

What will keep directors awake in 2016?

By [Patrick Bracher & Dale Cridlan](#)

19 Jan 2016

From cyber risk to corporate responsibility, job creation and skills training - so important to national stability; the responsibility of the board of directors is increasing, as latest trends and new regulations reveal.



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Although the obligation of a board of directors to manage the company includes directing others who can be relied on to do so, the responsibility of directors is increasing all the time. This results from the pace of change and from the increasing regulatory risks that grow exponentially by the year.

Cyber risk

All recent surveys place cyber risk at the top of the list. If the Cybercrimes and Cybersecurity Bill becomes law, not only electronic communications service providers, but also all financial institutions and any company that deals with data on behalf of a financial institution or its clients, will have cybersecurity obligations and a potential R10,000 a day penalty for breach.

These companies will have to establish procedures to deal with cybercrime and inform clients what the risks are. If this is

added to obligations under the Protection of Personal Information Act, where there are possible severe penalties and civil claims for loss of data, it is clear that time and money will have to be put into cybersecurity.

It is daunting because if hackers can get into the CIA, it is clear that no system is hackproof. But directors will have to see that their companies install reasonable systems to cope with the risks they face.

Electronic communications

Better electronic communications is also the source of South Africa's commitment to the Common Reporting Standard. This was signed under an international convention on mutual administrative assistance in tax matters. Companies and individuals who have previously relied on the non-disclosure or non-detection of funds held offshore, will find that revenue authorities worldwide are now parties to this standard by which taxpayer information will be exchanged between countries freely.

The information includes detailed information such as account balances and interest earned. There are about 70 countries (including jurisdictions such as the UK, Isle of Man, Guernsey and Jersey) which have already signed up. Collation of information has begun and it will be shared from 2017.

2016 is the time to act, possibly by availing oneself of the voluntary disclosure programme, if you do have funds offshore that have not been fully disclosed.

Because there is so much new regulation coming out of parliament and government departments, there are not enough government officials to administer or police the regulations. The consequence is that government is placing more and more responsibility on the directors and executives of companies to do the policing for them. This often includes day-to-day control over third parties who act as agents for the company (agents for insurers, for instance).

Corporate responsibility

Corporate responsibility is finding its way into personal liability for directors and executives. The US Department of Justice recently announced its intention to "maximise the ability to deter misconduct and to hold those who engage in it accountable". This includes personal liability (including criminal liability) for directors and executives and other employees.

There have been multimillion rand civil judgments against directors who have failed to fulfil their fiduciary duties in regard to major corporate transactions. A director can be found liable for a negligently managed poor merger transaction or missing a merger opportunity because of a breach of fiduciary duties. The Supreme Court in the US state of Delaware (the state where most US corporate regulation happens) recently found what they called 'aiding and abetting liability' for directors for unreasonable conduct in overseeing the sale of the company and in not properly managing their investment adviser who had serious conflicts of interest.

The trend is finding its way to South Africa. The Financial Sector Regulation Bill now being debated in parliament includes a proposed section that if a financial institution commits an offence under a financial sector law, each member of the governing body of the financial institution also commits the offence unless they establish they took reasonably practicable steps to prevent the commission of that offence. In those terms, the provision is almost certainly unconstitutional. But directors who are knowingly parties to offences or negligent conduct by the company, can find themselves personally liable and there is an increasing trend to do so.

Bill of Rights

We all need to take more seriously the general obligation on directors to promote the purposes of the Companies Act that includes achieving economic and social benefits and promoting compliance with the Bill of Rights. The recent marches by the EFF reminded companies that when directors are considering who their stakeholders are when making major decisions, they include not only the company, the shareholders, employees, customers and the environment but may also include the many unemployed and unskilled people in this country.

A concern for job creation and skills training is so important to national stability that it should form an active part of any business plan.

It seems clear that some major issues such as carbon tax and contribution towards the national health insurance are not going to be on the statute books during 2016. So directors can save some of their sleeping tablets for the following year.

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