

Johannesburg
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TIME TO INSURE YOUR POSITION AS THE NET BROADENS FOR 'PRESCRIBED OFFICERS'

What is now crystal clear for directors and prescribed officers -- particularly since the launch of the Companies Act 2008 ('the Act') which became effective on 01 May 2011 -- is the fact that the personal liability as attached to **directors** and **prescribed officers** of any type of business operation, is unparallel to years gone by. Most often there is big money attached to these posts and being directors and prescribed officers is serious business. It's certainly not meant for sissies and its impacts, particularly when things go wrong, can be devastating.

Following the introduction of the Act, employees -- other than directors -- may well want to establish with their HR departments whether or not their job-related functions fall within the ambit of a *prescribed officer*. 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, 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. 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;
- Internal Auditor;
- Members of a Board Committee, and
- Senior Management.

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 the provisions of the Act, which were not applicable to them in the past.

It is therefore imperative that a company determines which of their employees may be deemed to be their prescribed officers. Each and every case needs to be assessed on its own merits. For example, a Senior Manager in one company may well be a prescribed officer, but not necessarily in another company.

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Due to the fact that there are fiduciary liabilities attached to prescribed officers, employees should inform themselves of these new developments and understand the implications thereof. All directors and prescribed officers are in the 'same boat' so to speak, and it would be advisable to consider the necessary actions and indemnification insurance to at least protect yourself in times when any form of alleged negligence, default or breach of duty (or trust) is leveled against you.

To this end, it would be a good time for companies to provide each of their directors and prescribed officers a copy of CGF's ***Fast Tracking Company Officers Manual*** which provides a simplified account of various areas where directors and prescribed officers may become exposed to personal liability.



Contact CGF to order copies of the ***Fast Tracking Company Officers Manual*** for your company and its prescribed officers.

Orders over 100 copies will qualify for a 10% discount.

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