For company directors preventing a legal and regulatory fire from starting is always better than fighting the flames later. Sometimes however, these fires can originate from unexpected sources. Below, we discuss five pitfalls where a lack of awareness and appropriate precaution can lead to significant damage to the company and personal exposure to legal costs for directors and/or their insurers.

**Conflict Mineral Rule**

**What is it?**

S1502 Dodd-Frank Wall Street Reform and Consumer Protection Act requires companies listed on a US stock exchange and which use/produce/supply tin, tantalum, tungsten or gold in products in any way connected to the Democratic Republic of the Congo and adjoining countries, to investigate and report the source of the mineral to the US Government. The rule came into effect in November 2012 for all contracts entered into after 1 January 2013 with the first set of reports being produced by 31 May 2014. The objective is to give investors the option of whether they wish to invest in a company that uses these minerals as evidence from human rights groups has established the conflict in Congo is partially financed by the exploitation and trade of these minerals.

**Why does this matter?**

The US Securities Exchange Commission (SEC) which enforces the rule recognises that the rule will “impose significant compliance costs on companies that use/produce/supply these minerals”. The report will need to be audited by an independent auditor and even if a company is able to identify that the minerals are not from the Congo/adjoining country, a "specialised disclosure report" will still need to be filed to confirm the findings.

The rule applies to domestic as well as foreign private issuers who are listed on the US stock exchanges. While the SEC has confirmed that the rule is not intended to have an extraterritorial reach, the fact that it relates to minerals from outside of the US is in itself extraterritorial.

The SEC acknowledges that based on the extensive use of these minerals (electrical, computers, telephones, jet engine components, pipe welding), they expect the rule to apply to many companies and industries.

In summary the rule is onerous, extensive and will be expensive to comply with.

**Environmental liability/Impact of global warming**

**What is this?**

In February 2014 a coal ash spill in North Carolina, US resulted in extensive damage to the environment. The shareholders of Duke Energy that own the mine have sued fourteen directors and officers for misconduct and allege that the board knew this would happen but failed to address the internal concerns raised. Civil and criminal investigations have also been commenced. The law suit seeks damages, and corporate governance changes to prevent a similar accident happening again.

In May 2014 a series of letters were sent to a number of energy companies by environmental organisations which are campaigning for global climate change. The letters allege these corporations are denying the impact of greenhouse emissions on the climate and intentionally disseminating false, misleading information to the public/its investors on climate change at the expense of profits.

Finally, arctic drilling and fracking are further activities that have generated law suits for the structural and environmental damage allegedly caused.

**Why should this matter?**

The recent law suit and letters are a timely reminder that boards and their directors have a responsibility for ensuring that they comply with relevant regulations and/or disclosure requirements on pollutants and have a social responsibility to the public for dealing with pollution. While this may not cause much concern at the moment, if there is another Hurricane Sandy, Deepwater Horizon or similar, it is likely that boards and their directors will be targeted for failing to review the consequences of potentially disregarding their obligations towards the environment. The cost of complying with these obligations and the consequence is one that has not yet hit the radar of most corporations but recent commentary in the press and the industry itself suggests that some thought should be given now to who is going to bear that cost and how. For directors, a failure to address the consequences could be a lawsuit waiting to happen.

**Sanctions/Bribery**

**What Sanctions?**

While the US authorities are the most active in enforcing breaches of the Foreign Corrupt Practices Act (FCPA), the UK regulators are also joining the party with eight cases under
active consideration and the first serious set of charges laid out against a bio fuels company in August 2013 pursuant to the UK Bribery Act. Similarly the US Office of Foreign Asset Control has levied significant fines on overseas corporations and it will not be long before other jurisdictions start reviewing what they can do to enforce their own recent bribery/anti-corruption laws. Mexico, Brazil, Canada, India, China and Australia have all recently enacted anti-bribery legislation with China already pursuing a number of international companies for breaches of its bribery laws.

Why is this important?
The long arm jurisdiction of these laws is such that no matter where you are doing business, the regulators will look for potential actions. Recently a Ukrainian company with no base in the US found its directors under an FCPA investigation on the grounds that the company had used the US banking system to pay foreign officials in India to obtain Indian mining licences. No actual crime had been committed on US soil, this was not a US corporation and did not involve individuals (other than an Indian board director resident in the US).

Corporate social responsibility together with action groups pushing for governments to do more to prevent bribery and corruption are further factors that will only serve to heighten scrutiny of a corporations’ activities.

Alien Tort Claims Act 1798/Torture Victim Protection Act 1991
What is it?
These Acts allow US courts to hear civil claims relating to human rights abuses. The Alien Tort Claims Act (ACTA) was not relied upon for nearly 200 years but recently, due to the increasing international concern with human rights abuses, litigants have begun to seek redress under these Acts.

Why are these acts relevant?
Whether ACTA has an extraterritorial reach is open to question. The leading judgement in Kiobel et v Royal Dutch Petroleum 569 US_2013 held that ACTA only applied to human rights abuses in the US. However the US Supreme Court also confirmed “The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of ACTA” with the main concern being that the US should not be seen as a jurisdiction that allows human rights abuses to go unpunished. Directors and officers of companies with US employees operating in jurisdictions with human rights issues are therefore potentially open to being sued in the US under ACTA, if their activities are linked to the abuses.

Financial Reporting Council Guidance on disclosure of a company’s “Principal Risks” applicable to accounting periods on or after 1 October 2014
What is it?
The UK Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013 amended the UK Companies Act 2006 to include a requirement that all UK incorporated companies (unless an exemption applies) prepare a Strategic Report identifying a company’s “Principal Risks” defined as “a risk or combination of risks that can seriously affect the performance, future prospects or reputation of the entity”. The purpose of the Strategic Report is to provide shareholders and investors with “a holistic and meaningful picture of the company’s business model, strategy, development, performance, position and future prospects”. This month the Financial Reporting Council (FRC) issued its guidance on what should be included in the Strategic Report.

Why is this important?
The FRC Guidance is meant to be persuasive rather than mandatory and its main aim is to inject board accountability and transparency when reporting to shareholders. That said, what is there to stop a shareholder/investor from recouping its losses for a failure to identify a “Principal Risk” in its Strategic Report? The FRC Guidance together with the Strategic Report simply imposes another layer of responsibility and ultimately vulnerability on a board director.

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