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Institute of
Certified Secretaries
'The Governance Profession'



June 7, 2021

Mr. Kenneth Gathuma
Director General
Business Registration Service (BRS)
P. O. Box 30031-00100, Nairobi
Email: blrc@brs.go.ke
Cc: eo@brs.go.ke; kenneth.gathuma@brs.go.ke

Dear Mr. Gathuma,

PROPOSED AMENDMENT BILLS

We refer to your public notice calling for memoranda on review of various laws.

The Institute has considered the proposed amendment Bills and we have annexed our proposals to three of the Bills as follows:

1. Business Registration Service (Amendment) Bill, 2021 - Annexure (i)- pages 2&3
2. Companies (Amendment) Bill, 2021 - Annexure (ii)-Pages 4 to 8
3. Insolvency (Amendment) Bill, 2021 - Annexure (iii)-Page 8

Secondly, we note that Sections 6 and 7 of the Insolvency Act (No. 18 of 2015) provides that only a member of a recognised professional body can be authorised to act as an insolvency practitioner. Although Certified Public Secretaries were over the years practicing as insolvency practitioners under the Repealed Companies Act, the Institute was however not gazetted as a recognised professional body pursuant to Section 7 of the Act. We therefore request that the Institute of Certified Public Secretaries of Kenya be gazetted as a recognised professional body under section 7 of the Insolvency Act (no. 18 of 2015).

We trust that you will find our recommendations useful. For any clarifications, contact the undersigned on JKaranja@ics.ke with a copy to ceo@ics.ke.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JKaranja', written over a white background.

CS Jeremiah N. Karanja
Head of Professional Services

BUSINESS REGISTRATION SERVICE (AMENDMENT) BILL, 2021 - Annexure (i)

SECTION:	PROPOSED AMENDMENT:	COMMENTS:	RECOMMENDATION(s):
Section 9 on Meetings of the Board.	The principal Act is amended by deleting section 9 and substituting therefor the following new section— (1) The meetings of the Board shall be as prescribed in the First Schedule to this Act. (2) Despite subsection (1), the Board may regulate its own procedure. (3) The Board may co-opt into its membership a person whose knowledge and skills are considered exceptional for the effective discharge of the functions of the Service under this Act.	Subsection 2 may be open to different interpretation including ignoring the provisions in the First Schedule and adopting a new procedure.	The provisions in Subsection 2 of the principal Act should be retained to read: (2) Except as provided in the Schedule, the Board may regulate its own procedure. This will ensure new procedure is adopted only in circumstances where it is not included in the First Schedule

OTHER PROPOSED AMENDMENTS TO THE BUSINESS REGISTRATION SERVICE ACT

SECTION:	PROVISIONS IN THE ACT:	PROPOSED AMENDMENT:	JUSTIFICATIONS
Section 5 on the Board Service	5. (1) The Service shall be governed by a board of The Board of the directors. Service. (2) The Board shall consist of — (a) a chairperson; (b) the Solicitor-General or his representative;	Section 5 (e) of the Principal Act is deleted and replaced with the following: Four other members nominated by the following: (i) One by the Institute of Certified Public Secretaries of Kenya.	<ul style="list-style-type: none"> Members of the Professional Associations are the majority clients of the Service; this will also ensure balancing of the various stakeholders' interests. It is easier and gives more accountability for appointments to

	(c) the Principal Secretary in the Ministry for the time being responsible for matters relating to trade; (d) the Principal Secretary in the National Treasury; (e) four other members; and (f) the Registrar-General who shall be an ex officio member and secretary to the Board.	(ii) One by the Institute of Certified Public Accountants of Kenya (iii) One by the Law Society of Kenya (iv) One by the Kenya Private Sector Alliance	be through institutions rather than directly appointing individuals.
Section 5 on the Board Service	Secretary to the Board	Section 5 (f) of the Principal Act is amended by deleting the words "and secretary to the Board." The Principal Act is amended by inserting Section 5 (g) to read as follows; the Board shall appoint a Certified Public Secretary of good professional standing as the secretary to the board.	To ensure that the Board has access to services of a qualified Corporate Governance professional. This is in line with requirements of Mwongozo and best corporate governance practices.
<i>Section 18. (1)</i> Qualifications for appointment as the Registrar-General	18. (1) A person is qualified for appointment as the Registrar-General if the person- (a) is qualified as an advocate of the High Court of Kenya; (b) has at least ten years' experience in public affairs and management; and (c) meets the requirements of Chapter Six of the Constitution	The Principal Act is amended at Section 18. (1) (a) by wording the words "and a holder of a practicing certificate under the Certified Public Secretaries of Kenya Act"	The work of Registrar General requires corporate governance qualifications, in addition to law.

COMPANIES (AMENDMENT) BILL, 2021- Annexure (ii)

SECTION:	PROPOSED AMENDMENT:	COMMENTS:	RECOMMENDATION(s):
Section 58: Power to direct change of name in case of similarity to existing name	The principal Act is amended in section 58 by deleting subsection (2). (2) A direction under subsection (1) may be given only within twelve months after the date on which the company concerned was registered or within such extended period as the Registrar may specify in writing in a particular case.	The effect of deleting this provision is that the Registrar can request a company to change its name at any point. From a business perspective, the proposed section introduces uncertainty in the proprietary right to a company's business name. The Registrar may also not take cognizance of the sensitive discussions that have to be undertaken by a company with its various stakeholders and which usually cannot be rushed.	This amendment should not be taken forward.
Section 60: Misleading indication of activities	The principal Act is amended by inserting the following new section immediately after section 61— Misleading indication of activities 61A. (1) If in the opinion of the Registrar, the name by which a company is registered gives a misleading indication of the nature of its activities as to be likely to cause harm to the public, the Registrar may in writing, direct the company to change its name.	Amendment 17 should be to Section 60 of the Principal Act and not Section 61.	The amendment should be taken forward but subject to proper cross-referencing

	(2) A person who has been issued with a notice under subsection (1), must comply with the direction, within six weeks from the date of the direction.		
Section 287 on Resolution requiring special notice.	The principal Act is amended in section 287 by— (a) deleting paragraph (3)(b);	In view of technological advancement, a company should be allowed to publish such notice not only through newspaper advertisement but also through other means such as the Company`s website.	This amendment should not be taken forward.
Section 243 on private company not required to have a secretary	The principal Act is amended by inserting the following new "section 243(1A)" immediately after "Section 243": 243(1A). A private company which subsection (1) does not apply or Company limited by guarantee may elect to appoint a secretary.	The proposed amendment should replace the words `may elect` with `shall` Avoid ambiguity and discretion created by the words "may elect" which seems more of a proposal than a legal obligation.	The proposed new section 243(1A) should therefore read "A private company which subsection (1) does not apply or Company limited by guarantee shall appoint a secretary."

OTHER PROPOSED AMENDMENTS TO THE COMPANIES ACT

SECTION:	PROVISIONS IN THE ACT:	PROPOSED AMENDMENT:	JUSTIFICATIONS
S. 3 Interpretation of provisions of this Act		The principal Act is amended in section 3 (3) by adding the words " <i>Secretary means a Certified Secretary as defined under the Certified Public Secretaries of Kenya Act, Cap 534 of the Laws of Kenya</i> "	The word "Secretary" is used throughout the Act and therefore needs to be defined in the preamble
Section 3: Interpretation of provisions of this Act	(1) in this Act, unless the context otherwise Interpretation of requires —	The principal Act is amended in section 3 (3) by adding the words — company's constitution means Articles of Association	To provide clarity regarding what are a company's constitutive documents or "company's constitution".

		<p>Section 22 of the Companies Act (Cap 486) (Repealed) provided that memorandum and articles of association of a company once registered would bind the company and members as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all their provisions. The articles of association under the Repealed Act were therefore the main document to guide relationship between the company and its members.</p> <p>Section 30 (1) of the 2015 Companies Act provides that "A company's constitution binds the company and its members to the same extent as if the company and its members had covenanted agreed with each other to observe the constitution."</p> <p>Although Section 30 of the 2015 Act appears to have similar effect to section 22 of the Repealed Act, the distinction however is that Section 30 refers to the company's constitution rather than just the memorandum and articles of association as the binding document.</p> <p>Part III of the Companies Act No 17 of 2015 and titled "A Company's Constitution" contains three divisions namely:</p>
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			<ul style="list-style-type: none"> • Division 1 – Articles of Association – s. 20-26 • Division 2- Resolutions and Agreements Affecting the Company’s Constitution – s. 27-28 • Division 3 – Supplementary Provisions –s. 29-32 (This includes s. 29 Documents to be provided to members and s. 30 the effect of the company constitution) <p>From this one may want to conclude that “A Company's Constitution” include the Articles of Association and Resolutions of the company. However, the practice applying in Kenya in regard to interpretation of statutes is that section heads do not control the meaning of statutes and are not part of the statute for purposes.</p>
S.243 – Private Companies not required to have a Secretary	(1) A private company is required to have a secretary only if it has a paid up capital of five million shillings or more	The principal Act is amended in section 243 (1) by deleting the words “only if it has a paid up capital of five million shillings or more” coming after the word ‘secretary’ and replacing the same with “unless exempted under the Regulations”	<p>To all an objective criteria be developed in the Regulations for exempting small private companies from the requirement of having a Secretary.</p> <p>Nominal capital has no relationship on the size and complexity of the company. Exemption should not be applied wholesale for all private companies since private companies are actually larger than public companies yet they retain a share capital of Ksh 100,000 only.</p>

Section 244. Public company required to have secretary	244. Every public company is required to have at least one secretary	The principal Act to be amended in section 244 to read "Every public company and company limited by guarantee shall have at least one secretary" The header of the section be amended to read "Public company and companies limited by guarantee are required to have secretary"	The objects of companies limited by guarantee are usually for public purposes. Governance standards for such companies should therefore be at higher level.
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INSOLVENCY (AMENDMENT) BILL, 2021 - Annexure (iii)

SECTION:	PROVISIONS IN THE ACT:	PROPOSED AMENDMENT:	JUSTIFICATIONS
Section 701 (5)	701 (5) A person is not qualified for appointment as Official Receiver or Deputy Official Receiver unless the person is an advocate, a registered accountant or a chartered public secretary.	Section 701 (5) of the Principal Act is amended by replacing the words "chartered public secretary" with "certified public secretary"	<ul style="list-style-type: none"> • For clarity and to be consistent with the Certified Public Secretaries of Kenya Act, Cap 534 of the laws of Kenya. • The term "Chartered Secretary" is used in the United Kingdoms while in Kenya, the statutes use the term "Certified Public Secretary."

THE INSTITUTE OF CERTIFIED PUBLIC SECRETARIES OF KENYA TO BE GAZETTED AS A RECOGNISED PROFESSIONAL BODY UNDER SECTION 7 OF THE INSOLVENCY ACT (NO. 18 OF 2015)

Sections 6 and 7 of the Insolvency Act (No. 18 of 2015), provides that only a member of a recognised professional body can be authorised to act as an insolvency practitioner. Although Certified Public Secretaries were over the years practicing as insolvency practitioners under the Repealed Companies Act, the Institute was however not gazetted as a recognised professional body pursuant to Section 7 of the Insolvency Act. We therefore recommend that the Institute of Certified Public Secretaries of Kenya be gazetted as a recognised professional body.