



Financial Supervision Commission

P.O. Box 58, Finch Hill House, Bucks Road, Douglas, Isle of Man, IM99 IDT

August 2011

Guidance on the responsibilities and duties of directors under the laws of the Isle of Man

This guidance is published by the Financial Supervision Commission ("the Commission") in order to assist directors of Isle of Man companies to understand and perform their duties responsibly and within the laws of the Isle of Man. Although it has been produced by the Commission primarily to assist directors of companies holding a financial services licence under the Financial Services Act 2008 (including those persons providing director services to client companies of a licenceholder) it is also relevant to directors of all Isle of Man incorporated companies.

1. What is a director? How is a director appointed and removed?

- 1.1 There are two distinct company types in the Isle of Man. These are companies incorporated under the Companies Acts 1931-2004 ("1931 Act companies") and companies incorporated under the Companies Act 2006 ("2006 Act companies").
- 1.2 1931 Act companies must have at least two directors who are natural persons. Corporate directors are not permitted.

2006 Act companies may have a single director and corporate directors are permitted, provided that the corporate director meets the requirements of section 91(7) of the Companies Act 2006 ("the 2006 Act") (i.e. the corporate director is either the holder of a financial services licence with Class 4 authorisation (which does not exclude acting as such); or is the subsidiary of such a licenceholder). Corporate directors are legal persons whose actions are directed and determined by natural persons. The directors of corporate directors are therefore responsible for ensuring that the corporate director fulfils its duties and responsibilities under the law. The actions of the directors and members of the corporate director will be relevant in assessing the conduct of the corporate director. Furthermore, these actions will also be relevant in assessing the ongoing fitness and propriety of the individual directors and members.

- 1.3 The definition of "director" includes any person acting as a director "by whatever name called". The actions of any person holding themselves out to be a director are valid, even when the person has not been properly appointed as a director. (See sections 341 and 142 of Companies Act 1931 ("1931 Act") and sections 221 and 100 of the 2006 Act).

Although it is an offence not to comply with the formalities for the appointment of a director, a person is recognised as a director by his functions and by the authority and power he in fact exercises. Acting as a director makes a person a "de facto" director in the eyes of the law.

- 1.4** Although the term "shadow director" does not appear in either the 1931 Act or 2006 Act, both Acts contain provisions which refer to "persons in accordance with whose directions or instructions the director(s) are accustomed to act". This is an accepted definition of a shadow director. A "shadow director" must comply with the same standards as a properly appointed director. It is contrary to the principles of good corporate governance for a company to have a shadow director. Directors should never allow a person who has not been formally appointed as a director, to act as a director nor should they allow their discretion to be fettered by such a person. Equally, a person who has not been appointed as a director should not seek to direct or instruct the directors of a company.
- 1.5** The law makes no distinction between the standards to be observed by executive and non-executive directors in discharging their duties. The responsibilities and duties they are subject to do not differ. Non-executive directors are widely recognised that as having a useful and independent role to play in ensuring that the company's activities are undertaken in compliance with the law and adhere to principles of good corporate governance.
- 1.6** The concept of a "nominee" director does not exist in law. Every director has an equal duty of responsibility to the company. A director who neglects that responsibility in the interests of, or on the orders of, a principal will be guilty of a breach of duty. Directors should not allow others to unduly influence them in a way as to undermine the exercise of their powers, in good faith, in the best interests of the company. Any attempted "string-pulling" 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.
- 1.7** Under the 1931 Act, there is a requirement to notify the Companies Registry within one month of the date of the appointment, resignation or cessation (by removal, disqualification or death) of a director of a company. Notification is by means of a form 9N. Failure to notify the Companies Registry within one month of the appointment, resignation or cessation will result in a late filing penalty being incurred. Any changes in personal details, such as change of name, address, or nationality should also be notified to the Companies Registry on a form 9N, within one month of the change taking place.
- 1.8** A 2006 Act company is not required to notify the Companies Registry of any changes in its directors or any change of directors' personal details as they happen, but may elect to do so. If such an election is made, any changes must be notified to the Companies Registry within one month of the date of the change (see section 204 of the 2006 Act).

Whether an election is made or not, a 2006 Act company is required under section 85 of the 2006 Act required to file an annual return which, as prescribed by Regulations, records the details of serving directors and any changes since the date of the last return so that the directors' details at the date of the annual return will be available on the public record.

- 1.9** Rules governing the appointment and retirement of directors are set out in both the 1931 and 2006 Acts and the constitutional documents of the company. For example, the articles of association ("the articles") may require a director to take shares in the company as a condition of his appointment.
- 1.10** Sections 141A of the 1931 Act and section 96 of the 2006 Act include a statutory provision for the removal of a director from office. The constitutional documents may also provide for the removal of a director from office. However, the statutory powers of removal override any provisions to the contrary that may be set out in the constitutional documents.
- 1.11** Persons may be disqualified from acting as an officer of a company by statute. For example, section 10 of the Company Officers (Disqualification) Act 2009 prohibits an undischarged bankrupt from acting as an officer (which term includes, *inter alia*, director and secretary) of a company without the permission of the High Court.
- 1.12** In relation to 2006 Act companies, section 93 of the 2006 Act expressly sets out a list of persons who are not permitted by statute to act as a director of a 2006 Act company, including:
- an individual who is under 18 years of age;
 - an undischarged bankrupt;
 - in the case of a corporate director, a body corporate which does not hold a financial services licence with Class 4 authorisation (which does not exclude acting as such); or which is not the subsidiary of such a licenceholder
- 1.13** In addition, the constitutional documents of the company may include provisions disqualifying or prohibiting certain persons from being eligible to act as a director of that particular company.
- 1.14** Persons may also be disqualified from acting as a director of a company by way of a disqualification order made by the High Court or by way of a disqualification undertaking accepted by the Commission (see Company Officers (Disqualification) Act 2009).

2. Duties of directors

- 2.1** Directors should understand the nature and extent of the duties they owe in their role as directors. Where a director is in any doubt, they should **take appropriate professional advice**.
- 2.2** Directors are subject to certain minimum standards of care, skill and diligence in discharging their duties. As a general rule, the standard applied will be that of the

“reasonable man test”. It should be noted that a higher standard is likely to be applied to a person who offers his services as director as a profession or by way of business.

2.3 Failure to properly execute the duties and responsibilities of a director may result in civil and/or criminal proceedings being brought and subsequent disqualification as a director. A summary of the main duties of a director towards his company is set out below. This summary is not an exhaustive and complete statement of a director’s duties and is subject to change. **Directors who are unsure about their duties as a director in any particular set of circumstances should seek professional advice.**

2.3.1 Loyalty - A director must act in good faith in what he considers to be the best interests of the company.

2.3.2 Obedience - A director must act in accordance with the company's constitution (the memorandum and articles of association) and must exercise his powers only for the purposes allowed by law.

2.3.3 Independence - A director must not agree to restrict his power to exercise an independent judgement.

2.3.4 No secret profits - A director must not use the company's property, information or opportunities for his own or anyone else's benefit, unless either the company has agreed to this in general meeting, or the company's constitution expressly provides for this. It should be noted that consent may not be sufficient in certain circumstances.

2.3.5 Conflicts of Interest – Directors must exercise great care if a situation arises which could lead to a conflict (actual or potential) between their personal interests and their duties owed to the company or to a third party. A director must account to the company for any benefit received from a transaction that arises from a conflict of interest or duty. This applies whether or not the company sets aside the transaction. Where the company’s constitution expressly permits the transaction, a director will not have to account to the company provided the relevant requirements and terms of the company’s constitution have been strictly adhered to, or where the interest or duty has been fully and properly disclosed to the board of the company.

Sections 103 to 105 of the 2006 Act expressly permit a director of a 2006 Act company to retain the benefit derived from an interest in a transaction, provided that the director has disclosed his interest to the board of directors of the company. Disclosure must be made as soon as he becomes aware that he has a conflict of interest. Subject to any provision to the contrary in the company’s constitutional documents, and having disclosed his interest, a director may participate in any decisions that the board takes in relation to that matter.

The duty of directors to disclose any interest to the board of directors of the company is set out in section 148 of the 1931 Act and section 104 of the 2006 Act.

2.3.6 Care, skill and diligence - A director owes the company a duty to act with the care, skill and diligence that a reasonable person would exercise. In determining whether a director has acted with due care, skill and diligence, consideration will be given to:

- (a) the general knowledge, skill and experience that may reasonably be expected from a person carrying out the same functions as are carried out by that director in relation to the company, and
- (b) the actual knowledge, skill and experience which the director has.

2.3.7 Fairness - A director must ensure that his dealings with members are conducted impartially.

3. Powers of directors

3.1 The powers of directors are derived from law. However, the constitutional documents of a company may contain additional provisions relating to the management of the company. The powers must be exercised:

- in what a director honestly believes to be the best interests of the company; and
- for the purpose for which the power is intended.

3.2 The board of directors will normally exercise their powers collectively. However, in certain circumstances and where permitted by the constitutional documents, certain powers may be delegated to one or more persons, including to non-directors. A director cannot delegate his responsibility.

3.3 The board of directors are responsible for the management of the company. They are not agents of the members and the members cannot determine how the directors should exercise their powers. It is important that directors are mindful of any attempts by others to influence either themselves or any other board member in such a way so as to undermine the exercise of their powers. Members have a statutory right to remove a director where the director fails to act in the best interests of the company. (See section 141A of the 1931 Act and section 96 of the 2006 Act).

3.4 A director cannot delegate or abrogate his overall responsibility for the affairs of the company. Directors remain responsible for the exercise of powers they delegate. Where delegation is properly authorised, the directors must monitor properly the exercise of the delegated powers. Provided it is duly authorised to do so, the board of directors may delegate its powers to a third party. For example the board may pass a resolution agreeing to enter into a contract and may, by power of attorney, authorise a third party to

execute the contract. In all such circumstances, the board should restrict the attorney's powers to ensure that the board retains control over the company's affairs.

- 3.5 A director is entitled to rely on information given by an employee, expert, professional adviser or another director in relation to matters within that person's competence or responsibility, provided that the director acted in good faith, made proper enquiries and had no grounds for suspicion.
- 3.6 It is the responsibility of the directors to meet, discuss and if appropriate, approve any material transactions the company is entering into. While the directors can rely on opinions provided by the company's advocates, accountants and other advisers, the decision whether or not to enter into a transaction remains one for the directors.

4. Knowledge of the legal framework

- 4.1 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, directors must also have sufficient knowledge (or be reasonably able to rely on someone who does) of the laws of any other jurisdictions within which their companies may operate or do business with and ensure that such operations comply with those laws.
- 4.2 In addition to complying with relevant laws, a director should ensure that he has knowledge of the memorandum and articles of association of the company. The memorandum gives the basic information about the company (name, registered office, type of company etc.) and the articles of association deal with the internal conduct of the company's affairs.
- 4.3 The Companies (Memorandum and Articles of Association) Regulations 1988 ("Table A") are the standard model articles of association for companies incorporated under the 1931 Act. Most companies adopt the standard model articles, with some modifications. However, a company can tailor its own articles, within the powers and limitations of the relevant statutory requirements, to meet its particular needs.
- 4.4 The Companies (Model Articles) Regulations 2006 set out the standard model articles for 2006 Act companies. A 2006 Act company may also tailor its own articles, within the powers and limitations of the relevant statutory requirements, to meet its particular needs.
- 4.5 It should be noted that the 1931 Act and 2006 Act only permit companies to do certain specified acts if their constitutional documents also authorise it. For example, a 1931 Act company may reduce its capital only if authorised to do so by its articles of association (and subject to the sanction of the court under section 56) and the directors of a 2006 Act company can only remove a fellow director if this is expressly permitted by its constitutional documents (section 96(4) of the 2006 Act).

- 4.6** The 2006 Act allows flexibility concerning the internal management of the company and many sections of the 2006 Act allow the company's constitutional documents to provide otherwise than is required by or stated in the 2006 Act. For example, under section 106(1) of the 2006 Act, the directors of a 2006 Act company "may meet at such times and in such manner and places within or outside the Isle of Man as they may determine to be necessary or desirable and can regulate their proceedings as they see fit, subject to any contrary provision" in the memorandum or articles of association.
- 4.7** A company's constitutional documents have no effect to the extent that they contravene or are inconsistent with the Act. Although not expressly specified in the 1931 Act, this is stated in section 7(2) of the 2006 Act.

5. Liabilities – criminal and civil

- 5.1** Many provisions in the 1931 Act impose specific duties on a company's officers (particularly directors) in connection with the conduct of the company's business. In many instances, the 1931 Act provides that a failure to perform such duties constitutes a criminal offence.
- 5.2** Generally the 2006 Act imposes duties on the company itself but section 223 provides that if an offence committed by the company is proved to have been committed with the consent or connivance of or to be attributable to neglect on the part of a director, manager or other officer of the company or its registered agent, or a person who was purporting to act in any such capacity, that person as well as the company is guilty of the offence and is liable to be proceeded against and punished accordingly.
- 5.3** Where a director acts in breach of his fiduciary duty, he may be liable to indemnify the company for any loss it has suffered as a result, and to account to the company for any profit made. In some cases the members, with full knowledge, can ratify the actions of the directors. Such ratification cannot obviously be guaranteed and, in any event, may not be sufficient in some circumstances.
- 5.4** A director must always remember that he may be held accountable for losses if he has not complied with his statutory and fiduciary duties or failed to exercise the requisite duty of care, diligence and skill and that there is no such entity as a "nominee" director.
- 5.5** 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.
- 5.6** Directors should also be aware of the various statutory provisions which impose personal liability on directors guilty of wrongdoing. For example section 259 of the 1931 Act (which also applies to 2006 Act companies by virtue of section 182 of the 2006 Act) contains detailed provisions in relation to the personal responsibility of directors for fraudulent trading. If a director enables a company to carry on business and incur debts when to the

knowledge of the director there is no reasonable prospect of the debts being paid, the director could suffer personal liability in such circumstances.

Section 260 of the 1931 Act (which also applies to 2006 Act companies by virtue of section 182 of the 2006 Act) gives the court wide powers to make an order requiring a director to repay or restore any money which he has misapplied or retained or become liable or accountable for to the company or to contribute to the company's assets an appropriate sum by way of compensation. In addition, section 51 of the 2006 Act imposes a statutory personal liability on directors of a 2006 Act company where a 'distribution' has been made by the company to the members and the company did not, immediately after the distribution, satisfy the solvency test.

5.7 There are also statutory provisions which enable the High Court to make orders disqualifying individuals from acting as directors (see *Company Officers (Disqualification) Act 2009*).

6. Administration and accounts

6.1 The directors are responsible for the company's administration, including maintenance of proper accounting records, minutes of meetings, statutory books and filing of information at the Companies Registry. It is usual for these duties to be delegated - to the Secretary of a 1931 Act company or to the Registered Agent of a 2006 Act company - but this does not relieve the directors of the ultimate responsibility.

6.2 It is the duty of the directors under the 1931 Act:

- to ensure that proper accounting records are kept by the company;
- to prepare and approve annual accounts which comply with the Companies Acts;
- to ensure that the company sends a copy of the accounts to parties entitled to receive them; and
- to lay the accounts and reports before the shareholders in general meeting.

6.3 Under the 2006 Act, the obligation to maintain accounting records falls on the company and the Registered Agent is required to hold copies of such records. However, the responsibility for accounting records lies with the directors as they are responsible for the management of the company (see section 91(1) of the 2006 Act). The 2006 Act does not require a 2006 Act company to prepare financial statements but members have the right to require financial statements to be produced (section 80A of the 2006 Act). The 2006 Act only requires a company to appoint an auditor where the company's securities are listed or admitted to trade on a securities market or exchange (section 80C of the 2006 Act) but the company's constitutional documents may require this. There is no statutory requirement in the 2006 Act to lay accounts before the members in general meeting or send them copies.

However, members may on request access the accounting records of a 2006 Act company (see section 82 of the 2006 Act).

7. Board meetings

- 7.1** The powers of directors are not individual but collective. The directors should therefore exercise their powers by holding board meetings at which collective decisions are taken. The articles of association may stipulate when and how board meetings shall be held, and the quorum requirements. A meeting cannot proceed to business unless a quorum is 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.
- 7.2** Minutes must be kept of the proceedings of board meetings. Once agreed and signed by the chairman of the meeting they are evidence, though not conclusive evidence, of the proceedings to which they relate. In respect of 1931 Act companies, where minutes have been made in accordance with the relevant statutory provisions then, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings shall be deemed to have taken place, and all appointments of directors, managers, or liquidators shall be deemed to be valid (see section 119 of the 1931 Act). A written resolution, may replace a meeting of the board (section 109(3) of the 2006 Act and in respect of a 1931 Act company, section 118A to 118C of the 1931 Act and its articles).

8. Good corporate governance

- 8.1** Corporate governance relates to ownership and control and the roles of owners, directors, company secretary (1931 Act companies), registered agent (2006 Act companies), managers and shareholders and the way the business of the company is run. The board of directors is only 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.

This guidance is intended as a general guide only and must be read in conjunction with the relevant legislation. The guidance is general in scope, and is not in any particular order of relative importance. It is derived from the duties and responsibilities that already exist at law, but is not exhaustive and further guidance should be obtained from your legal adviser.

Further information

A list of licenceholders is available on the Commission's website at – www.fsc.gov.im

The Commission's corporate governance guidance for banks can be found at –

<http://www.gov.im/lib/docs/fsc/handbooks/guides//corporategovernanceguidancenotefo.pdf>

The Commission's corporate governance guidance for non-banks can be found at –

<http://www.gov.im/lib/docs/fsc/handbooks/guides//corporategovernancenonbanksfinal.pdf>

Details of Isle of Man advocates are available from –

The Isle of Man Law Society, 27 Hope Street, Douglas, Isle of Man IM1 1AR.

Tel: +44 (0)1624 662910

Fax: +44 (0)1624 679232

e-mail: enquiries@iomlawsociety.co.im

Website: www.iomlawsociety.co.im