

A presentation on

Practical Impediments under the Companies Act 2017

Amyr Malik (FCA)

Partner - KPMG

+92 301 821 9287

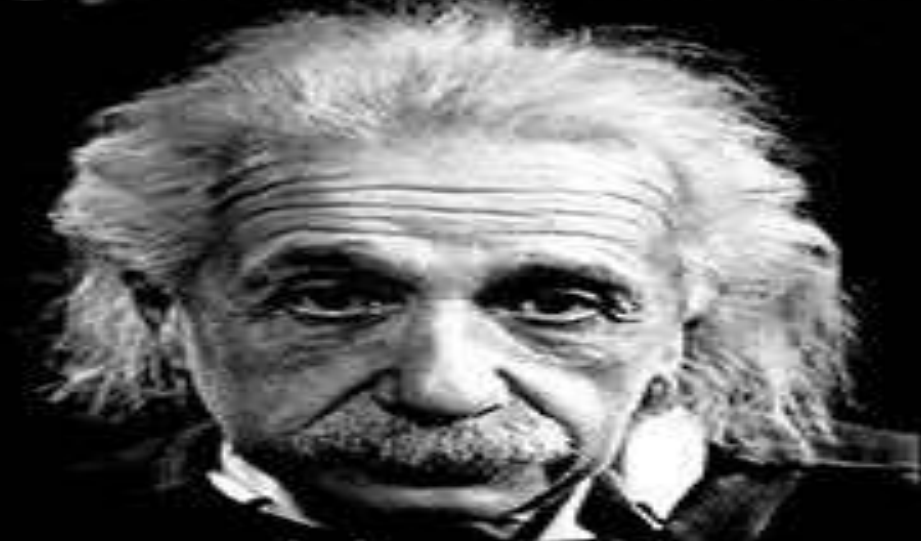
amymalik@kpmg.com

KTBA

12 September 2019

**A PERSON WHO NEVER
MADE A MISTAKE
NEVER TRIED ANYTHING NEW**

Albert Einstein



celebquote.com

Introduction

The Companies Act 2017 [**“Act”**] was promulgated on 30 May 2017.

The Act in view of ease of starting and doing businesses has:

- simplified procedures, introduced e-service facility of SECP;
- eased out procedures for incorporation of companies; and
- provided greater protection of investors etc.

Introduction – continue

The Act also introduced new concepts including Principal Line of Business; Class of Companies; Dormant Company; Agriculture Company and e.t.c

the Act has conflicting and ambiguous sections and there are compliance impediments which are being faced by stakeholders,

Impediment categories

The impediments may broadly be divided into two (2) categories :

- legal; and
- practical.



Legal Impediments



legal Impediments

- Conflict within provisions of the Act;
- Ambiguity within provisions of the Act; and
- The rules have not been prescribed.

Number of directors

There is a conflict between

- sub-sections (1) and (2) of section 155
 - sub-section (1) requires that a director cannot be a director in companies **as may be specified**
 - whereas sub-section (2) places a cap for a director to hold the position in **more than 7** companies.

It means that maximum number of directorship cannot (in any manner) exceeds seven – as is provided in sub-section (2) of section 155 of the Act.



Financial Statements (FS) – filing



sub-section (3) of section 233 (not to be filed)

- a private company, having paid up capital not exceeding Rs. 10 m - as may be notified by the Commission

*is **not required** to file financial statements*

sub-section (1) of section 234 (to be filed)

A private company having the paid up capital not exceeding Rs 1 m or such amount of paid up capital as may be notified by SECP

*is **required** to file duly authenticated financial statements.*

Show cause notice – FS

Show cause notice –

In case of non-filing of financial statements, - the registrar may send show cause notices u/s 234 R/W Section 479 of the Act –

A clarification is required for this legal impediment.

EOGM Notice – Time period

Respect of calling of EOGM - under section 133, the duration of notice to be issued prior to meeting has not been prescribed.

a clarification is required to be issued in this behalf.

Subscription Money – Foreign Entity

In respect of subscription money - which is to be submitted within 30 days in terms of sub-section (2) of section 17 of the Act, failing which in terms of its proviso unsubscribed shares is deemed to be cancelled and the name of that subscriber shall be removed from the register.

From practical aspect, - for foreign investors, this provision cannot be complied within the prescribed time.

In most of these cases a non-compliance is observed.

Related Party S. 208



- The definition of related party has been extended to include :
- a public company in which a director or manager is a director or holds along with his relatives, any shares of its paid up share capital.

Relatives means spouse, siblings and lineal ascendants and descendants (mom dad, brother, sister, kids).

The term 'manager' has not been defined anywhere in the Act. It has also been used in sections 113 to 117 relating to 'receivers and managers'. We consider that the use of this term in this section also relates to same concept i.e. where companies are being managed by directors or where companies are being managed by 'managers'

- This extension of definition of related parties (directors having any holding in another company and inclusion of siblings and all lineal ascendants or descendants) **would have wide consequences for the companies.**

Related Party IAS 24

- IAS 24 – defines related party as a person or entity that is related to the reporting entity. The person's or close member of that person's family relationship is mainly either control, significant influence or member of key management personnel. Entity's relationship is mainly due to being part of the same group either as a group company, associate or joint venture.
- According to IAS 24, close members of a person's family are those persons who may be expected to influence, or be influenced by, that person in dealings with the entity and include that person's children and spouse, children of that person's spouse and dependents of that person or that person's spouse.
- Similarly, two entities simply because they have a director or other member of key management personnel in common are not related parties.

Global Register of Beneficial Ownership

- S 452



- Every “SUBSTANTIAL SHAREHOLDER OR OFFICER” of a company, who is a citizen or Pakistan including holders of dual citizenship
- having shareholding in a foreign company or body corporate shall report to the company his shareholding or any other interest as may be notified by the Commission.

Substantial shareholding has been defined as 10% or more of the shares or 10% or more of the voting rights.

- The local company's investments in securities or other interest in a foreign company or body corporate or any other interest shall also be reported. Foreign Companies are not required to report
- All the above information shall be reported to the registrar THROUGH A SPECIAL RETURN ON A SPECIFIED FORM WITHIN 60 DAYS from commencement of this Act and thereafter ANNUALLY along with annual return.

Officer – *Definition*

officer" includes :

- any director;
- chief executive;
- chief financial officer;
- Company secretary or
- other authorised officer of a company

Fraud Investigation S 258



The Commission may **authorize** any one or more of its **officers or appoint** such number of professionals from amongst the persons of ability, integrity and having experience in the fields of corporate affairs, accountancy, taxation, forensic audit, capital market, banking, information technology, law or such other fields as may be notified, as an inspector or investigation officer to investigate such serious nature of offences relating to a company as may be specified by the Federal Government in Sixth Schedule from time to time.

The persons appointed as inspectors or investigation officer shall have all powers of investigation officer under this Act, the Securities and Exchange Commission of Pakistan Act, 1997 (XLII of 1997) and Code of Criminal Procedure, 1898 (Act V of 1898), mutatis mutandis and shall report in such manner as the Commission may direct.

Valuers S 460



- This is a newly inserted provision to introduce a regime for professional valuers, their registration and to regulate their activities.
- Where valuation is required, in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities, it shall be valued by a person having such QUALIFICATIONS AND EXPERIENCE and registered with the Commission as a valuer in the prescribed manner based on the criteria so laid down.
- **Valuer will be required to prepare report in such manner and by applying such approaches as may be prescribed.**

1year
500k



Contravention will expose valuer to penalty of level 2 on the standard scale. However, if valuer contravened with fraudulent intention, he shall be punishable with imprisonment that may extend to 1 year and with fine to the extent of Rs 500,000.

He shall also be liable to refund the remuneration received from the company; and pay for the damages to the company and to any other person for loss arising out of incorrect or misleading statements made in his report.

Money Laundering S 453

Every officer of a company shall endeavor to prevent fraud, offences of money laundering including predicated offences as provided in the AML Act, 2010 with respect to affairs of the company and shall take adequate measures for the purpose.

Non-compliance of this provision would attract very **stringent punishment** of imprisonment for a term which may extend to 3 years and with fine which may extend to **RS 100 MILLION** . (in addition to the penalty imposed by AML Act, 2010)

*However, if officer taken all reasonable measures available under the applicable laws within his capacity to prevent commission of such offence, **shall not be liable**.*



3 years
Rs 100m



Real Estate (applicability is deferred)

- ❑ Acceptance of advances by real estate companies (S 456)
 - The company cannot engage in the business of real estate ~~unless its~~ principal line of business is development of real estate projects.
 - A company undertaking a real estate project is now required to seek Approval of the Commission, before announcing the project, before advertisements and before accepting the deposits. (besides all necessary approvals, permissions, NOCs etc. of the concerned authorities).
 - **Agreements to be entered with the buyer**
 - Maintenance of Escrow Accounts specifically for the project along with books and records of the company and accounting on IFRS

The expression “real estate project” shall include projects for the development and construction of residential or commercial buildings or compounds and shall not include other construction project.

Any person to be guilty of an offence attracting a penalty of level 3 on the standard scale i.e. Rs. 100 million plus Rs. 500,000 per day during which default continues.



Residential & commercial

Level 3
penalty

Agriculture Company S457

❑ Agriculture Promotion Companies

(Sec 457)

- A person may establish Agriculture Promotion Company, having its **principal line of business related to produce for agriculture promotion or managing produce as collateral or engaged in any activity connected with or related to any Produce or other related activities.**
- If Agriculture Promotion Company or Collateral Management Company or Producer Company or their members **indulge in activities prejudicial to the interest of stakeholders,** shall be liable to **level 3 on the standard scale i.e. Rs. 100 million plus Rs. 500,000 per day** during which default continues.



Level 3
penalty

Free zone Company S 454

- A company incorporated for the purpose of carrying on business in the export processing zone or other area notified as free zone (CPEC) shall be eligible to such exemptions from the requirements of this Ordinance as may be notified in terms of section 459.
- Such company will be dispensed with the words 'Private Limited' or 'Limited' and called as 'Free Zone Company' having parenthesis as "FZC".



Independent Director



- A **data bank** of independent directors would be developed and all companies would be required to select independent directors from such data bank.
- The data bank **will be maintained by such institutions as notified** by the Commission.

Practical Impediments



Impediment categories – practical

- | | |
|--|-------------------------------|
| • Outages of e- services; | • Effect of non-issue of NOC |
| • Online Filing – returns pending approvals; | • Circular show cause notices |
| • Involvement of Ministry of interior; | |

Involvement of Ministry of Interior



The filing of undertaking is entirely an exercise which may be seen as an anti ease-of-doing business.

The Commission thus should revisit the policy with the Ministry.

Effect of non-issuance of NOC by the Ministry

In case of disapproval or non-issuance of NOC by the Ministry, in such case, all statutory returns/forms are annulled and cancelled since inception in relation to the person to whom NOC is denied.

It is proposed that the action should be prospectively enacted rather than applying it retrospectively – as historical facts cannot be altered – such as : signing of financial statements, election of directors, resolutions passed during their tenure – it would create legal difficulties.

A subscriber of company, after 13 years of incorporation, was denied NOC – all return/forms have been cancelled

SECURITY
CLEARANCE
REQUIRED

TO ENTER THIS
AREA!

Outage of e-eservice

During online filing –

We often face outage of e-service portal –

**resulting in failure to timely file
statutory returns/ forms.**



Online filing – returns pending approval

E filing

In case if a particular form is pending approval on part of Registrar, in such case, other form case cannot be filed

For instance - if Form-29 (appointment of auditor) is pending approval another Form-29 (say appointment of chief executive) cannot be filed unless the earlier form is approved.

This causes delay in timely filing of statutory returns/ forms.

Delays due to observations

E filing

The officer, at times, objects to accept statutory forms, which is either not properly communicated or does not reach the company – as a consequence there are delays in acceptance of statutory forms.

It is proposed that all such observations notices should appear on the e-services portal of respective company.

Foreigners' Sign-up



At sign-up for foreigners,
code messages on SMS on subscribers
foreign mobile is invariably not delivered –
hence it causes delay in incorporation –

This lacuna should be rectified.

Circular show cause notices



The Companies are receiving show cause notices for non-filing of statutory return/forms whether or not those forms **are due to be filed** or have already been filed.

Upon receipt of such legal notices, the foreign investors feel uncomfortable – hence such practice of issuance of circular show cause notices should be discontinued.



Thank you



Amyr Malik (FCA)

Partner - KPMG

+92 301 821 9287

amymalik@kpmg.com



kpmg.com/socialmedia



kpmg.com/app

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2019 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no services to clients. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved.

The KPMG name, logo and "cutting through complexity" are registered trademarks or trademarks of KPMG International.