



# **BVI Financial Services Commission**

## **Registry of Corporate Affairs**

### **User Guides on the BVI Business Companies Act**

#### **User Guide No. 4**

#### **Directors and Their Responsibilities**

This is one of a series of User Guides published by the Registry of Corporate Affairs that are intended to provide general information about different aspects of the BVI Business Companies Act ["the Act"].

The Guide is not intended to provide, and is not a substitute for, legal advice and is not intended to address the circumstances of any individual case. The Act has been summarised to make the Guide easier to read and the Guide should be read together with the Act. You should always consider carefully whether you might benefit from legal, accounting or other professional advice concerning your particular circumstances or the circumstances of your company.

#### **Introduction**

Every BVI business company must have at least one director, although the memorandum or articles may provide for a company to have more than one director. The first director of a company must be appointed within 6 months of the incorporation of the company.

The directors<sup>1</sup> of a company are responsible for managing the business and affairs of the company or, where the company has senior management staff who are not directors, for directing or supervising their management of the company's business and affairs.

The directors must manage the company's affairs in accordance with the Act and the law generally and in accordance with the company's memorandum and articles, which will usually impose additional responsibilities and obligations on the directors.

A director may be an executive director or a non-executive director. An executive director is also an employee of the company, usually a director in a full time senior management position. A non-executive director is a director of the company, but not an employee of the company. The responsibilities of a director discussed in this Guide apply to all directors, whether executive or non-executive. However, an executive director may, and usually will, have additional responsibilities provided for in his contract of employment.

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<sup>1</sup> Note that in this Guide, the word "directors" is used throughout. However, where a company only has one director, this should be read as including that single director.

The purpose of this Guide is to set out and explain some of the main responsibilities of a director, particularly as specified by the Act. The Guide is directed towards directors of small companies as different considerations may apply to large companies.

It is important to appreciate that this Guide cannot cover all aspects of being a director and cannot explain every obligation or cover all situations, particularly as much depends upon the particular circumstances of individual companies. You must not therefore rely on this Guide as a comprehensive summary of the law on directors.

Agreeing to act as the director of a company should be taken very seriously. If you do not properly discharge your responsibilities as a director this could result in you being personally liable to the company, to the creditors of the company or even committing an offence. It is very important, therefore, that if after reading this Guide you have any unanswered questions or doubts about your responsibilities, you should seek professional advice.

## Who is a director?

If you are appointed as a director of a company, you will be considered by the law to be a director of the company. However, if you are offered any position in or with a company that involves managing its affairs, the law may consider you to be a director, even if you are not actually called a director. This is because the Act states<sup>2</sup> that a person occupying or acting in the position of director, by whatever name called, is a director.

The articles of a company may provide, for example, for the appointment of a managing committee or a council, instead of a board of directors. It is most likely that members of the managing committee or council would be considered as directors of the company.

Before accepting any position in or with a company that involves managing its business and affairs, you should consider taking legal advice as to your status and responsibilities.

## A company with no directors

If a company does not have any directors, the Act states<sup>3</sup> that any person who manages, or who directs or supervises the management of the business and affairs of the company is considered to be a director. In this case, even a person who has never been appointed as a director, may find himself considered by the law to be a director and to have all the responsibilities and obligations of a director under the Act.

## What does the law expect of a director

### ***The Act***

The Act contains a number of provisions regarding the duties of a director and the standard of conduct required of a director.

The most important obligations set out in the Act are that a director must:

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<sup>2</sup> In section 2

<sup>3</sup> In section 109(6)

- act honestly
- act in good faith
- act in what he considers to be in the best interests of the company
- exercise his powers for a proper purpose
- not act, or agree to the company acting, in a way that contravenes the Act or the memorandum and articles of the company.

In carrying out his duties as a director, the Act expects a director to act with the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account factors such as the type of company, the type of decision being made and the position and responsibilities of the director concerned.

The Act also provides for the records and information that a director can rely on and conflicts of interest (which we will cover in a later section).

### ***What does all this mean for you?***

We have set out above the legal position as stated in the Act and it is important that you understand it. However, in plain language, what does all this mean for you as a director? We consider that the law can be summarised as follows:

As a director, the law expects you to:

- be honest and careful in your dealings at all times
- know what the company is doing and understand its business
- do everything you can to satisfy yourself that the company is complying with the Act, all other laws and the memorandum and articles
- make sure that the company can pay its debts at all times
- satisfy yourself that the company is keeping proper financial records
- take extra care if the company is operating a business that involves handling other peoples money
- act in the company's best interests at all times, even if this may not be in your own interests or in the interests of another company that you are a director or shareholder of (even if you have set up the company for your own purposes)
- satisfy yourself that the company files any documents that it needs to file with the Registrar of Corporate Affairs
- use any information you get through your position as a director properly and in the best interests of the company

## How can you comply with your obligations as a director?

Obviously, there are many different types of companies which carry on many different kinds of activities and businesses and we cannot provide sufficient information to cover them all.

However, bear in mind that the directors are responsible for, in effect, controlling the company's business and affairs. Executive directors, who will be working for the company, will usually be actively involved in the day to day management of the company. However, non-executive directors will not have the same involvement.

Non-executive directors, in particular, will need to make extra efforts to ensure that they can fulfil their obligations to the company. This will usually require the non-executive directors to:

- Find out about and understand their responsibilities and obligations as directors.
- Find out about, and understand the company's business and keep themselves up to date with changes and new developments
- Keep informed about the financial position of the company and its ability to pay its debts (see the paragraph below on companies unable to pay their debts)
- Assess for themselves how any proposed actions or transactions will affect the company's business performance, especially in the case of substantial transactions
- Consider obtaining outside professional advice when that is needed to make an informed decision
- Question managers and staff, especially senior staff, about the business of the company and about the decisions they are taking
- Properly prepare for, and taking an active part in, directors' meetings
- Make sure that, in everything they do, they consider the best interests of the company

## Conflict of Interests

The law expects every director to act in the best interests of the company. It is important that all directors can demonstrate that they have complied with this obligation. The Act therefore sets out procedures that must be complied with if a director has a conflict of interest. A conflict of interest occurs when a director has an interest in a transaction that the company is considering entering into.

For example, suppose that the company of which you are a director is considering refurbishing its office. You will have a conflict of interest if you own shares in (or are a director of) a company that supplies office equipment if the company is considering purchasing new office equipment from that company.

It is impossible to state all the circumstances in which a conflict of interest may arise. There are too many of them, but the Act covers any conflict of interest, whether actual or potential.

If, as a director, you have an interest in any transaction which the company has entered into or is considering entering into, the Act requires you to disclose that interest to the other directors. The only exception is where the transaction is with you and is entered into in the ordinary course of the company's business and on usual terms and conditions. A director who fails to disclose an interest as required by the Act commits an offence and could be subject to a fine of up to \$10,000.

The Act also contains provisions that enable the company to void (or invalidate) a transaction entered into that should have been disclosed, if it is not disclosed.

You should also be aware that using information that has come to you as a director to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company may result in the company being able to bring a claim against you.

## **Who can be a director?**

The Act provides that a person, including a company, can be a director unless that person:

- is an individual who is under 18 years of age
- is disqualified from acting as a director under the Insolvency Act
- is an undischarged bankrupt
- is disqualified from being a director by the memorandum or articles.

It is important to note that if a person disqualified from being a director is appointed as a director, that person still has the responsibilities of a director described in the paragraphs above.

A person must not be appointed as a director unless he has consented in writing to be a director.

## **Nominee directors**

There is a misconception that the law in the BVI recognises "nominee directors". Nominee directors are persons who are appointed by another individual or company to act on their behalf.

You must be aware that neither the Act or the law in the BVI recognises "nominee directors". If you are appointed as a director, you have all the responsibilities and obligations of a director provided for in the Act.

If someone offers to make you a director on the understanding that it won't involve any work or that you will just have to sign documents that are provided to you, do not accept the offer. You could be exposing yourself not just to liabilities to the company,

but also to committing one or more offences under the Act and possibly under other BVI laws.

Only agree to be a company director if you are willing, able and have enough time to put in the effort to do the required work.

## **What is the position if your company can't pay its debts?**

It is your duty as a director to ensure that the company is able to pay all of its debts as and when they become due for payment. A company is 'insolvent' if it cannot pay all of its debts as they become due and payable or if its liabilities exceed its assets.

The BVI has a relatively new Insolvency Act. This Act imposes potentially severe penalties and may have severe consequences for directors of insolvent companies. For example, directors of insolvent companies may be liable to criminal prosecution and a liquidator of the company may be able to recover moneys from them. The Insolvency Act also enables the Court, in certain circumstances, to make an order disqualifying a person from being a director of any company for a period of time.

We cannot, in this Guide, provide detailed information on the Insolvency Act, as this is a complex subject. However, it is essential that, if the company becomes insolvent or you consider that it is likely to become insolvent, you should obtain advice from an insolvency practitioner in the BVI. Insolvency practitioners are regulated by the Financial Services Commission and a list of licensed insolvency practitioners is available on the Commission's website. A licensed insolvency practitioner will be able to advise on the options open to the company.

It is important not to assume that the company will be able to trade out of the problem. Delay could be damaging to the company and to you personally, and may reduce the options available.

## **Company records**

As a director, you are responsible for ensuring that the company maintains proper company records. The following must be kept at the office of the company's registered agent:

- the memorandum and articles of the company
- the registers of members and directors
- copies of all notices and other documents filed by the company in the previous ten years

Although the registered agent of a company has responsibilities with respect to the maintenance of records and the filing of documents with the Registrar of Corporate Affairs, the registered agent is usually reliant on the directors to keep the records up to date and accurate.

If records required to be kept at the office of the registered agent are not accurate or documents that should be filed are not filed, the directors may find themselves liable.

A company must also keep other documents, including the following:

- minutes of members' and directors' meetings and copies of resolutions;
- financial records that are sufficient to show and explain the company's transactions and that will, at any time, enable the financial position of the company to be determined with reasonable accuracy.