

## ADVERTORIAL

Johannesburg

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### REGULATORY ASSESSMENTS: DIRECTORS AND PRESCRIBED OFFICERS - ARE YOU COVERED?

#### Advertorial by CGF Research

Over the last few months a number of companies have received record-breaking fines for poor governance practices. Moreover, business scandals and the unrelenting regulatory change is indeed a recipe for many more fines which are inevitable. It has also been a period of an unprecedented focus on risk, control and compliance activities within companies; and this trend looks set to continue as companies deal with the fall-out of major fines and regulatory change.

As the call for corporate governance intensifies, all the signs indicate that companies and their directors will need to seriously 'stretch' their risk and compliance functions yet further still; and will hopefully see these functions going beyond the typical 'tick-box' exercise adopted by so many companies. In recent times, a distinct trend has emerged with regulators in the way that they are drafting legislation. The overall effect is that directors and prescribed officers of companies are being held personally accountable for offences committed by the company. The trend shows the following:

- ✓ personal liability of directors and prescribed officers is now an option;
- ✓ the punitive fines have increased in value significantly (e.g. tenfold or multiples of earnings);
- ✓ ability of the regulator and aggrieved parties to convert punitive fines into civil judgements;
- ✓ ability of the regulator to prevent a person from acting as a director;
- ✓ ability of the regulator to institute civil action for damages;
- ✓ withholding of funds.

There are a number of South African pieces of legislation causing this new focus upon personal liability and various forms of penalties as afore-mentioned. The most common legislation causing these nightmares includes:

- ✓ Financial Intelligence Centre Act;
- ✓ Consumer Protection Act;
- ✓ Financial Markets Act;
- ✓ Protection of Personal Information Bill;
- ✓ Foreign Account Tax Compliance Act.

#### Comparative examples of administrative fines

Regulators across the globe are flexing their muscle and using the increased powers that have been afforded to them. For example, the regulator in the UK imposed administrative fines on 25 companies in 2012. Twenty-two of the fines were imposed for security breaches. Other fines were imposed for breach of the direct marketing rules relating to bulk SMS spam and breach of a rule that requires personal information to be accurate. The largest of the fines imposed by the UK regulator on the private sector was approximately R4.2 million, because the company had sent millions of unsolicited direct marketing text messages, concealed the identity of the company, and failed to provide a valid "unsubscribe" address.

The regulator also issued a fine of approximately R4.5 million, for an inappropriate disposal of IT equipment. Hard drives with personal information of customers were not destroyed and the personal information of its customers

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was accessed without permission.

The South African regulators are following their UK/European and US counterparts in levying hefty fines against companies that contravene legislation. An example of this is the recent fine of R1.5 million levied against Hippo for contraventions of the FAIS General Code of Conduct. The South African Competition Tribunal has also issued fines, based on multiples of earning, for restrictive practices and abuse of dominant position.

In some cases it is not necessary for the aggrieved party or the regulator to establish intent or negligence on the part of the company for a successful action for civil damages against the company. When found responsible, a court may award any amount that is just and equitable, including:

- ✓ payment of damages as compensation;
- ✓ aggravated damages;
- ✓ interest; and
- ✓ costs of suit.

It is therefore imperative that -- as a director or prescribed officer -- you are aware of your company's regulatory framework. This will allow you to understand the regulatory universe your company operates within and the risks associated with this universe. A regulatory framework will allow you to understand where there is potential risk and liability -- should the company not comply with the relevant legislation -- and what measures to put in place to avoid these risks. It should also trigger a review of your company's insurance coverage under the "directors and officers" portion of your insurance to ensure that it has been amended to take into account the expanded definition of "prescribed officers".

As a director or prescribed officer of your company; it is your duty to identify and manage the company's regulatory risk. Here are some of the questions you should be asking to manage the company's regulatory risk:

| Questions you should be asking   | How CGF can assist your company  |
|--|--|
| <b>Who can give me an overview of all the compliance issues we face, given our specific industry? What should our priorities be? How do we know?</b> | Based on the industry within which your company operates, we can provide you advice on your regulatory footprint and risk rate these to indicate what your priorities should be.                           |
| <b>What regulatory changes are likely to affect our business in the future, and what are we doing to address them?</b>                               | We are aware of emerging trends within the regulatory environment and we keep you abreast of these developments. This will help you to anticipate any potential opportunities / risk arising from changes. |
| <b>How are we identifying, monitoring, and adjusting for emerging compliance risks and requirements?</b>   | We have developed a methodology for identifying current and future regulatory risk. Using this methodology, we can guide you in dealing with the risk and compliance consequences.                         |
| <b>What are we doing to make sure our employees understand their responsibilities when it comes to compliance?</b>                                   | Our skilled compliance people have years of experience in compliance training. We able to offer employees training on specific regulatory/ compliance issues.  |

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**Where does the board's responsibility end and management's begin?**

Our team members have acted as advisors to the board or members of the relevant board committees. We are therefore able to help you define the scope of responsibility & accountability for management and the board.

**What knowledge and experience does the board require in order to understand and effectively oversee our compliance risks?**

We can develop a regulatory risk map that will keep you updated on your compliance risks. This is a living document that is updated on a regular basis.

**What is our process for remediating known compliance breakdowns? Who owns it?**

We adopt a proactive approach by identifying and addressing problems before they grow into a compliance breakdown which requires remediation. We will also assist you with implementation of remediation processes and procedures to deal with breakdowns.

**What are we doing to balance the requirement of compliance with the cost of complying**

We are able to assist you with streamlining your compliance processes for maximum efficiency.

**Is there any inherent value of compliance to our organisation beyond penalty avoidance? If so, what is it?**

By utilising a proactive approach, we are able to show the value add to your business of adopting a proactive approach to compliance.

**How are we monitoring changes in the business and their impact on compliance risk?**

By utilising our methodology for compliance / regulatory issues, the risk, controls and impact are clearly identified and measured.

At CGF, our respective Lead Independent consultants are able to assist you in preventing a possible catastrophe and the consequent reputational damage -- both corporate and personal levels -- resulting from not knowing your regulatory risk and how to avoid it.

### ENDS

Words: 1,231

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