

GUIDANCE NOTES ON THE RESPONSIBILITIES AND DUTIES OF DIRECTORS UNDER THE LAWS OF THE ISLE OF MAN

The following guidance is indicative of the responsibilities and duties of directors, is general in scope, and is not in any particular order of relative importance. These notes are derived from the duties and responsibilities that already exist under law, but are not exhaustive and further guidance should be obtained from your legal advisor.

INTRODUCTION

These guidance notes are provided in order to assist current and future company directors to perform their duties responsibly and within the laws of the Isle of Man. Directors should ensure that principles of good corporate governance are followed.

WHO IS A DIRECTOR? HOW A DIRECTOR IS APPOINTED TO OFFICE AND HOW HE CEASES TO BE A DIRECTOR

- 1.1 Companies incorporated under the Companies 1931 to 1993 of the Isle of Man (“the Companies Acts”) must have at least two individual directors. Corporate directors are not permitted.
- 1.2 A director as defined by the Companies Act 1931 includes “any person occupying the position of director by whatever named called” (section 341), and acts of directors are valid “notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”(Section 142). Therefore, even though it is an offence not to comply with the formalities of registration of a director’s appointment, an individual is recognised as a director by his functions and by the authority and power he in fact exercises. Acting as a director in this way makes you a ‘de facto’ director in the eyes of the law.
- 1.3 Although the term “shadow director” is not used in the Companies Acts, anyone upon whose instructions the director(s) act, will, in the eyes of the law, be considered to be performing the functions of a director. Directors should not allow a person who has not been formally appointed to act as a director, nor should they allow their discretion to be fettered by such a person.
- 1.4 There is no distinction in law between executive and non-executive directors. Non-executive directors have a useful independent role to play to ensure that the company’s activities are undertaken in compliance with the law and pursuant to principles of good corporate governance.
- 1.5 There is no such entity in law as a “nominee” director. Every director has exactly the same responsibility to the company as a whole and if he neglects that responsibility in the interests of or on the orders of his principal he will be guilty of a breach of duty. Directors should not allow others to unduly influence them in such a way as to undermine the exercise in good faith of their powers in the manner in which they consider to be in the best interest of the company. Any attempted “string-pulling” whether by other directors, shareholders, beneficial owners or other third parties should be firmly resisted by directors. The directors must make their own decisions, after receiving appropriate professional advice if necessary. They must not simply “rubber stamp” decisions made by others.
- 1.6 When a new director is appointed, resigned or ceases to be a director (by removal, disqualification or death), a form 9N must be completed, and filed with the Companies Registry within 1 month of the date of the change. Time penalties are imposed for late notification. Also, any changes in personal details must also be notified within 1 month of the change.
- 1.7 The rules governing the appointment and retirement of directors are contained in the companies Acts and the Articles of Association.
- 1.8 There are statutory provisions for removal from office and for disqualification of directors. Any provisions in the Articles of Association

or service agreement will be overridden by the Companies Acts.

- 1.9 A person can not be appointed as a director or continue in office if he is: an un-discharged bankrupt; or someone who is currently disqualified by a court from acting as a company director.

2 DUTIES OF DIRECTORS

- 2.1 Directors should understand the nature and extent of the duties, which they owe as directors. They should understand the nature of the role they perform. They should take appropriate professional advice where necessary.
- 2.2 Directors are subject to certain minimum standards of care, skill and diligence in discharging their duties.
- 2.3 The law imposes duties on directors. If a person does not comply with his duties as a director he may be liable to civil and/or criminal proceedings and he may be disqualified from acting as a director. The following is a basic list of the director's duties; it is not exhaustive. If unsure, the director should consult his legal advisor.
- 2.3.1 **Loyalty** – A director must act in good faith in what he considers to be the interests of the company.
- 2.3.2 **Obedience** – A director must act in accordance with the company's constitution and must exercise his powers only for the purposes allowed by law.
- 2.3.3 **No secret profits** – A director must not use the company's property, information or opportunities for his own or anyone else's benefit unless he is allowed to by the company's constitution or the use has been disclosed to the company in general meeting and the company has consented to it.
- 2.3.4 **Independence** – A director must not restrict his power to exercise an independent judgement
- 2.3.5 **Conflict of Interest** – If there is a conflict of interest between an interest or duty of a director and an interest of the company in any transaction, he must account to the company for any benefit he receives from the transaction.
- 2.3.6 **Care, skill and diligence** - A director owes the company a duty to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person

having both (a) the knowledge and experience that may reasonably be expected of a person in the same position as the director, and (b) the knowledge and experience which the director has.

- 2.3.7 **Fairness** – A director must act fairly as between different members.

4 POWERS OF DIRECTORS

- 4.1 The powers of directors are derived from law and their powers relating to the management of the company may be further defined in its articles of association. They must exercise their powers:-
- 4.1.1 in what they honestly believe to be the best interests of the company; and
- 4.1.2 for a proper purpose, being the purposes for which the power is intended.
- 4.2 Directors' powers are collective and not individual. A board may delegate powers to one or more of their number. Individual directors do not have the authority to commit the company unless authorised by the board. An individual director who acts without the board having delegated the requisite authority can be liable for breach of duty to the company.
- 4.3 Usually the board of directors will take all management decisions, and only those matters required by statute or the company's constitutional documents to be decided by the shareholders or members will be left in their hands. The directors are not agents for the members and cannot be instructed by the members as to how they should exercise their powers. Members, however, have the right to either not re-elect a director at the annual general meeting or to remove a director before the expiration of his period of office.
- 4.4 A director cannot delegate his overall responsibility.
- 4.5 A director may rely on information, given by an employee, expert, professional adviser or another director in relation to matters within their competence or responsibility, provided that the director acted in good faith, made proper enquiries and had no ground for suspicion.
- 4.6 In general terms it is for the directors to meet, discuss and if appropriate, approve the substance of any material transactions the company is entering into.

5 KNOWLEDGE OF THE LEGAL FRAMEWORK

- 5.1 A director must operate within the legal framework of the laws of the Isle of Man (or be reasonably able to rely on someone who possesses the relevant knowledge), to ensure that the company's operations comply with all relevant laws. In addition to the laws of the Isle of Man directors must also have sufficient knowledge of the laws of any other jurisdictions within which their companies may operate and ensure that such operations comply with those laws.
- 5.2 A director should ensure that he has knowledge of the memorandum and articles of association of the company.
- 5.3 A director should ensure that he is aware of the Companies Acts and how they interact with the memorandum and articles of association. When a specific procedure is contained within the Companies Acts, which is at variance with the memorandum and articles of association, then the Companies Acts will take precedence.

6 LIABILITIES – CRIMINAL AND CIVIL

- 6.1 Many provisions in the Companies Acts impose specific duties in a company's officers in connection with the conduct of the company's business. In many instances, a failure to perform the duties could result in criminal liability.
- 6.2 Where a director acts in breach of his fiduciary duty, he may be liable to indemnify or reimburse the company for any loss it has suffered as a result, and to account to the company for any profit made.
- 6.3 A director must always remember that he may be held accountable for losses if he has not been as diligent as he should have been and that there is no such entity as a "nominee" director when it comes to liability.
- 6.4 Directors should also be aware of potential liability on a "constructive trust" basis if they are engaged or assist in wrongful conduct. A constructive trust is imposed where a person receives assets and, although there is no formal recognition by him that anyone else has any interest in them, it would be inequitable to deny such an interest.
- 6.5 Directors should be aware of the various provisions in the Companies

Act which impose personal liability on directors guilty of wrongdoing.

- 6.6 There are also provisions in the Companies Acts, which enable the court to make orders disqualifying individuals from acting as directors.

7 ADMINISTRATION AND ACCOUNTS

- 7.1 The directors are responsible for the company's administration, including maintenance of proper accounting records.
- 7.2 It is the duty of the directors under the Companies Acts:
- to ensure that proper accounting records are kept
 - to prepare and approve accounts which comply with the Companies Acts
 - to ensure that the company sends a copy of the accounts to parties entitled to receive them
 - to lay the accounts and reports before the shareholders in general meeting.

8 BOARD MEETINGS

The articles of association may stipulate when and how board meetings shall be held, and the quorum present. Any member of the board is entitled to call a meeting of directors and every director is entitled to receive notice of a meeting.

Minutes must be kept of the proceedings of board meetings. Once agreed and signed by the Chairman they are evidence, though not conclusive evidence, of the proceedings to which they relate.

9 GOOD CORPORATE GOVERNANCE

Corporate governance is the system by which companies are directed and controlled. Good corporate governance relates to ownership and control and the roles of owners, directors, managers and shareholders. The board of directors are but one component. Good corporate governance can best be achieved by appropriately experienced and qualified individuals applying informed and independent judgements. Directors have an important role in ensuring good corporate governance.