

The appointment, duties and responsibilities of directors are governed by the Companies Act 2006, the common law and contracts if the director has a service contract with the company.

Directors' duties will largely be governed by the Companies Act 2006, the common law and contracts if the director has a service contract with the company.

This guidance note is only intended to provide a general overview and introduction to the issues that relate to directors and administrators of companies and which company

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Types of Directors

Under the Companies Act 2006 there is no legal distinction between an Executive Director and a Non-Executive Director but there are important practical differences between the two positions that any person occupying the position of director will be aware of, regardless of their title.

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**Executive** - A director is an individual who is involved in the operational and strategic business of the company, looking after assets, hiring and firing staff, etc. Executive Directors will usually be employed by the company so they are protected by employment law and will be paid a salary, which is taxed through the PAYE system. A contract of service with an Executive Director available for a fixed term of 2 years must be approved by the shareholders.

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**Non-Executive** – These directors are not involved in the day-to-day running of the business. They provide independent advice and objective views on executive management. They are treated as self-employed under the law and their terms and conditions of their appointment are usually set out in a contract. They attend board meetings and are responsible for matters relating to non-executive, all

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**Shadow** – Under the CA 2006 a shadow director is defined as “a person in accordance with whose directions or instructions the directors of the company are accustomed to act.” The shadow director is not formally appointed to the position but could be considered as a director for the purposes of the Small Business Enterprise (SBE) provisions in 170(5) of the CA 2006 to the extent they are capable of applying. The Secretary of State has the power to make regulations concerning the application of

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Section 90 of the SBEE also section 251 CA 2006. Section be a shadow director if the b directions given by that pers under legislation.

of shadow director in clear that a person will not ce with instructions or function conferred by or

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**Associate**—An associate di CA 2006. It is often a role w employees by giving them t statutory directors. An Assoc authority to commit the com

within the meaning of the ve an incentive to key ector without making them have any actual or implied cts or other transactions.

**Alternates**— An alternate di specifically provide for it.

ointed unless the articles

Whatever the use of the title confused with statutory auth *Solutions Ltd v O’Sullivan* [2 consider the legal status of appointed as a company dir High Court held that a pers Director” of a business divis director was not a “*de facto*

important that titles are not *Whopsgate Contracting* ), the High Court had to who had not been formally ompanies Act 2006. The es as a “Managing rmanally appointed as a

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This highlights that it is impo

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- **Create and follow a** Ensure company dire at Companies House meetings and minutes
- **Delineate clearly an** documentation should other than a director negotiate transaction
- **Consider using serv** as a director to be en employment. However formally appointed w employee and carryin
- **Choose job titles ca** include the word “dire found to be a de facto individuals are to be directors, take care to understand that the p

**Finance structure.** ly appointed and registered are taken at board

es. Significant contracts and any’s directors. If anyone to sign documents or specifically in writing.

Common for a person acting er a contract of person who has not been acto director if they are an employee could carry out.

ing a job title that does not sk that a person will be will not eliminate it). If e not being statutory ary, that third parties y director.

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Appointment

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Private companies must have at least two directors. At least one must be a natural person i.e., not a company. The Companies Act 2006 does not prescribe a maximum number of directors.

A public company must have at least one director who is a natural person. The Companies Act 2006 does not prescribe a maximum number of directors.

Directors must be a minimum of 18 years old. There is no maximum age for directors. Persons must have the mental capacity to hold office.

There is no maximum age for directors. Persons must have the mental capacity to hold office.

Under the SBEE the appointment of all directors must be natural persons. Breach of this requirement will be void. Directors who will need to be removed. **Has yet to be implemented.** Notwithstanding the provisions of the SBEE, appointments of corporate directors are permitted.

The appointment of directors is prohibited so that any appointment made in contravention of the provisions of the SBEE is void. **Has yet to be implemented.** Notwithstanding the provisions of the SBEE, appointments of corporate directors are permitted.

The SBEE has given the Secretary of State power to make regulations regarding exemptions, such as where a director represents a low risk company. Exemptions regarding governance or disclosure apply to these exemptions in due course. Corporate directors are implemented. It is considered that going forward, appointments should be natural persons only.

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As regards the number of directors, it may be convenient for a company to have more than one. Bear in mind that they will be responsible for such as share certificates, and a second director or company secretary. The act does not specify any minimum number of directors. The minimum number of directors is the minimum number specified in the company's articles of association.

A company should have, whilst it may be a sole director, sole directors should execute deeds and documents. The act does not specify otherwise be fulfilled by a second director or company secretary. The act does not specify a minimum number of directors. The minimum number of directors is the minimum number specified in the company's articles of association.

Methods of appointment

First Directors

As part of the registration process, a statement of proposed officers must be filed. Those named are to be the first directors of the company. The statement by the subscribers must contain a statement that each person named as a director has consented to act as a director.

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The persons so named in the statement of proposed officers have been appointed to that office.

The persons so named in the statement of proposed officers are deemed to have been appointed to that office.

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## Subsequent Directors

The Companies Act 2006 is silent on the procedure for appointing directors after incorporation. The procedure will usually be determined by the company's articles of association, which should always be consulted prior to any appointment.

However, there are two principal methods of appointing a director of a company (both of which are specified in Table A of the Model Articles under the CA 2006):

- appointment by resolution of the existing directors. Approval can either be sought at a routine meeting of the directors or alternatively via a written resolution of the existing directors; or
- appointment by an ordinary resolution of the shareholders, either in a general meeting or by written resolution.

If the articles make no provision for the appointment of directors, the members have an inherent power to appoint directors by ordinary resolution.

The SBEE requires the company to require each newly appointed director to complete and sign a declaration of consent to act.

The appointment of a director must be notified to Companies House within 14 days using Form AP01 (for a private company) or Form AP02 (for a public company). A statement by the director that capacity must be sent to Companies House with the notice of appointment. The statement is part of Companies House's public register. Notice of a person becoming a director must also be sent to Companies House. The particulars of the new director that are required to be included in the company's register of directors and its register of addresses.

The company must also notify Companies House of a person ceasing to be a director or their particulars changing within 14 days of a person ceasing to be a director or their particulars changing in the particulars of directors' residential addresses.

Note that as of October 2011, the particulars of directors' residential addresses will still be suppressed on the public register of directors' residential addresses. This is primarily to combat potential fraud. However, for companies that were incorporated from 1<sup>st</sup> October 2007 to 30<sup>th</sup> September 2009, the particulars of directors' residential addresses will be visible to those searching. This is primarily to combat potential fraud. However, for companies that were incorporated from 1<sup>st</sup> October 2007 to 30<sup>th</sup> September 2009, the particulars of directors' residential addresses will be visible to those searching.

<sup>1</sup> All references to Table A in this document apply to the version of Table A which applies to a company on the date of incorporation. For versions of Table A in force at earlier times, please visit the Companies House website.

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<sup>1</sup> All references to Table A in this document apply to the version of Table A which applies to a company on the date of incorporation. For versions of Table A in force at earlier times, please visit the Companies House website.

registers at Companies House. Details of directors will be available on the public register. You should think carefully about the implications of this.

Companies incorporated prior to 1980 will have adopted new articles of association based on Table A. If Table A was adopted by the company, the directors will be required to retire by rotation in accordance with the provisions of Table A. Discussion of the implications of this and each company must check its articles of association to determine which methods of appointment are permitted.

### Disputing an Appointment

There are always a small number of cases where, despite his or her appointment, a person contends that she was never properly appointed as a director (or company secretary).

The SBEE as of October 2008 provides a procedure for Companies House procedures which are considered inadequate.

The procedure as set out in the SBEE follows:

- a) When a company notifies Companies House of an appointment, it is required to make a "statement of consent" on behalf of the company, stating that the person has consented to their appointment as a director.
- b) Upon receipt of the notification, Companies House will write to the new director to notify them that their appointment has been recorded on the public register and will provide information regarding their legal duties as a director.
- c) The new director can apply to Companies House for removal of their appointment from the public register if they did not in fact consent to act as a director.
- d) If a company fails to provide a statement of consent, Companies House will remove details of that appointment from the public register.

In practice this means for new companies, a statement has been added to the public register and incorporation forms (particulars of directors) to confirm that the person has consented to act in their relevant capacity.

The full date of birth of directors should therefore be recorded on the public register.

Companies House will, unless they have been notified otherwise, base their records on Table A. If Table A was adopted by the company, then the directors will be required to retire by rotation in accordance with the provisions of Table A. Discussion of the implications of this and each company must check its articles of association to determine which methods of appointment are permitted.

If a person contends that, despite his or her appointment, they were never properly appointed as a director (or company secretary), they should apply to Companies House, he or she should provide evidence that they never consented to be a director (or company secretary).

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- d) If a company fails to provide a statement of consent, Companies House will remove details of that appointment from the public register.

In practice this means for new companies, a statement has been added to the relevant appointment forms (particulars of directors) to confirm that the person has consented to act in their relevant capacity (where applicable).

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Companies are also required to obtain the consent to act procedure of the Companies Act 2006 and personal authentication on e

ment. This replaces the old procedure on paper forms and

As part of this, Companies House will make them aware that their details will be filed on the public register and explain their statutory obligations

newly appointed directors to ensure their details are filed on the public register

In addition to this the SBEE will require newly appointed directors' details to be filed on the public register. Since April 2016, any person appearing on the public register can apply to have their name removed if they did not

get falsely or incorrectly registered. Since April 2016, any person appearing on the public register can apply to have their name removed if they did not

Termination

Directors may have a service agreement with the company, in which case the agreement will usually contain provisions. Notwithstanding this, Table A (article 81) and the Companies Act 2006 (s.18) specify circumstances in which a director's appointment is terminated automatically. These circumstances include:

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- disqualification from office;
- bankruptcy;
- a composition being made with creditors;
- admission to hospital under section 37 of the Mental Health Act 1983;
- a registered medical practitioner giving a written opinion to the Registrar that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months;
- a court making an order wholly or partly preventing that person from exercising any powers or rights which that person may exercise as a director;
- the director has been absent from meetings for six consecutive months without permission of the directors that his office be vacated;
- the director resigns.

creditors; application for treatment under section 37 of the Mental Health Act 1983; that person gives a written opinion to the Registrar that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months; person's mental health which prevents that person personally exercising any powers or rights which that person may exercise as a director; meetings for six consecutive months without permission of the directors that his office be vacated; and the directors resolve

A letter of resignation should be submitted to the Director (who may also be the Secretary) has resigned from office against which there is no settlement has been agreed for loss of office, this should be documented.

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The termination of the director's appointment should be registered at Companies House within 14 days of the termination.

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Removal



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By passing an ordinary resolution, the members of a company may remove a Director at any time. This right takes precedence over any provision in the company's Articles of Association which purports to prohibit the director's removal in this way. The ordinary resolution means that notice must be given to all the shareholders at least 28 days before the meeting at which the shareholders will vote on the resolution.

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Template covering the procedure for the replacement of a director can be accessed [here](#).

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Invalid appointments and valid acts

Section 161 of the Companies Act 2006 states that the acts of a person acting as a director are valid notwithstanding that it is afterwards discovered that:

Section 161 of the Companies Act 2006 states that the acts of a person acting as a director are valid notwithstanding that it is afterwards discovered that:

- (a) that there was a defect in their appointment;
- (b) that they were disqualified;
- (c) that they had ceased to hold office;
- (d) that they were not entitled to be directors.

Section 161 of the Companies Act 2006 states that the acts of a person acting as a director are valid notwithstanding that it is afterwards discovered that:

This provision validates transactions entered into by a company as well as between the company and its members. It is designed to avoid questions being raised on transactions where there has been a slip or irregularity in the appointment of a director.

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Remuneration, Expenses, Costs and Indemnity

Article 82 of Table A and articles of association of a company are entitled to remuneration for their services as directors. The level of remuneration shall be decided by the passing of a resolution. Whereas the Model Articles permit the other directors to receive remuneration. Under the Model Articles, the directors may receive remuneration not only for his services as a director but also for any other services undertaken for the company. In both cases, remuneration shall accrue from day to day in the absence of any provision to the contrary.

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Article 83 of Table A and articles of association of a company directors may be paid for out of the company's funds for their attendance at meetings of the directors or general meetings or separate meetings of any class of shares or of debentures of the company in connection with the discharge of their duties.

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Article 87 of Table A and articles of association of a company directors may receive gratuities and pensions from the company for any director who has held any executive office or

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employment with the company  
state that they may be included

whereas the Model Articles  
director's remuneration.

### Loans

If a private company wishes  
director of its holding company  
connection with a loan made  
must first be approved by a  
the company (and of the share  
also a director of the holding

of its directors or to a  
or provide security in  
a director, the transaction  
the shareholders of  
company if the director is

For the resolution to be passed

setting out:

- the nature of the transaction
- the amount of the loan
- the purpose for which
- the extent of the company's  
with the loan,

any transaction connected

must be made available to shareholders  
resolution or, if a general meeting  
company's registered office  
meeting itself.

sent with the written  
being made available at the  
general meeting and at the

Public companies must also  
directors, loans or quasi-loans  
related arrangements, disclosed  
document.

regarding quasi-loans to  
ns, credit transactions and  
de the scope of this

### Duties

Prior to 1<sup>st</sup> October 2008, the  
several sources, including the

Directors were derived from  
A 1985 and other statutes.

The general duties of directors  
codification of the existing law  
differences. The duties are a

2006 are described as a  
ing contains several

- *A duty to act in accordance  
exercise powers only*

ny's constitution, and to  
which they were conferred.

This replaced existing

- *A duty to act in the way  
likely to promote the  
members as a whole*

and faith, would be most  
y for the benefit of its



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This replaced the common law duty of good faith in the company's interests.

- *A duty to exercise independent business judgment.*

There was no equivalent common law duty but it replaced the prior obligation on directors to exercise independent business judgment to act or to take decisions.

- *A duty to exercise reasonable care, skill and diligence.*

This replaced the previous common law duty of care, skill and diligence.

- *A duty to avoid a situation where the director has, or can have, a direct or indirect interest that may conflict, with the interests of the company, in a proposed transaction or arrangement.*

The new duty replaced the previous common law duty to avoid a conflict of interest if a director allowed his personal interests, or those of a related person, to conflict with his duty to the company. It requires a director to avoid any relevant contract and (ii) he has not disclosed the conflict to the shareholders if he made out of the arrangement any 'secret profit' which the shareholders consented to the conflict).

- *A duty not to accept benefits from third parties given by reason of him or her being a director.*

This duty appears to be a new addition to the previous duties to act in the company's interests and to avoid conflicts of interest.

- *A duty to declare to the company any interest a director has in a proposed transaction or arrangement with the company.*

Previously, a conflict of interest in a transaction or arrangement with the company was only addressed by the general rule on conflicts of interest.

### Proceedings of Directors

Under both Table A and the Model Articles, resolutions can be made by the directors either by a majority or unanimously in writing. The Model Articles allow slightly more flexibility in that directors are able to hold a meeting even when not all directors are physically present, provided that they can all communicate with each other.

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In both cases, the quorum for a meeting of directors is two but it may be fixed from time to time by a decision of the directors. For companies with one director, the requirement for a meeting is waived.

The directors may appoint one or more of their number as chairman, and if there is an equality of votes then he shall have a casting vote.

Conflicts of Interest

Table A states that directors shall not be liable for any loss or damage sustained by the company or its subsidiaries in connection with any resolution at a meeting of directors concerning a matter in which a director has a material interest or duty which conflicts or may conflict with the interests of the company with the exception of the following:

- the resolution relates to a guarantee, security, or indemnity in respect of a liability incurred by the company or its subsidiaries for the benefit of, the company or its subsidiaries;
- the resolution relates to a guarantee, security, or indemnity incurred by the company or its subsidiaries for the benefit of, the company or its subsidiaries;
- the resolution relates to a guarantee, security, or indemnity incurred by the company or its subsidiaries for the benefit of, the company or its subsidiaries;
- his interest arises by virtue of his holding or agreeing to subscribe for any shares, debentures or securities of the company or any of its subsidiaries, or of his being or intending to become, a participant in the underwriting of an offer of any such shares, debentures or securities by the company or any of its subsidiaries for sale to the public;
- the resolution relates to a pension or superannuation benefits scheme which has been approved, or is to be approved, by the Board of Inland Revenue for tax relief purposes;

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The Model Articles are subject to the provisions of the Companies Act 2006. A director is concerned with an actual or potential conflict of interest in a company in which a director is participating in the decision-making process, except when:

- the shareholders have passed a resolution in which disapplying the provisions of the articles does not prevent a director from participating in the decision-making process;
- the director's interest is not regarded as likely to give rise to a conflict of interest.

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- the director's conflict given, by or to a director on behalf of the company;

a guarantee given, or to be a liability incurred by or on behalf of the company;

- the director's conflict of interest in relation to an agreement to subscribe for or any of its subsidiaries' shares or guarantee subscription for shares;

subscription, or an agreement to subscribe for securities of the company or to sub-underwrite, or to guarantee subscription for securities; and

- the director's conflict of interest in relation to arrangements pursuant to which benefits are made available to employees and directors or former employees and directors of the company or any of its subsidiaries which do not include former directors.

arrangements pursuant to which benefits are made available to employees and directors or former employees and directors of the company or any of its subsidiaries which do not include former directors.

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The CA 2006 has placed a duty on directors to declare any transaction or arrangement entered into by the company in respect of an existing transaction or arrangement if a declaration was made when

to declare their interest in a transaction or arrangement entered into by the company in respect of an existing transaction or arrangement if a further declaration in respect of the transaction or arrangement was proposed.

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The declaration in relation to a transaction or arrangement can be made in any of the following ways:

proposed transaction or arrangement.

- at a meeting of the directors;
- by notice in writing (under section 177(2)(b));
- by general notice (under section 177(2)(c)).

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A declaration in relation to a transaction or arrangement made before the company enters into the transaction or arrangement, then he will have committed a criminal offence if the transaction or arrangement is unenforceable and the director has made a profit.

or arrangement must be made before the company enters into the transaction or arrangement. If a director fails to make such a declaration, then he will have committed a criminal offence, meaning that the transaction or arrangement must account for any profit made.

If a declaration of interest provided to the company is false, inaccurate or incomplete, a further declaration must be made.

is, inaccurate or incomplete, a further declaration must be made.

A declaration in relation to a transaction or arrangement made as soon as is reasonably practicable after the transaction or arrangement is entered into. If a director fails to make such a declaration, then he will have committed a criminal offence. Despite being a criminal offence, it is unlikely to result in a claim for damages.

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In each case, a declaration is required where the director is not aware of the transaction or arrangement in question at the time it is made. If the director is not aware of the transaction or arrangement in question at the time it is made, a declaration is not required. For this purpose, a director is not aware of a transaction or arrangement if he is not aware of the facts which would lead to the transaction or arrangement in question.

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matters of which he or she is not aware. A director need not declare an interest in the following circumstances:

- if it cannot reasonably be expected to give rise to a conflict of interest;
- if the other directors are not aware of the interest (and for this purpose the other directors are treated as if they are not reasonably to be aware of the interest);
- if it concerns terms of a contract which are to be considered by a meeting of the directors.

aware. A director need not

to give rise to a conflict of

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that have been or are to be considered by a committee of the

Templates relating to directors' interests can be accessed [here](#).

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### Ratification

If a director commits negligence or a breach of trust, the shareholders can ratify the director's actions by passing a resolution. If the director in question casts his or her own vote and the other 'connected persons' vote, whether a simple majority of the members are unanimous.

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### Shareholder Litigation and Derivative Claims

The CA 2006 gives shareholders the right to bring an action in the company's name (known as a derivative claim) if a loss arising from negligence, default, breach of duty or breach of trust has been suffered by the company. The claim may be brought by a shareholder (or former director) and must satisfy certain criteria.

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However, it is only the company that can claim compensation in a derivative claim. The CA 2006 states that a shareholder must satisfy certain criteria to bring a derivative claim.

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The costs of a derivative claim are borne by the shareholder who brings the claim. However, if the court does not give consent to continue an action brought by a shareholder, the court may not order the company and the directors to pay the costs incurred by the shareholder.

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shareholder in bringing the  
company may have to pay for  
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