

Guidance Note: Appointment of Directors

This Guidance Note provides an overview of the appointment of directors within a private company and looks in particular at the types of directors (executive and non-executive), as well as the process for appointing and removing a director from a company.

Introduction

A company acts through two groups of people: its shareholders and its board of directors. The general role of directors is to manage the company for the benefit of the shareholders. Although a company is a separate legal entity, it acts through those authorised for that purpose, usually its directors.

The directors are basically the agents of the company for its day to day affairs. Directors have the ultimate responsibility for the company but not necessarily employ staff. The effectiveness of a company's management and its long term success is critical to its long term success. Their appointment and role must be understood by any new business.

Types of Directors

All companies are required to have at least one director (two for a public company must have two). This is because companies as "artificial" legal entities need to act through other persons. A company's directors are the persons to whom the law looks to manage the affairs of a company on behalf of the shareholders. In the case even for small private companies with only one or two shareholders, the director and shareholder is in fact the same person). The law does make a distinction between the owner of a company and a director who is appointed to manage the company.

The term "director" is not actually defined in the Companies Act 2006. Section 250 states that the term, "director", includes, "*any person in whatever name called*". Therefore any person exercising the role of a director in relation to a company (whether or not formally appointed and registered as a director) will be regarded as a director.

Whilst the Companies Act 2006 does not define the term "director", here are some of the more common types of directors:-

Executive and Non-executive – 'Executive' directors are not terms derived from the Companies Act 2006.

However, the term 'executive director' is used to refer to those who are involved in the day-to-day running of the company. They instead act in an advisory function.

Executive Directors perform operational functions such as managing the company's day-to-day affairs, looking after assets, hiring and firing staff, and so on. They will be paid a salary, so they are protected by the PAYE (pay as you earn) system.

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Non-executive directors do not get involved in the running of the business. They use their experience and expertise to provide advice and objectivity, and they usually have a role in monitoring executive management. They may be employed by the business but more likely they will be treated as self-employed and contract for services. Non-executive directors usually work part-time, attend board meetings and spend time on specific projects in a mentoring or strategic capacity.

Shadow – Under the Companies Act 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.” Therefore even a person not formally appointed as a director could be considered equivalent to a director. Note that following the introduction of the Small Business, Enterprise & Employment Act 2016 (SBEE), shadow directors are now subject to the same legal duties as formal directors (as set out in the Companies Act 2006), “... where and to the extent that the person acts in accordance with instructions or directions that person in the exercise of a function conferred by or under legislation.”

Corporate –The SBEE proposes to ban the appointment of corporate directors made after October 2016. Therefore the Companies Act 2006 will be amended by the SBEE and require that all directors must be natural persons and the appointment of corporate directors is prohibited. Any appointment of corporate directors made after October 2016 will be void and companies with existing corporate directors will need to take steps to remove them well in advance of October 2017. The SBEE grants companies a one year transition period during which to do so.

However under the SBEE, the Secretary of State will have the power to make regulations setting out exceptions to the general rule that directors must be individuals. These exceptions are currently the subject of consultation and this Guidance Note will be updated in due course setting out the details of any regulations. For SME businesses however, it is perceived that there will be no changes. It is recommended that any company with corporate directors takes steps to remove them well in advance of October 2017.

Associate – An associate director is defined in the Companies Act 2006. Generally the term is used to cover non-executive directors. The letter appointing them should clearly state that they are not directors in their dealings with the company and they must not hold directorial roles.

Alternate - A company's articles may allow a director to appoint an alternate to represent them when they are unable to perform their duties as directors. Note that the Companies Act 2006 do not give directors the right to appoint alternates. A company's articles may not appoint alternates. A company's articles may provide for alternates if they are deemed to be likely to be necessary.

Our sub-folder on [non-executive, alternate and shadow directors](#) has the documents to appoint these categories of directors in letter and

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It is common for small private companies to have only one shareholder. This shareholder will also be the only shareholder (called

As stated above, it is important to remain an owner. The company can enter into a contract with a separate legal entity from its owner is not the responsibility of the company - not

The only exception is if a director of guarantee to repay the company's debt if the company is not able to.

A company can have a sole director and the 2006 Model Articles recognise this, by nothing in the articles requires it to have decisions without regard to anything other words, the sole director can ignore unanimous decisions of directors).

If the articles of association are based on the Companies Act, the directors are required, and the articles of association resolution (held in a general meeting of the company) could adopt new articles of association.

A sole director is subject to the same advantage of being a sole director is the board of directors. There is no need for decision making. Sole directors are not required to make *decisions* of a sole director must still be subject to governance to keep records of decisions (CO.CA.MM.02)).

First meeting of the sole director: director will need to make a number of decisions to satisfy his or her requirements. The issues are: (1) whether to adopt a shelf company (whether there is to be one director or more, if appropriate), appointment of company secretary, (2) adopting new articles etc.

Conflicts of interest: the Companies coverage of conflicts of interest. Sol contract to themselves or to anyone else

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siness').

any.

company is a distinct legal entity to its owner(s). The fact that the company is a separate legal entity means that all the company's liabilities are the liabilities of the company, not the shareholder(s).

bank or other creditor a personal
 becomes personally liable to repay the

by the Articles of Association. The company has only one director, and if there is more than one director, then the sole director may take all decisions. The company may also decide on decision making by directors (in the articles that refer to majorities and

ies Act 1985), a minimum of two
ended by a shareholders' special
to reduce that number to one, OR
s the Companies Act 2006 Model

any other director. However, the
operate in a more flexible way than a
s, or to obtain consensus in any
ates of any meetings (although the
is also a matter of good corporate
ates – resolution of sole director

purchased 'off the shelf', the sole
 et in order to tailor the company to
 any company purchased off-the-
 resignation of the first directors (if
 to be one), changing the name.

prevalence of sole directors in its
d to declare their interest in any

Where a limited company has only one director, the sole director, the company can enter into a contract with that person, without the need for a written memorandum or recorded in the minutes of the company following the making of the contract.

Executing documents: a disadvantage of being a sole director is that he or she cannot execute a document on behalf of the company without having his signature witnessed. A deed can also be validly executed by a sole director in the presence of a witness (who also signs).

Employers' liability insurance: if a company has more than one employee, it is required under law to purchase employers' liability insurance. This rule is that if the company has only one employee, who owns 50 per cent of the share capital, employers' liability insurance is not required.

An individual who works for the company is always treated as an employee for these purposes, even if they call themselves a director.

Salary and dividends: a sole director's salary drawn from the company will be subject to PAYE and NI contributions (above certain thresholds and minimum personal allowances and minimum thresholds). Dividends are not subject to these rules. While to consult an accountant, to advise on the best way to structure personal allowances and minimum thresholds and salary.

Our sub-folder on [Paying Dividends](#) and relevant documents on the paying out of dividends.

Appointment of a Director

On incorporation of a new company, the first directors (if any) who have consented to act - and are named in the incorporation documents - will be automatically become the first directors. Their names must be entered into the Register of Directors (and secretaries) and the [Register of Directors' Residential Addresses](#) (CO.DAR.02) and (CO.DAR.03).

Subsequently, the methods of appointing or removing a director are determined by the company's articles of association, which should be consulted. There are basically two ways to appoint a director of a company:

- appointment by the board of directors (See: [Board Minutes – Appointment of Directors \(CO.DAR.04\)](#)); or
- appointment by the shareholders, to be passed as an ordinary resolution of the shareholders, (See: [Shareholders' Ordinary Resolution – Appointment of Directors \(CO.DAR.05\)](#)).

The appointment of a director must be made using Form AP01 (for an individual) or Form AP02 (for a corporate entity). (See: [Companies House Forms – Appointment of a Director](#)). Note however with the proposed abolition of corporate directors, Form AP02 is no longer relevant in due course.

Directors' date of birth

The SBEE as of October 2015 has ended the requirement for a director's birth when registering on the central register. This is visible to those searching. Companies must now provide the date of birth of directors as and when they are appointed.

This change has been introduced by the Companies Act 2006 and is retrospective in effect. However companies must provide a relevant date of birth will not be of use if the company registers on the central register. Companies must be able to do as of June 2016 also as part of the new requirements.

Companies Incorporated prior to 1st October 2009

Unless they have adopted new articles of association, companies incorporated prior to 1st October 2009 will have articles based on the old model.

Table A requires the directors to retire at the annual general meeting under articles 73-80. This process is outside the scope of this guidance.

New Director - Checklist of Practicalities

1.	Organise approval of necessary appointments by the board of directors (or by the shareholders if required by the articles).
2.	Prepare a service contract for the director (if applicable).
3.	File form AP01/AP02 with Companies House within 14 days of the appointment.
4.	Update the Register of Directors.
5.	Amend the bank mandate(s) if necessary.
6.	Check the directors' and officers' details on the Companies House website.

Directors' Service Contracts

Being a director does not, of itself, make a director an employee. If a director is an office, not necessarily an employee. If a director enters into a service contract with the director, the terms of the contract will determine whether the director becomes an employee. Many companies have service contracts for their directors. In these circumstances, the relevant aspects of employment law (including redundancy) apply in addition to the law relating to directors.

Most executive directors will be employees. Non-executives will not. Non-executives will not have a service contract.

Companies House to omit the day of birth. The requirement is that only the month and the year is required. Companies must send the Registrar the full date of birth of directors as and when they are appointed.

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Simply-docs offers four Director's Service Contracts with 'payment in lieu of notice' or 'PILON' provisions. There are two contracts containing both PILON provisions. These are intended for directors who are employed. See [Directors' Service Contracts](#).

Duration of Directors' Service Contracts

Under section 188 of the Companies Act 2006, a Director's Service Contract must be approved in advance by an ordinary resolution of the shareholders of the company.

Determining the length of the guaranteed term of a director's employment is either a simple or a complex rule. The guaranteed term of a director's employment is either:

- (a) the period during which the director's employment continues (whether under the original agreement or a new agreement), and it cannot be terminated by the company or it can be terminated only in specified circumstances, or
- (b) in the case of employment with a guaranteed term, the period of that guaranteed term is the period of the director's employment.

If the employment has a period within paragraph (b), the aggregate of those periods will be the period of the director's employment.

If the company enters into a further service contract with the director during the guaranteed term of a director's employment, then the unexpired period of the original contract gives the other party that right), then the unexpired period of the original contract will be added to the guaranteed term of the new contract.

How to Obtain Shareholder Approval

Where the proposed director's contract is for longer than two years, a general meeting must be convened (or a written resolution must be passed) to enable shareholders to vote on the proposed contract. Prior to the meeting, shareholders must be provided with a copy of the proposed contract.

Inspection of Directors' Service Contracts

A copy of every Director's Service Contract must be made available for inspection with the company under section 228 of the Companies Act 2006 ('single alternative inspection location').

Shareholders are entitled to request a copy of the contract for inspection.

The copies must be retained by the company for at least one year following the date of termination or expiry of the Service Contract.

There are two fixed salary contracts (one with and one without PILON provisions), and there are two contracts containing both PILON provisions (again one with and one without PILON provisions). These are intended for directors who are employed. See [Directors' Service Contracts](#).

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Tax Status of Company Directors

HMRC requires directors to complete a form which is classed as 'office holders' for the purpose of National Insurance Contributions (NICs). An office holder's earnings are automatically treated as employment income and there is also a liability for Class 1 NICs.

The rules for calculating NICs for directors are the same as for other employees. Class 1 NICs must still be paid if a director earns over the primary threshold, but unlike employees, directors are taxed on their annual earnings to date. There is more detail in relation to this on HMRC's website.

Director Disputes regarding appointment

There are always a small number of cases where a director's appointment being registered at Companies House and/or he or she never consented to be a director.

The SBEE as of October 2015 has changed the Companies House procedure for verifying a director's appointment.

The procedure as set out in sections 167A to 167D of the Companies Act 2006 is as follows:

- a) When a company notifies Companies House of a new director's appointment it is required to make a "statement of truth" to confirm that the director has consented to their appointment. This statement must be included on initial registration of the company.
- b) Upon receipt of the notification, Companies House will write to the new director to notify them that their appointment has been registered and will direct them to information regarding their legal responsibilities.
- c) The new director can apply to Companies House for removal of their appointment from the public register if they did not consent to act as a director.
- d) If a company fails to provide Companies House with sufficient evidence that a person did consent to act as a director, Companies House will remove details of that appointment from the public register.

In practice this means for newly appointed directors, a statement has been added by Companies House to the new incorporation forms (paper and electronic) that the person has consented to act as a director in their capacity.

This replaces the consent to act as a director on electronic filings. This replaces the consent to act as a director on electronic filings.

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Termination of Appointment of Directors

General Position

A director who is a full time employee a senior employee of the company. Th will be governed by his service agree

Secondly, as a director, he is an office governed by the articles of associatio governed by the Companies Act 200 fiduciary duties imposed on a director b

Termination of employment: if th agreement, the options for terminat Sometimes the service agreement will a clause stating that either party can provisions, if the director has been employees who start work with the co a fair reason for dismissal, and must a

Even if the director has been employe without renewal constitutes a dismiss purposes. Moreover, if a fixed term ag terminated until the end of its term, and the employer will become liable for loss

Automatic Termination of Directors

The Model Articles (Article 18) and director's appointment will terminate au

These circumstances include:

- disqualification from being
- bankruptcy;
- a composition being made
- admission to hospital in p Health Act 1983 (Table A o
- where a registered medic opinion to the company st incapable of acting as a c (Model Articles only);
- a court makes an order b partly prevents that person person would otherwise ha

or incorrectly appointed directors' EE creates a new mechanism by tor can apply to have their name

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on for treatment under the Mental

reating that person gives a written as become physically or mentally n so for more than three months

's mental health which wholly or ng any powers or rights which that

- the director has been absent from the company for six consecutive months without the permission of the directors (Table A only); or
- the director resigns.

Resignation

A director may tender his resignation, in accordance with the terms of his service agreement or employment contract, and the board should be convened to accept the resignation (See: [Board Minute – Resignation](#) (CO.DAR.07)).

The director's letter of resignation should state that the director has no claim for compensation for loss of office against the company (CO.DAR.08)). The letter should be entered in the minutes. If there is a settlement has been agreed for loss of office, this should be properly recorded in the Settlement Agreement.

The termination of a director's appointment should be recorded at Companies House within 14 days using Form TM01, (See: [Company's Articles of Association – Termination of Appointment of Director](#) (CO.DAR.09)).

Procedure for Replacement/Removal of Directors

By passing an ordinary resolution at a general meeting, shareholders can remove a director *before* the expiry of his term of office. The procedure is set out in the Guidance Note found in Sections 168 and 169 of the Companies Act 2006.

This shareholders' right takes precedence over any provision in the company's Articles, which endeavour to restrict or exclude this right.

The shareholders' ordinary resolution must be passed at a general meeting given to both the director concerned and the company at least 28 days before the general meeting where the shareholders will vote on the resolution.

A shareholders' written resolution cannot be used to remove a director from office.

A shareholder or shareholders wishing to challenge the appointment of a director should follow the steps laid out below. This mechanism is most often used where the board of directors does not support the challenge to a director. The shareholder will request a general meeting of the shareholders, which will then vote on the resolution to remove / replace the director.

The board is then obliged to convene a general meeting at which the resolution to remove the director will be put to a vote of the shareholders.

This method can be used to remove a director if the articles of association do not otherwise provide for the removal of a director by ordinary resolution of the shareholders.

Step 1 - Shareholders require the director to be removed

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The directors are required to call a general meeting of the shareholders with voting rights holding at least 10% of the paid-up capital (unless it has been 12 months since the last meeting where shareholders have the right to circulate resolutions in advance, in which case the required percentage is 5%).

This means that if the shareholder who has requested the meeting does not hold the required percentage of the paid-up capital of the company, they must find other shareholders who are prepared to join the request until the required percentage is reached.

The notice:

- must state the general nature of the business to be dealt with at the meeting;
- should include the text of any resolution(s) to be moved at the meeting, including any resolution(s) to remove the director which is being proposed;
- may be in hard copy form or by electronic means;
- must be authenticated by the shareholder(s) submitting it.

(See: [Shareholder Notice – Replacement/Removal of a Director](#) (CO.DAR.10)).

Step 2 - The directors must hold a board meeting

The directors must hold a board meeting to consider the shareholders' request and the proposed ordinary resolution(s), and to call a general meeting of the shareholders to move the ordinary resolution(s). If the directors fail to call a general meeting, the shareholders who requested the meeting may hold one at the expense of the company, provided that it takes place within three months of the date when the directors were notified of the request. (See: [Board Minutes – Replacement/Removal of Directors](#) (CO.CA.DIR.07)).

Step 3 – A copy of the shareholders' notice must be sent immediately to the director concerned

A copy of the shareholders' notice must be sent immediately to the director concerned immediately because he or she will be entitled to be heard at the meeting, regardless of whether the director is a shareholder or not.

The director concerned may also make representations to the company. Provided that they are a reasonable length, the directors must ensure that the shareholders of the company are notified of the representations. If the representations are received too late, the company must send a copy of the representations to the shareholder to whom notice of the general meeting is sent. If the 'Special Notice of General Meeting' has already been sent out, the company must send out the statements of representations to the shareholders separately.

Step 4 - Special notice must be given to the shareholders

The shareholders should receive the text of any resolution(s) at the same time as they receive notice of the meeting. (See: [Special Notice of General Meeting](#) (CO.DAR.11)).

Step 5 - General meeting of the company

A general meeting of the shareholders must be called to consider the ordinary resolution(s).

As specified in step 3 above, the director's representations has not been made or because the company failed to do so or because the company failed to read out at the meeting (in addition to the

If the director is removed at the general meeting, the company's damages are not affected simply because the director was removed. *Meeting Minutes – Replacement or Removal of Directors*

Step 6 - The board of directors must

Following the general meeting, the directors confirm that the ordinary resolution has been passed and the necessary filings at Companies House have been made.

Where a director is appointed at the existing director, he or she is treated director he or she replaced was last a he or she is due to retire).

If a director is not appointed to replace a vacancy can be filled as a casual vacancy or she must also be replaced at the same time. 2006 requirement that all private company directors be natural persons, not corporations.

Step 7 – Filing with Companies House

1. Form TM01, which records the and (if applicable) Form AP0 Companies House, along w shareholder's meeting. (See: [*Director* \(CO.CA.DIR.22\)](#)).

heard at the meeting. If a copy of the representations is not made available to the public, the Commission will cause them to be received too late to be considered. The Commission will require that the representations are made available to the public (orally).

entitlement to compensation and moved in this way. (See: [General DAR.12](#))).

Meeting

and board meeting to acknowledge
the company secretary to make the

has been convened to remove an
director on the day on which the
the purposes of determining when

at the general meeting, then the sole director is removed, then he must comply with the Companies Act as one director. Sole directors must

or removed at the general meeting
 The removal director must be sent to
 The resolutions passed at the
 House - Removal/Replacement of