

Johannesburg  
19 September 2011

### THE NET BROADENS FOR 'PRESCRIBED OFFICERS' OF A COMPANY

Following the introduction of the new Companies Act No.71 of 2008, ('the Act'), employees may well want to establish with their HR departments whether or not their job-related functions fall within the ambit of a *prescribed officer*, as defined in the Act.

In the Act, Section 66 (10), refers to a "prescribed officer" as "a person who, within the company, performs any function that has been designated by the Minister in terms of Section 66 (10)". In this section of the Act, it states that "the Minister may make Regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of this Act."

Moreover, Regulation 38 of the Act elaborates further, saying that a person is considered to be a prescribed officer -- despite not being a director -- if they exercise (or regularly participate to a material degree in) general executive control over and management of the business, or a significant portion of the business and activities of the company. This applies to a prescribed officer irrespective of any particular title given by the company to that prescribed officer.

"Executive control" can be roughly defined as *the consistent application of directive or regulative decisions or acts in the management of the business*. At its extreme; any individual who takes actions to (i) changing the circumstances or (ii) makes executive decision-making in the business can be said to be in "executive control". The Act unfortunately offers no definition of "executive control" and therefore one must endeavour to find a practical middle ground.

Furthermore, in Regulation 58 (1), it says that: "in this Regulation, a reference to directors, proposed directors or prescribed officers of a company includes any person holding one or more material contracts to perform any executive function for the company."

To this end, the most likely persons who may be deemed prescribed officers of the company could be the following individuals:

- Chief Executive Officer and / or Managing Director;
- Executive and Non Executive Directors;
- C-suite Executive (e.g. CFO, COO, CIO, CPO, HR, etc.);
- Company Secretary;
- Senior Management;
- Internal Auditor; and
- Members of a Board Committee.

Based on their office and/or function, some individuals will be defined as prescribed officers of the company, regardless of the specific title given to the person by the company. The definition is wide, and encompasses additional employees of the company, other than its directors, who now have to comply with certain provisions of the Act, which were not applicable to them in the past.

In conclusion, the company must be able to determine who may be deemed as its prescribed officers. Each and every case needs to be assessed on its own merits. For example, and similar to the questions around the independence of directors, it is both a subjective and objective enquiry. Therefore a Chief Operating Officer in one company may well be a prescribed officer, but not necessarily in another company.

Due to the fact that there are certain fiduciary liabilities attached to prescribed officers, employees should inform themselves of these new developments and understand the implications thereof.

Words: 530

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