

Guidance Note: Directors

Companies Act 2006 – An

The appointment, duties and powers of directors under the Companies Act 2006, the common law and equity, and the position of a director 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 a company and which company

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. The position of director will be

Executive - A director is an employee of the company and will not automatically be deemed to be an employee of the company. Executive Directors perform operational and strategic business functions, including looking after assets, hiring and firing staff, and entering into contracts. Executive Directors will usually be employed on a full-time basis and will be paid a salary, which is taxed through the PAYE system. Executive Directors are usually appointed on written service agreements with a term of 2 years must be approved by the shareholders.

Non-Executive – These directors are not involved in the day-to-day running of the business. They provide independent advice and objective oversight of executive management. They are usually self-employed and are treated as self-employed under tax law. Their terms and conditions of their appointment are usually set out in a written agreement relating to non-executive, all

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 position of a shadow director is not formally appointed to the board but the board might be deemed to be acting in accordance with the directions of a shadow director. The position of a shadow director is equivalent to that of a director under the Companies Act 2006. The Small Business Enterprise and Employment Act 2015 (“SBE Act”) provides that the general duties of directors under the CA 2006 apply to shadow directors to the extent they are capable

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of applying. The Secretary of State has issued guidance concerning the application of the provisions of Section 90 of the SBEE also known as Section 90A of the Companies Act 2006. Section 90A section 251 CA 2006. Section 90A states that a person will not be a shadow director if the person has not received directions given by that person or any other person under legislation.

power to make regulations under section 90A of the Companies Act 2006 to allow shadow directors. The definition of shadow director in section 90A(1) of the Companies Act 2006 is clear that a person will not be a shadow director if the person has not received instructions or directions from any person to exercise the function conferred by or under the legislation.

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Associate—An associate director is defined in section 251(1) of the Companies Act 2006. It is often a role which is given to key employees by giving them the authority to act as statutory directors. An Associate Director has authority to commit the company to contracts or other transactions.

within the meaning of the definition of shadow director in section 90A(1) of the Companies Act 2006. It is often a role which is given to key employees by giving them the authority to act as statutory directors. An Associate Director has authority to commit the company to contracts or other transactions.

Alternates— An alternate director is defined in section 251(1) of the Companies Act 2006. An alternate director is appointed unless the articles of association specifically provide for it.

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Whatever the use of the title, it is important that titles are not confused with statutory authority. In *Chopsgate Contracting Solutions Ltd v O’Sullivan* [2011] EWHC 1201, the High Court had to consider the legal status of a person who had not been formally appointed as a company director. The High Court held that a person who acted as a “Managing Director” of a business division was not a “de facto” director.

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This highlights that it is important to ensure that the company’s governance structure is clear and that the company’s directors are properly appointed and registered.

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- **Create and follow a clear governance structure.** Ensure company directors are properly appointed and registered at Companies House. Minutes of board meetings and minutes of directors’ meetings should be taken and minuted.
- **Delineate clearly and document roles.** Significant contracts and other important transactions should be signed by any of the company’s directors. If anyone other than a director is to sign documents or negotiate transactions, this should be specifically in writing.
- **Consider using service providers.** It is common for a person acting as a director to be employed by the company. However, a person who has not been formally appointed as a director but who is an employee and carrying out the duties of a director may be considered a de facto director if they are an employee and carrying out the duties of a director.
- **Choose job titles carefully.** Avoid using a job title that does not include the word “director” (e.g. “Managing Director”) as this may lead to a person being found to be a de facto director. If individuals are to be employed as directors, take care to ensure that they are not being statutory directors, that third parties are not misled, and that they are not de facto directors.

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Appointment

Private companies must have at least two directors. At least one must be a natural person i.e., not a corporation. 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 16 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 before becoming a director.

Under the SBEE the appointment of all directors must be natural persons. Breach of this requirement will be void. Directors who have been appointed in breach of this requirement will need to be removed. **How to implement.** Notwithstanding the provisions of the SBEE, appointments of corporate directors are permitted.

The appointment of corporate directors is prohibited so that any appointment made in contravention of the SBEE is void. Corporate directors of companies must be removed. **How to implement.** The Companies Act 2006 has yet to be amended to limit the number of corporate directors.

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

The Secretary of State has power to make regulations regarding exemptions, such as where a director represents a low risk of fraud, governance or disclosure. These exemptions in due course will be updated to reflect the SBEE and the prohibition of corporate directors. For most SME businesses, it is considered that going forward, appointments of directors should be as limited to natural persons only.

As regards the number of directors, it may be convenient for a company to have more than one director. Bear in mind that they will require powers of attorney, such as share certificates, and a second director or company secretary. The Companies 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 convenient for a company to have more than one director, sole directors should require powers of attorney, such as share certificates and documents otherwise be fulfilled by a second director or company secretary. Whilst the model articles do specify a minimum number of directors, if the number of directors is below the minimum number specified in the articles, the directors may not be able to act.

Methods of appointment

First Directors

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

The subscribers must deliver to the registrar a statement of particulars of the persons who are to be the first directors. This statement must also contain a statement by the subscribers that each person named as a director has consented to act.

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 directors after incorporation determined by the company consulted prior to any appoi

procedure for appointing directors will usually be n, which should always be

However, there are two prin (both of which are specified 2006):

director of a company Model Articles under the CA

- appointment by resol be sought at a routi directors' resolution s directors; or
- appointment by an o general meeting or b

directors. Approval can either rnatively via a written ach of the existing

If the articles make no provi have an inherent power to a

e shareholders, either in a

The SBEE requires the com newly appointed directors. T director to complete and sig

nt of directors, the members inary resolution.

The appointment of a direct 14days using Form AP01 (f entity). A statement by the d that capacity must be sent t statement is part of Compar becoming a director must al new director that are require directors and its register of c

consent to act" from all sk each newly appointed r.

The company must also not ceasing to be a director or t contained in the register of c addresses.

at Companies House within m AP02 (for a corporate n has consented to act in notice of appointment. The Notice of a person of the particulars of the company's register of dresses.

Note that as of October 201 Companies House will still d when they are appointed, h suppressed on the public re visible to those searching. T

within 14 days of a person change in the particulars directors' residential

¹ All references to Table A in this document a The version of Table A which applies to a cor A in force at earlier times, please visit the Cor

he terms of the SBEE, rth of directors as and director's birth will be month and the year will be ntroduced by the SBEE

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primarily to combat potential...
However, for companies that...
registers at Companies House...
directors will be available on...
think carefully about the imp...

Companies incorporated prior...
adopted new articles of assoc...
A was adopted by the comp...
required to retire by rotation...
of Table A. Discussion of th...
and each company must ch...
appointment are permitted.

Disputing an Appointment

There are always a small nu...
despite his or her appointme...
she was never properly app...
director (or company secret...

The SBEE as of October 20...
Companies House procedur...
inadequate.

The procedure as set out in...
follows:

- a) When a company notifies...
required to make a "stat...
consented to their app...
company.
- b) Upon receipt of the no...
director to notify them...
public register and will...
duties as a director.
- c) The new director can a...
appointment from the p...
as a director.
- d) If a company fails to p...
that a person did cons...
remove details of that...

In practice this means for ne...
statement has been added...
and incorporation forms (pa...

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...retrospective in effect.
...of the option to keep their...
...the full date of birth of...
...directors should therefore...
...on.

...will, unless they have...
...based on Table A. If Table...
...on, then the directors will be...
...etings under articles 73-80...
...the scope of this document...
...mine which methods of...

...a person contends that,
...Companies House, he or...
...e never consented to be a...

...as it was previously felt that...
...or's appointment was...

...102 of the SBEE provide as...

...of an appointment it is...
...firm that the director has...
...s on initial registration of the...

...house will write to the new...
...has been recorded on the...
...tion regarding their legal...

...use for removal of their...
...d not in fact consent to act...

...se will sufficient evidence...
...Companies House will...
...public register.

...s and secretaries, a...
...to the relevant appointment...
...t the person has consented...

to act in their relevant capacity (see above).

Companies are also required to obtain consent to act procedure of personal authentication on e

As part of this, Companies must make them aware that their and explain their statutory g

In addition to this the SBEE appointed directors' details person appearing on the pu name removed if they did not

Termination

Directors may have a service agreement will usually contain Table A (article 81) and the in which a director's appointment circumstances include:

- disqualification from office;
- bankruptcy;
- a composition being entered into;
- admission to hospital under the Mental Health Act 1983;
- a registered medical practitioner's written opinion to the effect that the director is physically or mentally incapable of acting so for more than three months;
- a court makes an order wholly or partly preventing the director from exercising powers or rights which are conferred on him;
- the director has been absent from meetings for six consecutive months without permission that his office be vacated;
- the director resigns.

A letter of resignation should also be the Secretary) has resigned the Company. It should be documented for loss of office, this

The termination of the director's office must be registered at Companies House within 14 days of the

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ment. This replaces the on paper forms and

newly appointed directors to filed on the public register

get falsely or incorrectly ster. Since April 2016, any or can apply to have their

company, in which case the ns. Notwithstanding this, 18) specify circumstances omatically. These

s creditors; application for treatment under

ting that person gives a hat person has become s a director and may remain es only);

erson's mental health which personally exercising any herwise have;

etings for six consecutive and the directors resolve

at the Director (who may ion for loss of office against here a settlement has been documented.

be registered at Companies office using Form TM01.

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Removal

By passing an ordinary resolution, the members of a company may remove a Director. 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 shareholders at least 28 days before the meeting at which the shareholders will vote on the resolution.

When a Director is removed, the members of a company may also resolve that the Director shall not be eligible for re-appointment for a specified period of his term of office. This resolution may be subject to the Director's service agreement or any other contract which purports to prohibit the director's removal in this way. The ordinary resolution means that notice must be given to all shareholders at least 28 days before the meeting at which the shareholders will vote on the resolution.

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

When a Director is removed, the members of a company may also resolve that the Director shall not be eligible for re-appointment for a specified period of his term of office.

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:

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; or
- (d) that they were not entitled to be directors.

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; or (d) that they were not entitled to be directors.

This provision validates transactions entered into between the company and its members as well as between the company and its directors. It also answers questions being raised on the validity of transactions where there has been a slip or irregularity in the appointment of a director.

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Remuneration, Expenses, Compensation

Article 82 of Table A and any other articles 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. The Model Articles permit the other directors to be paid for their services as directors. Under the Model Articles, a director is entitled to receive remuneration not only for his services as a director but for any other service he performs for the company. Remuneration is deemed to accrue from day to day in the absence of the contrary.

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

Articles state that the directors may be paid for out of the company's assets for their attendance at meetings of the company, at general meetings or separate meetings of any class of shares or of debentures of the company or for the discharge of their duties.

Article 87 of Table A and any other articles of a company directors may receive gratuities and pensions from the company or from any other body.

Articles allow directors to receive gratuities and pensions from the company or from any other body. That these may be provided for is not prohibited by the Act.

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for any director who has held any executive office or employment with the company or has been employed by the company in any capacity whatsoever. The Model Articles state that they may be included in the company's articles of association.

any executive office or employment with the company or has been employed by the company in any capacity whatsoever. The Model Articles state that they may be included in the company's articles of association.

Loans

If a private company wishes to lend money to any of its directors or to a director of its holding company in connection with a loan made to the company, the transaction must first be approved by a resolution of the shareholders of the company (and of the holding company if the director is also a director of the holding company).

If a private company wishes to lend money to any of its directors or to a director of its holding company in connection with a loan made to the company, the transaction must first be approved by a resolution of the shareholders of the company (and of the holding company if the director is also a director of the holding company).

For the resolution to be passed, the following matters must be set out:

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- the nature of the transaction;
- the amount of the loan;
- the purpose for which the loan is to be made;
- the extent of the company's liability in connection with the loan,

the following matters must be set out:

the terms of the loan must be made available to shareholders in written form before the resolution or, if a general meeting is held, the terms must be made available to the company's registered office before the meeting itself.

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Public companies must also disclose in their annual financial statements details of directors, loans or quasi-loans, credit transactions and related arrangements, disclosed in the company's annual financial statement.

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Duties

Prior to 1st October 2008, the duties of directors were derived from several sources, including the Companies Act 1985 and other statutes.

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The general duties of directors under the Companies Act 2006 are described as a codification of the existing law. The duties are a codification of the existing law. The duties are a codification of the existing law.

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- *A duty to act in accordance with the company's constitution, and to exercise powers only for the purposes for which they were conferred.*

A duty to act in accordance with the company's constitution, and to exercise powers only for the purposes for which they were conferred.

This replaced existing duties of directors.

- *A duty to act in the way which they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.*

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

- *A duty to exercise independent judgment.*

There was no equivalent common law duty but it replaced the prior obligation on directors to exercise independent 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 and skill.

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

The new duty replaced the previous common law duty to avoid a conflict of personal interests, or a conflict of duty to the company, with a contract and (ii) he has made or may make out of the conflict if a director allowed his personal interests, or those of another person, to conflict with his duty to the company. A director could avoid any relevant conflict by disclosing the conflict to the company for any 'secret profit' if 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 duty, distinct from 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 arose from a transaction or arrangement with the company which was prohibited 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 as 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 directors to be the chairman, and if there is an equality of votes then he or she has a casting vote.

Conflicts of Interest

Table A states that directors shall not be liable in respect of any resolution of the directors concerning a matter in which they have 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 the grant of a guarantee, security, or indemnity in respect of any liability incurred or to be incurred for the benefit of, the company or any of its subsidiaries;
- the resolution relates to the grant of a guarantee, security, or indemnity to or for any party of a guarantee, security, or indemnity of the company or any of its subsidiaries for the benefit of, the company or any of its subsidiaries in connection with its assumed responsibility in connection with others under a guarantee, security, or indemnity;
- 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 shares, debentures or securities by the company or any of its subsidiaries for sale to the public or for exchange;
- the resolution relates to the approval of a pension or other employee benefits scheme which has been approved, or is to be approved, by the Board of Inland Revenue for tax relief purposes.

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 if he or she is participating in the decision-making process of the company in which a director is not to be counted as participating in the decision-making process for quorum or voting purposes except when:

- the shareholders pass a resolution which disapplies the provisions of the articles which would otherwise 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;

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

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The CA 2006 has placed a duty on directors to declare any transaction or arrangement entered into by the company (section 177) as well as any transaction or arrangement entered into by the company in respect of an existing transaction or arrangement if a declaration was made when

the director is first to declare their interest in relation to any transaction or arrangement to be entered into by the company (section 177) as well as any transaction or arrangement entered into by the company in respect of an existing transaction or arrangement if a declaration was made when

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

in any of the following ways:

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

A declaration in relation to a transaction or arrangement made before the company enters into the transaction or arrangement, then he will have no liability. If a declaration is made after the transaction or arrangement has been entered into, the transaction or arrangement may be unenforceable and the director may be liable for any profits.

or arrangement must be made before the company enters into the transaction or arrangement. If a declaration is made after the transaction or arrangement has been entered into, the transaction or arrangement may be unenforceable and the director may be liable for any profits.

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

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A declaration in relation to a transaction or arrangement made as soon as is reasonably practicable after the transaction or arrangement has been entered into, then the director will have committed a criminal offence. Despite being a criminal offence, it is unlikely to make the transaction or arrangement unenforceable.

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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 entered into. If the director is not aware of the transaction or arrangement in question at the time it is entered into, 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

(and for this purpose the other directors are treated as if they are not reasonably to be aware of the interest);

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 breach by passing an ordinary resolution. If the director in breach casts in his or her own favour (or in favour of his or her family or other 'connected persons') votes, whether a simple majority or otherwise, the resolution is valid if 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) for a loss arising from negligence, default, breach of duty or breach of trust by a director of the company. The claim may be brought by a shareholder (or former director) who has sought to bring or continue the derivative claim.

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However, it is only the company that can bring a derivative claim. The CA 2006 states that a shareholder must satisfy certain criteria before the court will give consent to continue the 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 the claim, the company may be ordered to pay the costs.

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company may have to pay for
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