitution. Notably, Section 10B requires that the Cabinet Secretary makes a Standards Levy Order being the instrument to enable collection of levies.

7.2.3. Option three: Promulgating a Standards Levy Order, 2023

Given the shortcomings of the Standards Levy Order, 1990, there is need to issue a new Standards Levy Order to address the challenges posed by the current one.

As noted throughout this RIA statement the current Standards Levy Order has many gaps and weaknesses which the proposed Standards Levy Order seeks to address.

7.3.: Impact analysis of the Options

Table 2: Regulatory and non-regulatory options

Impact on sectors	Option one: Maintaining the Status quo	Option two: Administrative measures	Option three: Promulgating a Standards (Standards Levy) Order, 2023
Impact on Private sector	• Difficulty in accessing international markets for their products leading to unfavorable trade balance. • unethical conduct and unfair business practices due to inability to enforce standards • Increased cost of doing business due to unequitable tax regimes • Overburdened MSE contrary to Bottom-up Economic Transformation Agenda (BETA) • Limited access to SMCA services will be limited leading to stifled growth of MSE	• Unethical business practices • Corruption	• Greater access to international markets; through standardization • Fair trade due to balanced and equitable tax regimes • Reduced cost of doing business to MSEs • Increased level of compliance to standards and regulations; • Increased ethical conduct and fair business practices; • Reduced litigation due to noncompliance • Greater access to SMCA services leading to reduces cost of doing business

	• Hefty penalties due to noncompliance • KEBs will focus of finding sources of revenue to sustain its operations and thus little attention to key mandate of trade facilitation		
Economic Impact	• Unsustainability of the demands of quality infrastructure • Risk of sickness and disease burden as a result of possible exposure to unsafe products • Continued loss of revenue • Suboptimal of foreign income • Slow economic growth • KEBS will increase costs of other services key to the quality assurance like training, certification and destination inspection and neglect key mandate in	• Loss of foreign earnings due to lack of standardized goods that meet international requirements. • Loss of tax revenue by the Government. • Unemployment • Risk of shrinking markets and economy	• Increased foreign earnings through access to international markets. • Sustainability of KEBS operations • Enhanced tax revenue • Employment opportunities • Thriving economy • Reduced disease and safety risks

	support of the government BETA		
Social Impact	• Disproportionate taxation of the people at the bottom • Inadequate protection of the consumers due to ineffective SMCA • Overburdened taxation of the lower tire of manufacturers	• Consumption of substandard goods and services by the citizenry. • Poverty	• Confidence in the government on implementation of the provisions of the constitution • Enhanced health and safety of the public
Human Rights Impact	KEBS will focus on finding other sources of revenue such as form training and system certification to sustain its operation and thus little attention on important role of protection of consumers Infringement of the rights of access to goods and services of reasonable quality as is their right under Article 46 of the Constitution.	No guarantee to adequate access to goods and services of reasonable quality as is their right under Article 46 of the Constitution	Enhanced access to goods and services of reasonable quality as is their right under Article 46 of the Constitution.

Impact on business	• Lack of adequate support to MSMEs and strategic industries • Low penetration to international markets. • Unfair competition due to market pricing	There is a risk of collapse due to inability to access local and international markets. Closure due to unfair competition	• Likely to spur the growth MSMEs • Contributes to ease of doing business at local and international level by providing SMCA infrastructure. • Fair trade platform
Impact on environment	Inadequate protection of the environment due to insufficient SMCA infrastructure.	Exposure of the environment to hazards in the absence of SMCA.	Protection of the environment through enhancement of SMCA infrastructure.
Impact on existing legal frameworks	• Regulatory concerns will remain un-addressed. The existing legal gaps will not be addressed.	There will be a gap which will hinder full implementation of the Standards Act.	Increased compliance and basis for enforcement • Provides harmony with related legal frameworks • No further legal amendments or enactments will be required

7.4. : Preferred Option

Based on the above analysis it is clear the third option (promulgating a new Standards Levy Order) is the preferred option. The benefits and impact of promulgating a new Standards Levy Order by far outweigh any estimated cost of its implementation. The other two options have little or no impact in addressing the problems outlined above.

Chapter 8: COMPLIANCE AND IMPLEMENTATION

As different aspects of the proposed order are evaluated and analyzed, it is important to determine how compliance and implementation of the actual provisions will be achieved. It is the duty of KEBS to assess the adequacy of the institutional framework and other incentives through which the order will take effect.

KEBS has been implementing the current Order for over 30 years and has put in place a plan as outlined in the Strategic Plan 2022-2027 of strengthening its institutional capacity to enable it enforce full compliance with the proposed Levy Order.

KEBS has an ideal situation an institution responsibility for enforcement a Standards Levy order as provided by the Standards Act CAP 496. KEBS has the capacity to co- ordinate institutional frameworks from a whole-of-government perspective, the requisite independence, sufficient authority and political support at all levels to enforce the levy order.

Chapter 9: CONCLUSION

Based on the above analysis, the following matters are apparent:

(a) **Regulatory-Making Authority and the legal mandate:** Section 10B of the Standards Act, Chapter 496, empowers the Cabinet Secretary in Consultation with the Council to make regulations generally to give effect to the Act and in particular for the Standards Levy Order. The Council and the Cabinet Secretary therefore have the required legislative powers to propose the Standards Levy Order, 2023.

(b) **Requirements of the Statutory Instruments Act:** Section 5 requires that a regulation-making authority to conduct public consultations and drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and to ensure that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content. Sections 6 and 7 require that a RIS/RIA be prepared where a statutory instrument is likely to impose significant costs on the community. The RIS/RIA must contain certain key elements namely:

   (1) a statement of the objectives of the proposed legislation and the reasons,
   (2) a statement explaining the effect of the proposed legislation,
   (3) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
   (4) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
   (5) the reasons why the other means are not appropriate.

   The RIA structure requirements have been fully met. Public consultation requirements have been fully adhered to.

(c) **Other existing legal frameworks**: The draft Standards Levy Order, 2023 proposes to promulgate a new legislation. It is in harmony with other laws making their implementation more effective.

(d) **The draft:** The draft Standards Levy Order, 2023 as drafted is clear, consistent, comprehensible and comprehensive enough to cover all matters.

Chapter 10: RECOMMENDATION

In view of the above conclusions, it is recommended that the Standards Levy Order, 2023 be adopted.

Chapter 11: ANNEXURES

1. The draft Standards Order, 2023
2. Stakeholder consultations matrix