

Companies Act, 71 of 2008

Prescribed Officers

The Companies Act of 2008 (the "Act") defines "**prescribed officer**" as a person who, within a company, performs any function that has been designated by the Minister in terms of section 66 (10). In terms of the said section of the Act, 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.

What you should do:

Identify the prescribed officers within your company.

The Regulations to the Act as issued the Minister include the description of a "prescribed officer". Regulation 38 reads as follows:

(1) Despite not being a director of a particular company, a person is a "**prescribed officer**" of the company for all purposes of the Act if that person

- (a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

This regulation applies to a person contemplated in sub-regulation (1) irrespective of any particular title given by the company to an office held by the person in the company or a function performed by the person for the company.

In addition to the above, both the Act and the Regulations make a number of references to the prescribed officer.

What you should know:

Understand the implications of the Act for prescribed officers as well as the company.

Some of the more important references in the Act address the following matters:

- **Section 30(5):**
The information to be disclosed under subsection (4) must satisfy the prescribed standards and must show the amount of any **remuneration or benefits** paid to or receivable by persons in respect of–

 - (a) services rendered as directors or prescribed officers of the company; or
 - (b) services rendered while being directors or prescribed officers of the company–
 - (i) as directors or prescribed officers of any other company within the same group of companies; or
 - (ii) otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

- **Section 45:**
Financial assistance may not be provided by the company to any director or prescribed officer without approval of shareholders by way of a special resolution.

- **Section 69:**
A company may not appoint a person as a prescribed officer if such person is **ineligible or disqualified** from being appointed based on the provisions of this section.

- **Section 75:**
The duty to disclose a **personal financial interest** in any matter that may concern the company and that may result in a conflict of interest is not only imposed on directors, but also on prescribed officers.

- **Section 76:**
The same **standard of conduct** that is expected from directors is also expected from a prescribed officer.

- **Section 77:**
A prescribed officer may also be **liable** in the event of any contravention as contemplated in this section.

- **Section 78:**
A prescribed officer may be **indemnified** against liability in terms of this section on the same basis as a director.

What you should do:

Following the identification of the prescribed officers it is important for the relevant individuals to be adequately informed of the implications of the Act and the potential for personal liability in the event of any contravention of the relevant provisions thereof.

Based on the above, it is important for a company to identify its prescribed officers for the following reasons, amongst others:

- For purposes of **disclosure** of remuneration in the annual financial statements;
- In order to **educate** the prescribed officers on the implications of the Act on them as prescribed officers of the company, specifically with respect to their duties, standard of conduct and potential liability;
- To **ascertain** whether any of the prescribed officers may be ineligible or disqualified to be appointed as such (Schedule 5 to the Act states that any director or prescribed officer who is ineligible or disqualified in terms of section 69 of the Act is deemed to have resigned from such position with effect from 1 May 2011).

As with a number of other provisions of the Act, there are **opposing views** as to the interpretation and meaning of some of these provisions. The question as to who would "qualify" as a prescribed officer is one of these areas of contention. In addition, the question whether the prescribed officers should be identified by name in the annual financial statements, have been answered both in the positive and the negative. In view of these, and other, areas of uncertainty surrounding the prescribed officer, companies will be well advised to consult with their auditors in order to agree on the criteria for the identification of prescribed officers and to clearly document the motivation for decisions taken in this respect.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

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