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GENERAL NOTICE

Provincial and Local Government, Department of

General Notice

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GENERAL NOTICE

NOTICE 636 OF 2005

MINISTRY FOR PROVINCIAL AND LOCAL GOVERNMENT

LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT, 2000

GAZETTE FOR PUBLIC COMMENT

I, Fholisani Sydney Mufamadi, Minister for Provincial and Local Government, acting in terms of section 120(1) of the Local Government: Municipal Systems Act 2000 (Act No 32 of 2000), hereby publish for public comment the draft guidelines contained in schedule 1 to this notice.

Any person wishing to submit comments on these guidelines should do so on or before 20 May 2005 at email address: themba@dpplg.gov.za or fax number 012-334 0903, or mail to: Private Bag X804, Pretoria, 0001. For attention: Mr Themba Fosi.

FHOLISANI SYDNEY MUFAMADI

MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT

EXPLANATORY NOTE ON DRAFT GUIDELINES

These draft guidelines relate to the assignment and delegation of functions from national or provincial government to local government. They are issued in order to provide a uniform approach to the assignment and delegation of functions. They do not deal with the assignment of powers between spheres of government.

Assignments and delegations produce a dynamic division of functions between the three spheres of government. Although the Systems Act does prescribe procedures for general and specific assignments in sections 9 and 10, there has not been guidance on when the transfer of functions is appropriate and, if so, which options (as between assignment and delegation) are most desirable. As a result, a wide-range of approaches has been adopted, not all of them conducive to effective local government.

The Department for Provincial and Local Government accordingly adopted a policy framework in 2003 to guide the decision about whether to assign or delegate a function and how to do so. These guidelines represent a formalization and codification of this policy framework.

These guidelines govern the process to be undertaken when a national or provincial department is considering transferring responsibility for a function to local government. The process involves two stages: a decision must be taken to transfer responsibility for a function to the local government sphere (see Part 3 of the guidelines); once such a decision is taken, it must be decided whether the appropriate mechanism for transfer is assignment or delegation (see Parts 5 to 9 of the guidelines). The differences between assignment and delegation are defined in the guidelines and a preference indicated for assignments and general assignments, in particular. The guidelines are, however, flexible in that they allow for the most appropriate mechanism to be determined for the particular function. The guidelines also make it clear that the financial and planning implications of any assignment or delegation must be considered and proper procedures followed if there is an impact on the destination of equitable share (see Parts 11 to 13 of the guidelines).

Departments and municipalities and stakeholders are invited to submit comments to the Department of Provincial and Local Government on the content of the guidelines on or before 20 May 2005.

SCHEDULE 1

ASSIGNMENT AND DELEGATION GUIDELINES

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Part 1: Interpretation and Scope

1. Definitions

In these guidelines, unless the context indicates otherwise—

“Act” means the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000);

“administrator” means the official in the assigning department, municipality or in the South African Local Government Association responsible for complying with these guidelines and appointed in terms of guidelines 15(1)(a) or 16(1)(a);

“Annual Division of Revenue Act” means the Act of Parliament which must be enacted annually in

terms of section 214 (1) of the Constitution;

“assignment” means the permanent transfer of the authority role in relation to a function from national or provincial government to local government;

“asymmetric general assignment” means a general assignment where the outcome following the implementation of the assigning legislation is that certain municipalities are assigned the function and others are not;

“authority role” means the role exercised by the sphere of government with responsibility for ensuring that a particular function is exercised competently and which involves responsibility in relation to the function for—

- (a) administration;
- (b) planning;
- (c) revenue raising through grant funding, taxes or user fees;
- (e) policy development;
- (f) supply-related legislation;
- (g) appointment of service providers;
- (h) monitoring service provision and intervening in the case of poor performance; and
- (i) ownership of fixed assets associated with the function,

but does not necessarily involve the provider role;

“commencement date” means the month of July in the year in which the municipality receiving an assignment starts to exercise authority over the newly-assigned function;

“co-operative government” means the structure for inter-governmental relations set out in Chapter 3 of the Constitution which is based on the principle that the three spheres of government are distinct, interdependent and interrelated;

“the Constitution” means the Constitution of the Republic of South Africa, 1996;

“deconcentration” means localising the provision of a function by the authority through its own structures rather than transferring the function to local government as elaborated in Part 9 of the guidelines;

“delegation” means the temporary transfer of the provider role from national or provincial government to local government as elaborated in Part 6 of these guidelines;

“executive power” means the power to develop policies and plans and implement legislation through administrative structures;

“Fiscal and Finance Commission” means the Commission established in terms of section 220(1) of the Constitution and regulated in terms of Part 1 of the Financial and Fiscal Commission Act, 1997 (Act 99 of 1997), which acts as a consultative body for, and makes recommendations and gives

advice with regard to, financial and fiscal matters to organs of state in the national, provincial and local government spheres;

“function” means an area of responsibility that has been allocated to national or provincial government by Part A of schedules 4 or 5 of the Constitution or is included among the powers of national government which fall outside the constitutional schedules;

“general assignment” means the transfer of a function to all municipalities that fall within a designated category as elaborated in Part 6 of these guidelines;

“Government Employees Pension Fund” means the fund referred to in section 2 of the Government Employees Pension Law, 1996, which continues the fund established in terms of section 3 of the now-repealed Government Service Pension Act, 1973 (Act 57 of 1973);

“Government Employees Pension Law, 1996” means Proclamation 21 published in Government Gazette 17135 of 19 April 1996;

“IDP” means an integrated development plan adopted under the Act;

“Intergovernmental Relations Framework Act” means the legislation giving effect to the principle of co-operative governance in South Africa by, among other things, developing structures for inter-governmental dispute resolution;

“Intergovernmental Fiscal Relations Act” means the Intergovernmental Fiscal Relations Act, 1997 (Act 97 of 1997);

“Labour Relations Act” means the Labour Relations Act, 1995 (Act No. 66 of 1995);

“legislative power” means the power to enact primary legislation subject to the procedural or substantive constraints set out in the Constitution and applying to each sphere of government;

“Minister” means the national Minister responsible for provincial and local government;

“power” means the legislative or executive power exercised by a sphere of government in respect of a function allocated or assigned to it;

“PFMA” means the Public Finance Management Act, 1999 (Act No 1 of 1999);

“The Municipal Planning and Performance Management Regulations” means the Local government: Municipal Planning and Performance Management Regulations, 2001 published as Notice R 796 in the Government Gazette, 24 August 2001 Volume No 22605;

“provider role” means the delivery of services to end-users and may involve responsibility for the operational, maintenance and capital requirements of the service;

“Public Service Regulations” means the regulations enacted under the Public Service Act (Proclamation 103 of 1994) published as Government Notice R.1 in the Regulation Gazette No 6979, Vol 427 in Government Gazette No 21951 of 5 January 2001;

“Republic” means the Republic of South Africa;

“specific assignment” means the transfer of a statutory power or a function by a national or provincial department to a particular municipality as elaborated in Part 7 of these guidelines; and

“the South African Local Government Association” means the national organisation recognised by the Minister in terms of section 2 the Organised Local Government Act, 1997 (Act No 52 of 1997).

2. Application

(1) These guidelines apply to—

- (a) all national departments;
- (b) all provincial departments;
- (c) all municipalities.

(2) These guidelines do not apply to—

- (a) organs of state established by departments to function as service providers including public entities under the Public Finance Management Act, 1999 (Act 1 of 1999) and municipal entities established under the Act; or
- (b) the allocation of legislative powers **between** spheres of government as envisaged in sections 44(1)(a)(iii) and 104(1)(c) of the Constitution;

Part 2: General Principles

3. Principles Applying to Transfer of Functions

(1) The principles set out in this part form the basis for these guidelines and—

- (a) Are intended to discharge the responsibility at all levels of government to respect, promote and fulfil the provisions of the Constitution that apply to delegation and assignment;
- (b) serve as the general framework within which decisions to assign or delegate powers should be made; and
- (c) guide the interpretation, administration and implementation of this guideline and any other law concerned with the assignment or delegation of powers.

(2) Departments and municipalities contemplating the transfer of functions between them must comply with the principles set out in this part.

4. Co-operative government

(1) In accordance with the principle of co-operative government, spheres of government considering a transfer of functions are subject to the following requirements:

- (a) the decision to assign or delegate a function must be based on what is appropriate for the Republic as a whole, rather than on what is appropriate for a particular sphere of government;
- (b) notwithstanding an assignment or delegation, spheres of government remain interdependent and accordingly the assigning or delegating department must accept funding requirements or support necessary to make the assignment or delegation successful and must constantly monitor or review the function

assigned or delegated;

- (c) an agreement reached between the parties to assign or delegate a function must not be a consensus forced on either party and must be intended to achieve benefits for government as a whole in the Republic rather than for a specific sphere of government.

5. Enhancing Local Government Functions

(1) In accordance with section 156(4) of the Constitution, a function must be assigned by national or provincial departments to a municipality, unless—

- (a) the matter or function does not relate to other functions already allocated to local government by the constitution;
- (b) the function would not be effectively administered locally; and
- (c) the municipality does not have the capacity to administer the function.

6. Transfer of the Authority Role

(1) There cannot be more than **one** authority for a function and accordingly the assignment of functions is subject to the following requirements—

- (a) The authority role must be transferred in full when a function is assigned **between** spheres of government;
- (b) a function must not be split **between** spheres of government;
- (c) a function must not be split **between** a district and a local municipality, but need not be assigned uniformly to either district or local municipalities for the whole country or to all local municipalities within the area of a district municipality.

(2) Service provision elements which are not essential to the authority function may be delegated to a municipality by another sphere of government using the delegation mechanism set out in Part 8 of these guidelines.

7. Preference for General Assignments

(1) As a matter of coherency and co-ordination, general assignments made on a provincial or national scale should be preferred to specific assignments or delegations and accordingly—

- (a) a national or province-wide process should be undertaken to review the function as a whole before a decision is taken to transfer a function in terms of Part 3 of these guidelines;
- (b) a general assignment may assign the function to all municipalities or to particular categories of municipality (A, B or C) or to particular municipalities that have satisfied a particular requirement such as accreditation;
- (c) it will be appropriate only in unusual circumstances to assign a function to a

specific municipality rather than generally assign the function; and

- (d) to a general assignment may also involve asymmetric assignment as elaborated below in guideline 28.

8. Functional definition

(1) Assignment cannot occur without a definition of the function to be assigned and accordingly—

- (a) The exact definition of the assignment must be settled before the assignment occurs as elaborated in guideline 18; and
- (b) definitions must be comprehensive and unambiguous and should be included in the assigning legislation or proclamation.

9. Finance (Resources) Follows Function

(1) The principle that resources (finance) follows function arises from section 27(2) of the Annual Division of Revenue Act and requires that equitable share allocations for the financing of particular functions, and conditional grants, both operating and capital, must be paid to the organ of state which will become responsible for that function following an assignment.

(2) Accordingly, as elaborated in Part 10 of these guidelines, the assignment of a function requires—

- (a) compliance with section 27(2) of the Annual Division of Revenue Act as elaborated in guideline 41;
- (b) a recalculation of equitable share allocations in terms of the Annual Division of Revenue Act;
- (c) in the case of integrated capital grants such as the provincial and municipal infrastructure grants, revision of the formula used, and recalculation; and
- (d) allocation of any revenue raising powers associated with the function to the municipality receiving the function, subject to any constitutional or legislative requirement to the contrary.

(3) While a delegating authority must pay operating or capital funds to a municipality undertaking a service on its behalf through a delegation, such payments do not represent transfers between spheres of government in terms of the Annual Division of Revenue Act and are subject only to the applicable provisions of the PFMA as elaborated in guideline 37.

10. Assignments are Permanent

(1) All assignments are intended to be permanent, subject to any legislation to the contrary, and accordingly a province may exercise supervisory powers in terms of section 139 of the Constitution to correct non-performance by a municipality, but may not revoke an assignment.

11. Personnel Transfer

(1) In the absence of a single public service between the local government sphere and the national and provincial spheres, transfer of personnel must be effected in terms of section 197 of the Labour Relations Act as elaborated in guideline 42.

12. Consultations

(1) Due to their significant impact on the inter-governmental fiscal system, assignments are subject to mandatory consultation in terms of sections 9 and 10 of the Act, section 27 of the Annual Division of Revenue Act and section 6 of Intergovernmental Fiscal Relations Act, 1997 (Act No. 97 of 1997) as elaborated in guidelines 27, 31 and 41.

(2) General assignments require an assessment of the financial and fiscal implications of the legislation by the Fiscal and Finance Commission under section 9 of the Act, as amended, and the prior consultation with the Minister of Provincial and Local Government, the Minister of Finance, and the organised local government representing local government nationally as elaborated in guideline 4127 .

(3) Specific assignments made in terms of section 10 of the Act as well as assignments in terms of section 156(4) of the Constitution—

- (a) do not require consultation with the Fiscal and Finance Commission; but
- (b) do require consultations with the Budget Council and the Local Government Budget Forum in terms of section 6 of the Intergovernmental Fiscal Relations Act.

(4) Delegations are not subject to any mandatory consultation requirements.

Part 3: The Decision to Transfer Functions

13. The Prescribed Process for Assignment and Delegation

(1) Any decision to assign or delegate functions must be conducted in terms of these guidelines.

(2) The process for deciding to assign or delegate a function involves the following three phases:

- (a) the first phase is the decision whether to transfer responsibility for a function to local government which is made in terms of this part;
- (b) if the decision is taken to transfer responsibility for a function, the second phase is the choice of assignment or delegation which is made in terms of Parts 6 to 8 of these guidelines; and
- (c) if a decision is taken to—
 - (i) assign a function, the third phase is compliance with the requirements in parts 6 or 7 of these guidelines which incorporate the requirements set out in sections 9 and 10 of the Act as they relate to general and

specific assignments and set out additional requirements relating to assignments; or

- (ii) to delegate the function, the third phase is compliance with the requirements in part 8 of these guidelines which set out requirements relating to delegation.

14. Initiating Discussion

(1) The process set out in this Part to consider transferring a national or provincial function to local government may be initiated by—

- (a) A national department;
- (b) a provincial department;
- (c) a municipality; or
- (d) the South African Local Government Association.

15. National or Provincial Initiation

(1) If a national or provincial department intends assigning or delegation a function, it must—

- (a) appoint an official as an administrator to take responsibility for complying with the requirements of these guidelines;
- (b) provide written notice to the local government representative, be it the South African Local Government Association or a specific municipality whichever is required by guideline 17, that an assignment or delegation is being considered by the department;
- (c) provide a proposed definition of the function under consideration which complies with the requirements of guideline 18; and
- (d) arrange a meeting in which the criteria set out in guideline 19(1) can be considered in terms of the process envisaged in guideline 19(2).

16. Municipal Initiation

(1) If a municipality or the South African Local Government Association considers a function appropriate for assignment or delegation, it must—

- (a) appoint an official as an administrator to take responsibility for complying with the requirements of these guidelines;
- (b) provide written notice to national or provincial department responsible for the function, that an assignment or delegation of the function should be considered by the department;
- (c) provide a proposed definition of the function under consideration which complies with the requirements of guideline 18; and

(d) arrange a meeting in which the criteria set out in guideline 19(1) can be considered in terms of the process envisaged in guideline 19(2).

(2) The South African Local Government Association may propose general assignments only and must consult through its structures with the category of municipalities affected by the general assignment.

17. Representatives

(1) When considering a general assignment, municipalities must be represented by the South African Local Government Association.

(2) When considering a specific assignment or a delegation, an affected municipality must represent itself.

18. Functional Definitions

(1) In defining a function an administrator must provide a clear and non-ambiguous description of the function based on definitions of functions set out in the Constitution.

(2) An assignment or delegation may relate to a function not included in the schedules to the Constitution if it falls within the responsibility of the national sphere of government.

19. Criteria for Decision Making

(1) In considering whether responsibility for a function should be transferred to local government, the administrator must have regard to the following factors:

- (a) any legislation or policy that relates to the function and any indication in existing or draft legislation that the function is suitable for transfer;
- (b) any technical, operational or financial factors specific to the function that make the function suitable for transfer;
- (c) the capacity of a municipality or municipalities, as the case may be, to receive and exercise the function;
- (d) a comparative assessment of the capacity or potential capacity of the administrator's department and the municipality or municipalities to undertake the function, which shall favour transfer if both entities have the same capacity;
- (e) the extent to which transfer would allow for greater accountability to the individuals who are intended to benefit from the exercise of the function;
- (f) the extent to which the function requires a single authority across a whole province or across the Republic, as the case may be;
- (g) the extent to which there would be any benefit in terms of cost or efficiency in managing the function broadly across a whole province or across the Republic, as the case may be, because—
 - (i) a high-level of technical and managerial expertise is required;

- (ii) the provision of the service or function requires substantial crossing of municipal boundaries or large-scale bulk infrastructure; or
- (iii) this is appropriate in terms of any other factor which the administrator reasonably considers relevant;

(h) the implications for inter-governmental fiscal arrangements; and

(i) the transfer costs relating to staff, assets and professional or expert advice.

(2) In using the factors in guideline 19(1) to decide whether a function should be transferred to local government, the administrator and local government representative or representatives, as the case may be, must —

- (a) apply the requirements set out in Part 4 of these guidelines in respect of the factors relating to capacity;
- (b) agree on a weighting to be attributed to the factors;
- (c) gather information to allow for measurement of each factor;
- (d) where there is no quantifiable measurement for the factor, obtain qualitative information from an expert or an agreed group of stakeholders, or both; and
- (e) undertake an analysis comparing the status quo with the situation likely to follow transfer to local government based on the measures for each of the criteria and the relative weights.

(3) The administrator must report on the outcome of the decision-making process and indicate in the report how its conclusion is sensitive to changes in the data relating to measurements and the weighting of the factors.

(4) Where assigning legislation invests a discretion in the administrator, the factors set out in guideline 19(1) shall apply, subject to the assigning legislation.

Part 4: Municipal Capacity

20. Capacity

(1) In considering capacity in Part 3 of these guidelines, the administrator must have regard to the provisions of this part.

21. Requirements of the Act

(1) Section 10A of the Act requires that a Cabinet member, MEC or other organ of state initiating an assignment of a function or power to a municipality in terms of section 9 or 10 of the Act, must take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed, for the performance of the assigned function or power by the municipality if—

- (a) the assignment of the function or power imposes a duty on the municipality;
- (b) that duty falls outside the functional areas listed in Part B of Schedule 4 or Part

B of Schedule 5 to the Constitution or is not incidental to any of those functional areas; and

(c) the performance of that duty has financial implications for the municipality.

(2) Compliance with the requirement in section 10A of the Act in respect of “capacity building initiatives” requires assigning departments to—

(a) make expert advice available to municipalities to support managers; and

(b) set up training programmes for municipal staff required to undertake the function.

22. Assessing Capacity

(1) Where the municipality does not currently undertake a function, capacity assessments in respect of that function relate to the potential of the municipality to undertake the performance of the function which must be assessed by considering the overall performance of the municipality in delivering the services for which it is currently responsible.

(2) Current capacity may be measured by having regard to the Municipal Planning and Performance Management Regulations and in particular to the following indicators of capacity:

(a) the percentage of households with access to basic services as an indicator of past performance;

(b) the extent to which the municipality’s capital budget is spent each year; and

(c) the municipality’s financial viability as measured by debt-coverage ratio, debtors’ ratio and cost-coverage ratio.

(3) Outside of metropolitan areas and the district management areas of district municipalities the capacity of both the district and local municipalities must be separately considered, as the assignment cannot be made to two authorities in terms of guideline 6.

(4) The assessment of the capacity of the assigning body must also be considered and may be based on a history of delivery of the function to be assigned.

23. Monitoring Capacity

(1) The monitoring function retained by the assigning body in accordance with these guidelines must assist in identifying the ability of a municipality to fulfil its mandate following an assignment.

*Part 5: Mechanisms***24. Choosing a Mechanism**

(1) After having decided to transfer responsibility for a function, the administrator must decide whether an assignment or delegation is appropriate in terms of parts 6 to 8 of these guidelines.

*Part 6: General Assignment***25. Principles**

(1) A general assignment is the transfer by legislation of a function in the national or provincial sphere of government to all municipalities that fall within a designated category as envisaged in section 9 of the Act.

(2) General assignment is the favoured mechanism for transferring functions from national or provincial government to local government and unless other mechanisms for transferring a function are mandatory or appropriate, a function must be transferred by way of a general assignment.

(3) A general assignment is subject to the principles pertaining to assignment set out in Part 2 of these guidelines, and, in particular, a general assignment is permanent subject to the assigning legislation or any subsequent legislation to the contrary.

26. Requirements for General Assignment

(1) A function may not be transferred by general assignment unless—

- (a) the function has been defined in accordance with the requirements of guideline 18;
- (b) agreement has been reached with local government representatives, using the factors set out in guideline 19(1), that the function should be assigned;
- (c) there has been compliance with part 10 of these guidelines dealing with financial conditions; and
- (d) there has been compliance with part 11 of these guidelines dealing with labour requirements.

27. Compliance with the Act

(1) If the conditions set out in guideline 26 are satisfied, the national or provincial administrator must comply with section 9 of the Act.

(2) In the case of a general assignment of a function by National Government, section 9(1) of the Act requires that the cabinet member or Deputy Minister responsible for the function, must within a reasonable time before the draft Act providing for the assignment is introduced in Parliament—

- (a) request the Financial and Fiscal Commission to assess the financial and fiscal implications of the legislation, after informing the Financial and Fiscal

Commission of the possible impact of such assignment on—

- (i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;
- (ii) the fiscal power, fiscal capacity and efficiency of municipalities or any category of municipalities; and
- (iii) the transfer, if any, of employees, assets and liabilities; and

(b) consult the Minister, the Minister of Finance and the South African Local Government Association with regard to—

- (i) the assessment by the Financial and Fiscal Commission contemplated in paragraph (a);
- (ii) the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option;
- (iii) the financial implications of the assignment projected over at least three years;
- (iv) any possible financial liabilities or risks after the three-year period referred to in subparagraph (iii);
- (v) the manner in which additional expenditure by municipalities as a result of the assignment will be funded;
- (vi) the implications of the assignment for the capacity of municipalities;
- (vii) the assistance and support that will be provided to municipalities in respect of the assignment; and
- (viii) any other matter that may be prescribed.

(3) In the case of a general assignment of a function by provincial Government by way of a provincial Act, section 9(2) of the Act requires that the MEC seeking to initiate the assignment must, within a reasonable time before the draft provincial Act providing for the assignment is introduced in the relevant provincial legislature—

(a) request the Financial and Fiscal Commission to assess the financial and fiscal implications of the legislation, after informing the Financial and Fiscal Commission of the possible impact of such assignment on—

- (i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;
- (ii) the fiscal power, fiscal capacity and efficiency of municipalities or any category of municipalities; and
- (iii) the transfer, if any, of employees, assets and liabilities; and

(b) consult the MEC for local government, the MEC responsible for finance, and

organised local government representing local government in the province, with regard to—

- (i) the assessment by the Financial and Fiscal Commission contemplated in paragraph (a);
- (ii) the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option;
- (iii) the financial implications of the assignment projected over at least three years;
- (iv) any possible financial liabilities or risks after the three-year period referred to in subparagraph (iii);
- (v) the manner in which additional expenditure by municipalities as a result of the assignment will be funded;
- (vi) the implications of the assignment for the capacity of municipalities;
- (vii) the assistance and support that will be provided to municipalities in respect of the assignment; and
- (viii) any other matter that may be prescribed.

(4) When draft legislation referred to in guideline 27(2) or 27(3) is introduced in Parliament or a provincial legislature, section 9(3) of the Act requires that the legislation must be accompanied by—

(a) a memorandum—

- (i) giving at least a three-year projection of the financial and fiscal implications of the assignment of that function or power for those municipalities;
- (ii) disclosing any possible financial liabilities or risks after the three-year period;
- (iii) indicating how any additional expenditure by those municipalities will be funded; and
- (iv) indicating the implications of the assignment for the capacity of those municipalities; and

(b) the assessment of the Financial and Fiscal Commission referred to in subsection (1) (a) or (2) (a), as the case may be.

28. Asymmetric General Assignments

(1) Asymmetrical general assignments, where the implementation of assigning legislation has the result that only certain municipalities receive an assignment, are permissible.

(2) An asymmetric general assignment contemplated in guideline 28(1) may arise as between local municipalities within the same district in which case the assignment will be to some local municipalities within the district area and to the district municipality for the remainder of its area.

(3) The legislation relating to general assignments in the sector concerned may set requirements producing the asymmetrical assignments contemplated in guideline 28(1).

Part 7: Specific Assignments

29. Principles

(1) Specific assignment involves either—

- (a) the transfer of a statutory power in provincial or national legislation to a specific municipality by agreement as envisaged in sections 99 and 126 of the Constitution and section 10 of the Act; or
- (b) the transfer of a function listed in part A of Schedule 4 or Part A of Schedule 5 of the Constitution to a specific municipality by agreement as envisaged in section 156(4) of the Constitution.

(2) An administrator must transfer a function envisaged in guideline 29(1)(b) by specific assignment to a designated municipality if—

- (a) that matter would most effectively be administered locally;
- (b) the municipality has the capacity to administer it in terms of Part 4 of these guidelines;
- (c) the function has not been the subject of legislative attention that excludes the possibility of specific assignment; and
- (d) the nature of the function and municipal capacity to administer it are not suitable for a general assignment.

(3) Subject to any subsequent legislation to the contrary, a specific assignment is subject to the principles pertaining to assignment set out in Part 2 of these guidelines.

30. Requirements for Specific Assignment

(1) An administrator may not assign a function by specific assignment in terms of section 10 of the Act unless—

- (a) the function has been defined in accordance with the requirements of guideline 18;
- (b) the administrator has reached agreement with local government representatives, using the factors set out in guideline 19(1), that the function should be assigned;
- (c) there has been compliance with part 10 of these guidelines dealing with financial conditions; and

- (d) there has been compliance with part 11 of these guidelines dealing with labour requirements.

31. Compliance with the Act

(1) If the conditions set out in Guideline 30 are satisfied, the national or provincial administrator must comply with section 10 of the Act.

(2) In terms of section 10(1) of the Act, if a function or power is assigned to any specific municipality in terms of a power contained in an Act of Parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, the organ of state assigning the function or power must, before assigning the function or power, submit to the Minister and the National Treasury a memorandum—

- (a) giving at least a three-year projection of the financial implications of that function or power for the municipality; and
- (b) disclosing any possible financial liabilities or risks after the three-year period; and
- (c) indicating how any additional expenditure by the municipality will be funded.

32. Specific Assignment of Statutory Functions

(1) If a statutory power in terms of an act of parliament is specifically assigned to a municipal council, then the requirements in section 99 of the Constitution must be satisfied and the specific assignment—

- (a) must be in terms of an agreement between the relevant Cabinet member and the Municipal Council;
- (b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
- (c) takes effect upon proclamation by the President.

(2) If a statutory power in terms of a provincial Act is specifically assigned to a municipal council, then the requirements in section 126 of the Constitution must be satisfied and the specific assignment—

- (a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;
- (b) must be consistent with the provincial Act in terms of which the relevant power or function is exercised or performed; and
- (c) takes effect upon proclamation by the Premier.

(3) The agreements envisaged in guidelines 32(1) and (2) must—

- (a) clearly state that the specific assignment is in terms of section 99 or 126 of the Constitution, whichever is applicable;

- (b) attach the memorandum envisaged in section 10(1) of the Act and incorporated in guideline 31;
- (c) clearly indicate the function to be assigned;
- (d) make provision for human resources issues in terms of Part 11;
- (e) make provision for financial issues in terms of Part 10; and
- (f) comply with these guidelines including the principles set out in guideline 3.

33. Specific Assignment of Functions

(1) If a matter listed in part A of Schedule 4 or Part A of Schedule 5 of the Constitution is specifically assigned to a municipality in terms of section 156(4) of the Constitution, then the assignment must be by agreement and the requirements in guideline 29(2) must be satisfied.

(2) The agreement envisaged in guideline 33(1) must—

- (a) state that the specific assignment is in terms of section 156(4) of the Constitution;
- (b) attach the memorandum envisaged in section 10(1) of the Act and incorporated in guideline 31;
- (c) indicate the function to be assigned;
- (d) make provision for human resources issues in terms of Part 11;
- (e) make provision for financial issues in terms of Part 10; and
- (f) comply with these guidelines including the principles set out in guideline 3.

(3) The specific assignment envisaged in guideline 33(1) takes effect—

- (a) upon proclamation by the president, if it relates to a function within the national sphere of government;
- (b) upon proclamation by the premier, if it relates to a function within the provincial sphere of government.

Part 8: Delegations

34. Principles

(1) Delegation involves either—

- (a) the temporary transfer of the service provision component of a power or function in provincial or national legislation to a specific municipality by agreement as envisaged in section 238(a) of the Constitution; or
- (b) the temporary transfer of the service provision component of any power or function in the provincial or national sphere as envisaged in section 238(b) of the Constitution.

(2) Subject to any legislation to the contrary, delegation is subject to the principles pertaining to assignment set out in Part 2 of these guidelines save for the principles set out in guidelines 3(6), (9) and (10) which relate specifically to assignments.

35. Requirements for Delegation

(1) The provider role in respect of a function may only be delegated to a municipality if a general or specific assignment is not appropriate.

(2) A general or specific assignment will not be appropriate if—

- (a) permanent transfer of the authority role in relation to a function is not appropriate; or
- (b) the transfer of the entire authority role is not appropriate.

(3) Responsibility for the service provision component of a function may only be delegated to a municipality if the administrator reaches agreement with the municipality which is expressed in a service level agreement between them which specifies—

- (a) the term of the delegation;
- (b) that the delegation is in terms of section 238(a) or 238(b) of the Constitution, whichever is applicable;
- (c) a precise description of the provider role to be performed by the municipality specifying—
 - (i) service levels;
 - (ii) performance indicators;
 - (iii) risks transferred to the municipality; and
 - (iv) whether the municipality functions as an agent of the assigning department; and
- (d) the remuneration to which the municipality is entitled for performing the provider role.

36. The Nature of the Agreement

(1) The nature of the service level agreement envisaged in guideline 35 depends on the extent of a delegation and includes—

- (a) concession-type agreements where the municipality takes responsibility for raising capital to provide infrastructure;
- (b) lease-type agreements where the municipality is responsible for raising revenue but is not responsible for capital investment; and
- (c) management-contract-type agreements where the municipality only takes responsibility for managing the service for a fee and where all other responsibilities remain with the assigning body.

37. PFMA Compliance

(1) Typically an agreement contemplated in guideline 36(1) will constitute a “future financial commitment” as contemplated in section 66 of the PFMA and will require authorisation under the PFMA including the signature of the Minister or MEC for finance in the province in terms of sections 66(2)(a) or (b) of the PFMA which state that—

- (a) a government may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind a Revenue Fund to any future financial commitment:
 - (i) The National Revenue Fund: The Minister or, in the case of the issue of a guarantee, indemnity or security, the responsible Cabinet member acting with the concurrence of the Minister in terms of section 70;
 - (ii) A Provincial Revenue Fund: The MEC for finance in the province, acting in accordance with the Borrowing Powers of Provincial Governments Act, 1996.

(2) Furthermore, the administrator (if authorised) or the department’s accounting officer must comply with applicable obligations under section 38 of the PFMA which include—

- (a) settling all contractual obligations and paying all money owing, including intergovernmental claims, within the prescribed or agreed period;
- (b) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, obtaining a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, rendering the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems.

Part 9: Deconcentration

38. Principles

(1) Deconcentration involves localising the provision of a function by a national or provincial department through its own structures rather than transferring the function to local government.

(2) Deconcentration must be considered as an alternative to assignment if the national or provincial Department is merely seeking to improve delivery through geographic rather than administrative and political localisation of the function.

(3) It is not necessary for a deconcentration to comply with the principles set out in Part 2 of these guidelines.

39. Requirements for Deconcentration

(1) A function may be deconcentrated if, in the opinion of the administrator or any other authorised official within the provincial or national Department, it is necessary to localise the provision of the function in geographic terms without transferring the authority role or responsibility for service provision.

(2) A decision to deconcentrate a function may be taken internally by a department in the national or provincial sphere and does not involve any form of municipal involvement in the provision of the function; accordingly the process outlined in Parts 2 and 3 of these guidelines does not apply to deconcentration.

Part 10: Finance Issues

40. Principles

(1) The assignment of functions must comply with the procedures for assignments set out in the Act, the Intergovernmental Fiscal Relations Act and the Annual Division of Revenue Act.

(2) The Annual Division of Revenue Act provides—

- (a) in section 27(1) that the transfer of functions or obligations from one organ of state in one sphere of government to an organ of state in another sphere of government must take place only with prior written approval of the National Treasury and the national accounting officer responsible for provincial and local government;
- (b) in section 27(2) that unless the Minister of Finance has directed otherwise, the transfer of functions must also include the transfer of funds available to the transferring sphere of government for the purpose of performing such transferred function or obligation.

41. Finance Follows Function

(1) The impact of a general assignment on equitable share allocations must be calculated by the administrator initiating a general assignment and included in the notice provided to the Financial and Fiscal Commission in terms of sections 9(1)(a) or 9(2)(a) of the Act, whichever is applicable.

(2) Subject to the annual Division of Revenue Act, equitable share allocations for the financing of an assigned function, but not a function delegated or deconcentrated, must be transferred to the municipality or municipalities responsible for the function before a specific or general assignment is implemented.

(3) In order for the necessary approvals to be made by national government, and for the Fiscal and Finance Commission to be consulted, the administrator must complete the decision-making process in Part 3 of these guidelines at least 16 months prior to the desired commencement date.

(4) The administrator, acting together with the minister in the national or provincial sphere of government responsible for the function to be assigned, must then—

- (a) inform Cabinet of the intention to undertake an assignment;
- (b) request written approval from the Minister responsible for Finance and the Minister, as required by the annual Division of Revenue Act;
- (c) submit a notice to the Financial and Fiscal Commission, in terms of sections 9(1)(a) or 9(2)(a) of the Act, whichever is applicable; and
- (d) prepare a submission to the Local Government Budget Forum, as required by section 6 of the Inter-Governmental Fiscal Relations Act.

(5) The impact of an assignment on equitable share allocations must be calculated by the administrator initiating the assignment and included in all the submissions required in sub-guideline (4).

(6) At least 9 months prior to the July month in which it is anticipated that the municipality will commence taking authority for the newly-assigned function, the national Minister responsible for finance and the Minister must approve or reject the request for an assignment, taking into consideration the findings of the Financial and Fiscal Commission and the Local Government Budget Forum.

(7) Subject to the Constitution, an assignment transfers the revenue-raising powers associated with a function.

Part 11: Labour Issues

42. Labour Relations Act

(1) In terms of the Public Service Regulations, 2001, the transfer of employees from the national or provincial spheres of government to municipalities on assignment of a function must be dealt with in terms of section 197 of the Labour Relations Act which requires, among other things, the allocation of the financial liability between employers in respect of accrued employee benefits.

(2) The application of section 197 may require agreements to be entered into between the assigning department, municipalities and employees where—

- (a) there is a difference in the affected employees' current conditions of service and the conditions of service applicable to employees in the relevant local authority; and
- (b) it is necessary to allocate liability between employers in respect of accrued employee benefits including—
 - (i) leave credits,
 - (ii) long service awards; and
 - (iii) post retirement medical assistance

in order to give effect to section 197(8) of the Labour Relations Act which stipulates that the old employer is jointly and severally liable with the new

employer for a period of 12 months after date of transfer to any employee who becomes entitled to receive a payment as a result of the employee's dismissal for a reason relating to the new employer's operational requirements, unless the old employer is able to show that it has complied with the provisions of section 197 Labour Relations Act.

(3) Notwithstanding guideline 42(1) which requires that all employees involved with the performance of an assigned function at national and provincial level at the date of commencement of the assignment be transferred to the local level in terms of section 197 of the Labour Relations Act, a department may apply section 189 of the Labour Relations Act which regulates dismissals for operational reasons when restructuring within the assigning department occurs before implementation of the assignment.

43. Government Employees Pension Fund

(1) Notwithstanding the stipulations of **section 197(4) of the Labour Relations Act**, concomitant withdrawals from the Government Employees Pension Fund must satisfy the requirements laid down in Section 32 of the Government Employees Pension Law, 1996 and Rule 21 of the Rules of the Government Employees Pension Fund.

(2) In respect of group transfers from the Government Employees Pension Fund the rules require that provision be made in legislation for the transfer of employees to the pension fund arrangements of the new employer.

(3) In order to satisfy the requirement in Guideline 43(2), the conclusion of a collective agreement must be made and the approval of financial arrangements regarding the transfer of members' accrued interest in the Fund by the Minister of Finance in concurrence with the Board of Trustees of the Government Employees Pension Fund must be obtained.

(4) Transfers of employees must take account of the rules of the Government Employees Pension Fund which provide that the value of each member's interest to be transferred will not exceed the funded position of such member's accrued interest in the Fund, based on market values as determined by the actuary and in this regard any agreement between the assigning department and municipalities as contemplated in guideline 42(2) must include stipulations on the funding liability that will result from the current funding shortfall in the Government Employees Pension Fund.

Part 12: Implications for Municipal Process

44. Budget Process Implications

(1) An assignment has implications for the budgeting process in both the assigning department and the municipality receiving the function and changes to transfers from the national revenue fund in the case of assignments also imply implications for the national budgeting process.

(2) The timing of assignment decisions must take the budgeting process into consideration and in order for funds to be allocated properly in provincial and national

budgets the approvals for assignments must be completed by the end of September in the year before the commencement date.

(3) The revised figures for transfers will be published in the Annual Division of Revenue Act and the figures for new allocations of funds must also be reflected in municipal budgets which are finalised in June which implies that functions which are transferred to municipalities will only become effective on 1 July of any year, nine months after the deadline for approval of the transfer of the function and related finances.

45. Implications for IDPs

(1) The acceptance of an assignment or a delegation must be addressed in the planning process and specifically in the integrated development planning process of the municipality.

(2) In order to allow the municipal budget process to take account of new priorities set in the IDP in anticipation of an assignment, an assignment or delegation must be considered in the IDP review in the middle of the year so that, once a decision is taken in September to approve an assignment, the function can be included in the IDP to be completed in December of that year.

Part 13: General

46. Intergovernmental Dispute

(1) If spheres of government involved in a proposed assignment or delegation cannot agree on—

- (a) whether responsibility for a function should be transferred to local government;
- (b) the methodology, including criteria, weighting and the analysis contemplated in guideline 19, and this produces a disagreement about whether a function should be transferred to local government;
- (c) whether assignment or delegation is an appropriate mechanism for the transfer of a function;

an intergovernmental dispute may be called by the administrator in terms of the Intergovernmental Relations Framework Act.

47. Transfer of Assets and Liabilities

(1) In principle the authority should own the assets required to undertake the function for which it is responsible and accordingly if a function is assigned the ownership of related assets must be transferred unless the parties specifically agree otherwise.

(2) If assets are transferred as envisaged in guideline 47(1)—

- (a) they should not be separated from liabilities; and
- (b) the municipality receiving the function must also accept the existing liabilities associated with the function, both of a short and long-term nature.

(3) At the time the decision in guideline 19 regarding whether a function should be transferred to local government is made, both assets and liabilities must be listed and valued and this information must be included with the assessment report envisaged in guideline 19(3).

48. Reporting

(1) Within two months of the coming into operation of these guidelines, the administrator must provide the Minister with a report detailing any assignment or delegation of functions that occurred before the coming into operation of these guidelines.

(2) When these guidelines come into operation, the administrator must provide a report to the Minister detailing any assignment or delegation of a function within two months of the assignment or delegation coming into operation.

49. Penalties for Non-Compliance

(1) A delegation or assignment that fails to comply with the requirements may be subject to the sanction envisaged in section 120(6)(b) of the Act.

50. Date of Commencement

(1) These guidelines commence on the date of publication in the Government Gazette.
