

APPENDIX: ICPAK SUBMISSIONS ON THE COMPANIES BILL 2015

Monday, June 15, 2015

#	Reference	Proposed requirement	Our observation	Our recommendation	Justification
1.	Definitions	"prescribed financial accounting standards" means statements of standard accounting practice issued by such 'body or bodies as may be prescribed by the regulations for the purpose of this Act;	We propose that this be amended to indicate standards issued by the ICPAK and PSASB and ICPAK.	"Prescribed financial accounting standards" means statements of standard accounting practice issued by <u>a professional body in accounting and finance recognised by law in Kenya.</u> such 'body or bodies as may be prescribed by the regulations for the purpose of this Act;	To expressly mandate the Institute to issue accounting standards in line with its mandate as stipulated under the Accountants Act.
2.	Definition	"sign" includes sign by means of an electronic signature	This definition is not fully exhaustive and is likely to be open to misinterpretation.	This definition should be amended to read: "sign" includes sign by means of an electronic signature <u>"sign" means handwritten; typed; or electronic signature</u>	To have a complete definition of "sign" that is precise and clear.
3.	Definition	<p>“statutory auditor” means-</p> <p>a. a person-or firm appointed as auditor of a company) under Part XXVII (Auditing of companies financial statements); or</p> <p>b) a person or firm appointed as an auditor of a body of a kind prescribed by the regulations prescribed by ICPAK;</p>	<p>The definition of who a statutory auditor is neither clear, nor does it differentiate from other auditor(s) provided for in Part XXVII vs Part XXVIII.</p> <p>This is copy pasted from the UK law. In Kenya, we do not separate an auditor from a statutory Auditor. In the UK, there is a body that registers statutory auditors and the Act defines which audits must be</p>	<p>Amend as below:-</p> <p>“statutory auditor” means-</p> <p>a. a person-or firm appointed as auditor of a company) under Part XXVII (Auditing of companies financial statements); or</p> <p>b. a person or firm appointed as an auditor of a body of a kind prescribed by the</p>	<p>By clearly defining statutory auditor and linking with the respective audit segment as provided for in the UK Act.</p> <p>Maintenance of register for auditors vested with the Institute and the same should be upheld.</p>

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			undertaken by those licensed as statutory auditors, hence this provision.	regulations issued by the <u>Institute of Certified Public Accountants of Kenya</u> for the purposes of this definition;	
4.	Definition	"working day" means any day that is not a Sunday or a public holiday.	We do not see the objective of this definition. The definition of "working day" should be left to the employment laws and not the companies law.	We propose the deletion of this in the bill to read " <u>working day as defined by the Employment Act, 2007</u> "	This should be defined in the employment laws and not the companies act.
5.	Section 133 (4)	(4) In this section, "public interest company" means a company that has responsibility for receiving, handling or spending public funds.	Public funds are not defined hence there a probability of inconsistent application in practice. For example, would public funds mean funds drawn from the exchequer only? What of instance where members of the public paying for services from a private hospital would this qualify the hospital to a public interest entity?	This section should be expanded to clarify what should be considered to be public funds. We propose amendment to read as:- "(4) In this section, "public interest company" means a company that has responsibility for receiving, handling or spending public funds <u>money as defined by the PFM Act as well as regulated financial services entities</u> "	To eliminate any ambiguity, public funds should be defined as Public Money as defined in the PFM Act of 2012.
6.	Section 152 (3)	(3) A declaration is not effective for the purpose of subsection (2) unless the	This proposal may impact on the independence of the auditor.	We recommend that we change certified to read as:	The auditor should be independent, and this may impact his independence as it

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		valuation of the goods or services and the valuation of the assets of the company are certified by the <u>company's auditors</u> as being the true market value of those goods or services and those assets.	<p>The other fundamental issue would be who is going to pay for the services of the auditor when involved in assessing such declarations? Should it be the director or the company?</p> <p>We opine that the such verification should be left to the Directorsø (who will therefore seek independent expertise to assist with such valuation) and should it be determined at a later date that the directorø declaration was not true ó he will be required to resign as a director and may be prosecuted subject to the liability limitations in this law.</p>	(3) A declaration is not effective for the purpose of subsection (2) unless the valuation of the goods or services and the valuation of the assets of the company are <u>verified</u> certified by the <u>company's auditors</u> as being the true market value of those goods or services and those assets.	<p>may be deemed that the auditor is acting in the interest of the directorø.</p> <p>Expertise on Valuations is on property valuers.</p>
7.	Section 624 and 625	<p>(3) The qualifying conditions are satisfied by a company in a year in which it satisfies two or more of the following requirements-</p> <p>(a) it .has a turnover of not more than <u>seven hundred and twenty million shillings</u>;</p> <p>(b) the value of its net assets as shown in its balance sheet as at the end of the year is <u>not more than three hundred and sixty million shillings</u>; and</p> <p>(c) it does not have more than</p>	<p>These companies or groups of companies are exempted from auditing requirements under Section 724.</p> <p>The qualification threshold appears quite high and could capture a large number of small and medium size businesses.</p> <p>We note particularly that this is borrowed from the United Kingdomø Companies Act 2006, Section 383 (4)].</p>	<p>We recommend that the monetary thresholds be revised to levels that fairly reflect the size of the Kenyaø economy in comparison of thresholds set by other countries. For instance harmonisation with KRA threshold for VAT</p> <p>(3) The qualifying conditions are satisfied by a company in a year in which it satisfies two or more of the following</p>	<p>We expect the capital providers (shareholders and lenders) and the Revenue Authority to want reliable financial information from these businesses to assess their performance and tax obligations while the proposed thresholds will make nearly 90% of Kenyan companies exempt from audit.</p> <p>This may negatively impact on the economy.</p>

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		fifty employees.	<p>However based on the Gross Domestic Product (GDP), Kenya is only 2.6% the size of UK.</p> <p>High threshold will only leave a small fraction of group of companies in the qualification bracket.</p> <p>The UK started exemption in 1994 with turnover of £90K and balance sheet of £1.4 million http://www.legislation.gov.uk/ukxi/1994/1935/made).</p>	<p>requirements-</p> <p>(a) it has a turnover of not more than five seven hundred and twenty million shillings;</p> <p>(b) the value of its net assets as shown in its balance sheet as at the end of the year is not more than five nine three hundred and sixty million shillings; and</p> <p>(c) it does not have more than fifty employees.</p>	
8.	Section 626 (2)	<p>(2) A group is ineligible if any of its members</p> <p>(a) a public company;</p> <p>(b) a body corporate (other than a public company) whose shares are admitted to trading on a securities exchange or other regulated market in Kenya; or</p> <p>(c) a person who carries on insurance market or banking activity.</p>	<p>For (b), entities that float debt instruments have been omitted from this description.</p> <p>The provision in (c) excludes a number of entities with diverse holding or trade in public funds such as SACCOs, co-operative societies, deposit taking micro finance institutions etc.</p>	<p>We propose amendments as:-</p> <p>2) A group is ineligible if any of its members</p> <p>(a) a public company;</p> <p>(b) a body corporate (other than a public company) whose shares <u>or debt instruments</u>, are admitted to trading on a securities exchange or other regulated market in Kenya EAC; or</p> <p>(c) <u>any company and its subsidiaries, that is subject to a regulation within the financial sector in Kenya.</u> or banking activity.</p>	<p>The entities left out in this provision have a public interest obligation and as such should be subject to an independent audit which will provide that additional assurance to the public hence should not be exempted.</p>

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				Consider <i>UKA – 384 (2) -(c) a person (other than a small company) who has permission under Part 4 of the Financial services</i>	
9.	Section 650 (1)	650. (1) Except in the case of a company that is subject to the small companies regime, the directors of a company shall include in the notes to the company's individual financial statement details of the benefits that they have received during the relevant financial year of the company.	Why are small companies regime exempted from this requirement? There is no additional cost of obtaining this information hence we do not see the reason why it should be an express exemption.	We are of the view that this be optional for small entities. The clause should read: 650(1) Except in the case of a company that is subject to the small companies regime, the directors of a company <u>may</u> include in the notes to the company's individual financial statement details of the benefits that they have received during the relevant financial year of the company.	The complete set of financial statements enables one to better understand the financial performance and position of a company.
10.	Section 654 (1)	654. (1) The directors shall include in their report for a financial year- (a) the names of the persons who, at any time during the financial year, were directors of the company; and	The end of the financial year in most cases comes before the financial statements are finalised. It is important also to include those who are there as at the date of issuance of the financial statements	667. (1) The directors shall include in their report for a financial year- (a) the names of the persons who, at any time during the financial year <u>and up to the date of signing the report</u> , were directors of the company; and	There are instances where reports would be presented to members who joined after the end of the financial year, they will be involved in the approval hence need to include them as long as the date of appointment is clearly stipulated.
11.	Section 655	678. (1) A company may, in	There is need to clearly specify	We propose that the	To separate these summary

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	(1)	such circumstances as may be prescribed by the regulations for the purposes of this section, send to its members a summary financial statement instead of the copy of the financial statement required to be sent out in accordance with section 675	what summary financial statements entail ó ICPAK should provide guide on this.	summary financial statements are as per the prescribed financial reporting standardsö issued by a professional body in accounting or finance recognised by law in Kenya.	financial statements (668) and abbreviated financial statements (Section 690)- stick to summary, since they serve different objectives and are intended for different users.
12.	Section 670	670. (1) A quoted company shall ensure that its annual financial statement and directors' report- (b) remains available on the website until the annual financial statement for the next financial year of the company is made available in accordance with this section.	This seems to imply that the directors' report is a distinct report. We are of the view that the directors' report should be prepared as part of the annual report. The act should clearly define what annual report contains. We are of the view that time limit provided here is very short. The annual report should remain on the company website for at least 7 years. This will be consistent with our proposal for amendment of section 643.	683. (1) A quoted company shall ensure that its annual financial statement and directors' report annual report and financial statements. (b) remains available on the <u>company website for at least seven years from the date of the annual report and financial statements until the annual financial statement for the next financial year of the company is made available in accordance with this section.</u>	Align with the duration for keeping records as per section 630 of the Bill.
13.	Section 686 (5) (b) (ii)	(b) that the copy of the auditor's report lodged with the	Details of form and content of the auditor report should be	We propose that by deleting (i) and (ii) and amending (b)	To ensure consistency in the form and content of the

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		Registrar under this section- i. states the name of the auditor and, if the auditor is a firm, the name of the person who signed it as senior statutory auditor; or	vested on the Institute. The Institute to issue clear regulations as to what should be contained therein. We do not have these things of senior statutory auditor and we should stick to who the engagement partner is- <i>This bill takes cognisance of the fact that an auditor can be a firm – ICPAK to issue regulation in this light of this once the bill is enacted.</i>	to read as:- (b) that the copy of the auditor's report <u>in the format prescribed by the Institute lodged with the Registrar under this section</u> - <i>We submit that this be extended in all instances in the Bill where an auditor's report is required.</i>	auditor's report to ICPAK to issue regulations as per the Accountants Act.
14.	Section 689	(3) This does not apply if- (a) the exemption conferred by this section company is a banking or insurance company or the parent company of a banking or insurance group; or (b) the company is of a class prescribed by the regulations as a company to which this subsection applies.	This should be broadened to ensure that it captures all public interest entities	We propose that all public interest entities are included in filing returns. See our proposal in 626 (2) above.	
15.	Section 695	708 (i) This section applies to the following documents: a. the annual financial statement of a company; b. the directors' remuneration report	We take note that documents to be amended fail to include a report of the independent auditor and we are in agreement. However, we observe that the section fails to require the auditor to issue a	The Bill should give express powers to the Institute to establish these regulations	

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		<p>c. the directors' report of a company;</p> <p>d. a summary financial statement of a company.</p> <p>(4) (a) The regulations may prescribe how the provisions of this Act are to apply in relation to documents to which this section applies.</p>	<p>statement to the extent of the revisions made.</p> <p>Operationalisation of this provision needs to be thought critically as it exposes the auditors and the directors. Specific issues for consideration should include clarity on the duration within which such revision can be made, and to what extent the auditor will be involved in verifying these facts a freshí</p>		
16.	Section 702	<p>715 (4) The prohibition also does not apply to a disclosure made-</p> <p>(a) with a view to the bringing of, or otherwise in connection with, disciplinary proceedings relating to the performance by an accountant' or auditor of professional duties;</p>	<p>We are in agreement except that this section should make specific reference to ICPAK and the Accountants Actí</p>	<p>We propose amendment as:</p> <p>715 (4) The prohibition also does not apply to a disclosure made <u>to the Institute-</u></p> <p>(a) with a view to the bringing of, or otherwise in connection with, disciplinary proceedings relating to the performance by an accountant' or auditor of professional duties;</p>	<p>Make specific reference to ICPAK, a body mandated by law to regulate the profession.</p>
17.	Section 706 and 707	<p>Contents of annual return: general.</p>	<p>Content of the annual returns should include auditor's report on the financial statements/ exemption statement, where applicable.</p>	<p>We propose an addition of (d)</p> <p>719. (l) A company shall ensure that its annual return states the date to which it is made up and contains the</p>	<p>The Institute intends to deal with ðquacksö by tightening the auditor report. This will be attained through collaborating with the registrar to ensure that returns are accompanied with</p>

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				following information: (d) a report of the independent auditor on the financial statements.	valid report of licensed auditors.
18.	Section 711	(1) A company that complies with the conditions of subsection (2) in respect of a financial year is exempt from the requirements of this Act relating to the audit of accounts for that year. (a) that the company qualifies as a small company in relation to that year; (b) that its turnover in that year is not more than seven hundred and twenty million shillings; and (c) that the value of its net assets specified in its balance sheet as at the end of that year is not more than three hundred and sixty million shillings.	The threshold is not realistic.	See our comments on 624 and 625 above. (1) A company that complies with the conditions of subsection (2) in respect of a financial year is exempt from the requirements of this Act relating to the audit of accounts for that year. (a) that the company qualifies as a small company in relation to that year; (b) that its turnover in that year is not more than <u>five</u> seven hundred and twenty million shillings; and (c) that the value of its net assets specified in its balance sheet as at the end of that year is not more than <u>five</u> three hundred and sixty million shillings.	The proposed threshold will stifle businesses and lead to loss of jobs.
19.	Section 712	A company is not entitled to the exemption conferred by section 711 if it was a public company, or carried on a banking or insurance business, at any time within the relevant	PIE should not be exempted from audit	See our comment on 625 (2) above.	As per our proposals above.

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		financial year.			
20.	Section 716	729. (1) The requirements of this Part as to audit of financial statements do not apply to a company for a financial year if it is non-profit-making and its financial statements are subject to audit by the Auditor General.	<p>This provision is ambiguous and should be clarified further.</p> <p>There are instances where the auditor general sub-contracts auditor to carry out an audit on his behalf.</p> <p>The provisions of ISAs are also general and apply even for not for profit entities.</p> <p>The Public Audit Act is applicable to public entities. Unlike in the UK, the Companies Act augments the Public Audit very well hence no need to have this in law.</p>	We propose deletion of this.	The mandate of the Auditor General is expressed and the Public Benefit Organisations Act provide for PBOs to be audited by a registered auditor.
21.	Section 725 and 726	(3) Regulations made for the purpose of this section must provide for the disclosure of any variation of the terms on which a company's auditor is appointed, remunerated or required to carry out the responsibilities of auditor.	ICPAK to develop these regulations as to what should be disclosed in line with the engagement letter.	<p>Amend to Include a clause to give the role to</p> <p><u>For purposes of Sec 725 and 726 the regulations shall be issued by the Institute of certified public accountants of Kenya.</u></p>	The body mandated with registration and regulation of auditors. This will ensure that terms of audit engagement align with International standards.
22.	Section 727	(2) The auditor shall include in the auditor's report- (a) an introduction identifying the annual financial statement that is the subject of the audit	Form and content of the auditor report should be aligned with the provisions of ISA. The best way is to provide for the Institute to	<p>We propose deletion of subs (a) and (b) and amendment of 740 (2) to read as:-</p> <p>(2) The auditor's report shall</p>	To be in conformity with International standards on Auditing and global best practise. Also, changing the Act takes long hence for

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		and the financial reporting framework that has been applied in its preparation; and (b) a description of the scope of the audit identifying the auditing standards in accordance with which the audit was conducted.	make regulationsí	be in the format prescribed by the Institute include in the auditor's report- (a) an introduction identifying the annual financial statement that is the subject of the audit and the financial reporting framework that has been applied in its preparation; and (b) a description of the scope of the audit identifying the auditing standards in accordance with which the audit was conducted.	adaptability; the Institute should have the powers to prescribe such formats.
23.	Section 735	748. (1) Subject to subsection (2), an auditor shall- (a) sign and date the auditor's report; and (b) ensure that the auditor's name is prominently displayed in the report. (2) If the auditor is a firm, the senior statutory auditor shall sign the report on behalf of the firm (3) An auditor who fails to comply with subsection (1), or a senior statutory auditor who fails to comply with (2), commits an offence and is liable on conviction to a fine not exceeding two hundred	The proposed law creates a new category of auditors called ōstatutory auditorö. As highlighted above, the circumstances in Kenya and the UK are different hence no need for the establishment of this class of auditors. ICPAK to issue regulations on signing assurance engagements in line with the ISAs.	We propose amendment to (2) and (3) as:- (2) If the auditor is a firm, the <u>engagement partner responsible for the audit engagement and its performance, and for the auditor's report that is issued</u> shall sign the report on behalf of the firm (3) An auditor who fails to comply with subsection (1), or <u>the engagement partner responsible for the audit engagement and its performance, and for the auditor's report that is issued,</u> a senior statutory auditor	Audit being a professional body, a natural person, even in a firm would be charged with the responsibility of overseeing the performance of the engagement and issuing a report containing the opinion. Accounting regulations provide for an engagement partner and not the managing partner (senior statutory auditor).

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		thousand shillings.		who fails to comply with (2), commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.	
24.	Section 737	Senior statutory auditor to be nominated when audit is conducted by firm of auditors.	<p>Whenever an engagement is taken by a firm, there is always an engagement partner responsible for the audit. As has been the practice, each audit firm has a managing partner/senior partner.</p> <p>We do not see the need for this new establishment of statutory auditor.</p>	<p>We propose deletion of this section as each firm is required under the partnership act and the Institutes regulations to appoint a managing partner.</p> <p>Senior statutory auditor to be nominated when audit is conducted by firm of auditors.</p>	This is because globally, the profession is structured in a manner such that the engagement partner bears the primary responsibility for the audit subject to the firm's internal policies and quality controls in place.
25.	Section 752 (to 755)	765. (1) An auditor who ceases to hold office before the end of the term for which the auditor was appointed shall notify the <i>appropriate audit authority</i> .	<p>We note that the term "appropriate audit authority" has not been defined in this law. This may lead to ambiguity and multiple overlaps in trying to implement this provision.</p> <p>Is there justification for notifying the CS when an auditor resigns? We believe that the regulatory bodies herein report to the CS directly or indirectly.</p> <p><i>767 makes reference to</i></p>	<p><i>We propose amendment as:-</i></p> <p>765. (1) An auditor who ceases to hold office before the end of the term for which the auditor was appointed shall notify the <u>Institute and the body that regulates the company (where applicable)</u> appropriate audit authority.</p> <p><i>And deletion of all other sections herein. This should make it clear that it is the duty of the auditor and the company to notify the</i></p>	In Kenya, ICPAK is mandated with the regulation of the audit practice and as such, the notification should be channeled to the Institute. In addition to notifying the Institute, for PIEs it would add value if the regulator is also notified of the same. The regulator would include CMA, RBA, IRA, CBK and SASRA.

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			<p><i>notification being done to ICPAK. It would add value if this “appropriate audit authority” is explained in the law.</i></p> <p>768 is vague.</p>	<p><i>Institute and the regulators when an auditor ceases office. This will augment section 762 and eliminate unnecessary overlaps and bureaucracies.</i></p>	
26.	Section 771	(1) The audit committee of a quoted company shall-	<p>To ensure that the audit committee is well grounded on matters of finance and accountability, we propose that the law set minimum criteria for its composition.</p> <p>We also note that nothing is mentioned in regard to private companies in regard to audit committees.</p> <p>This is also backed by the findings of our assessment of the effectiveness of internal audit committees and Mwongozo Code.</p>	<p>We propose that the bill be amended to include the establishment of an audit committee for each quoted company specifically,</p> <p><u>771. (1) Every quoted company shall establish an audit committee which shall be:-</u></p> <p><u>(i) chaired be an independent member of the Board; and</u></p> <p><u>(ii) have at least one member of the ICPAK in good standing</u></p> <p>(24) The audit committee of a quoted company shall- <i>(continuation as in the proposed bill)</i></p> <p>Need for the law to make it optional for private companies to establish audit committees for best corporate governance.</p>	<p>The proposed bill provides significant additional responsibilities on the directors hence the need to ensure that the composition of the committees add value i.e. persons who understand aspects of financial reporting and internal controls of an organisation. Who are able to engage and critically question the report of the independent auditor. The professionalism will also be enhanced in the committees of the Board of quoted companies thus enhancing corporate governance.</p>

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27.	Section 773	773. A natural person or firm is eligible for appointment as a statutory auditor only if the person, or each partner of the firm, is the holder of a practising certificate issued under section 21 of the Accountants Act.	This eliminates the provision that ða body corporate cannot be appointed an auditor. ICPAK will therefore be required to issue regulations on how audit firms will be structured.	We propose amendments as:- 786. A natural person or firm is eligible for appointment as an statutory auditor only if the person, or each partner of the firm:- <u>(i) is the holder of a practising certificate issued under section 21 of the Accountants Act; and</u> <u>(ii) has a valid annual license issued under section 22 of the Accountants Act.</u>	To ensure that requirements of the profession are strictly adhered to.
28.	Section 774	(3) A person who- (a) acts as a statutory auditor in contravention of subsection (1); or (b) fails to give the notice referred to in subsection (2Xb), commits an offence and is liable on conviction to a fine not exceeding one million shillings and to imprisonment for a term not exceeding two years, or to both.	Some members view that there is need to ensure that part of this fine is used to develop the profession through remissions to ICPAK. There should be proper mechanisms to ensure that the government provides funding for the development of the profession ó especially on matters regulation and quality control as this is primarily aimed at serving the public interest.	As per the Accountants Act	The auditors are regulated by ICPAK and we submit that this be retained in the Companies Bill/Act.
29.	Section 779	779. (1) The Cabinet Secretary may, by notice published in the Gazette, declare that persons of the following classes are to be recognised as being holders of an approved foreign	This implies that the CS will admit auditors. We take note that the CS should already have such powers, and in fact exercising such powers by through nominating members to the Registration	We propose deletion of this section. 779. (1) The Cabinet Secretary may, by notice published in the Gazette, declare that persons of the	This is unprecedented; regulation of audit profession is country specific. Nowhere in the world does any law allow foreigners into the profession without

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		<p>qualification for the purposes of this Act-</p> <p>(a) persons who are qualified to audit company financial statements of accounts under the law of a specified foreign country;</p> <p>(b) persons who hold a specified professional qualification in accountancy obtained in a specified foreign country.</p> <p>(2) A declaration under subsection (1) may impose special requirements that persons of a class specified</p>	<p>and Quality Assurance Committee.</p> <p>This section must therefore be deleted from the Bill.</p> <p>Section 778 is very clear and should be the basis. <i>RQA to determine any other qualifications and not the CS since they act on behalf of the CS.</i></p>	<p>following classes are to be recognised as being holders of an approved foreign qualification for the purposes of this Act:</p>	<p>reference to the local institution mandated to regulate that profession. It contravenes the Accountant Act. The Best practice all over the world, compliance Contravenes Common Market protocol</p> <p>We also submit that the Accountants Act provides for the Registration Committee which is a statutory committee whose members are appointed by the CS, National Treasury. We opine, that he is duly represented in this committee hence this provision amounts to duplicity of functions.</p>

FCPA Fernandes O. Barasa,
Chairman, Institute of Certified Public Accountants of Kenya

The Institute of Certified Public Accountants of Kenya (ICPAK) is the professional organization for Certified Public Accountants in Kenya established in 1978 by the Accountants Act, CAP 531. ICPAK is dedicated to development and regulation of the accountancy profession in Kenya so as to enhance its contribution and that of its members to national economic growth and development. In this regard, ICPAK wishes to advise the public that an Accountant by Law is an individual who has qualified by passing the three levels of the CPA examinations and is duly registered by the Institute of Certified Public Accountants of Kenya. For more information, please contact us on icpak@icpak.com.