

The Companies Act 2014

Directors' duties

June 2015

Under common law directors occupy a fiduciary role in relation to companies. Directors are required to act in good faith in the interests of the company and this duty is owed to the company as a whole rather than to the individual members of the company. The equitable and common law principles relating to directors' duties are specified and codified in Part 5 of the Companies Act 2014 (hereafter the "Act") and became effective as of the commencement of the Act on 1 June 2015.

Director appointment

While the Act has introduced certain changes relating to the appointment of directors, much of the previous law remains intact. The Act provides that none of the following are eligible to act as directors of a company:

- persons under the age of eighteen;
- bodies corporate;
- undischarged bankrupt persons;
- disqualified directors; and
- directors of more than 25 companies, ignoring PLCs and treating groups of companies as one company.

In addition to these restrictions, every company is required to appoint a minimum of two directors subject to one exception. The Act now provides that private limited companies registered under Part 2 ("LTDs") may have only one director. It should be noted that this exception only applies to LTDs and in circumstances where there is only one director a separate company secretary will need to be appointed.

Directors' duties

Before the Act, the fiduciary responsibilities of directors, including the duty of skill, care and diligence, were derived from common law, various statutory instruments and legislation. The definition of director under the Act has been extended to include de facto and shadow directors i.e. those not officially appointed but nonetheless acting as directors or those influencing the decision making of the board of directors. The result of this expanded definition means that all forms of director are now bound by the duties of directors enshrined in Part 5 of the Act.

Fiduciary duties

Fiduciary duties are set out in Section 228 of the Act and provide that a director must:

- act in good faith in what the director considers to be the interests of the company;
- act honestly and responsibly in relation to the conduct of the affairs of the company;
- act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- not act unless permitted by the constitution or approved by resolution;
- not use the company's property, information or opportunities for his or her own or anyone else's benefit;
- not agree to restrict his/her power to exercise an independent judgment;
- avoid any conflict between his/her personal interests and company duties;
- exercise the care, skill and diligence of a reasonable person with the knowledge and experience which he/she actually has and which may reasonably be expected of a person in his/her position;
- in addition to the general duty, to have regard to the interests of company employees in general, have regard to the interests of its members of the company; and
- familiarise themselves with their new and varied obligations to ensure both they and their companies are in compliance with the Act.



General duties

The Act also contains a number of general duties that directors must adhere to. As with fiduciary duties, many of these are just codified versions of existing common law duties while others simply expand on prior statutory duties:

- underscoring all duties is the general requirement to be in compliance with the Act (this was historically a duty of the company secretary and understandably the Act has moved this responsibility to that of the directors);
- directors are required to satisfy themselves that the company secretary has the necessary skills or resources to perform the duties of the role. As there is no criteria set out in the legislation as to how a director may so satisfy themselves or what constitutes the requisite skills, it is thought that there will be an increase in the engagement of professional company secretarial firms to ensure the directors may satisfy themselves of this requirement;
- directors must be aware of their duties in order to uphold them and their appointments;
- directors are required to sign a declaration acknowledging their responsibilities to the company;
- directors must disclose any interest they have in relation to company transactions and contracts. They must notify the company where they hold a shareholding of greater than 1% in the company or its associated companies; and
- the Act also upholds the existing restrictions on transactions between the company and its directors, including loans, quasi-loans, guarantees and substantial property transactions (See our director loans and advances factsheets for more detail).

Breach of duties

Breach of the duties outlined above may result in the director being:

- disqualified from acting as a director; and/or
- made personally liable for the debts of the company; and/or
- liable to account to the company for any gain made by him/her.

However, the courts may exercise discretion in apportioning liability where there is breach of duty if the director has acted honestly and reasonably, and under the circumstances, it would be equitable to excuse him/her in whole or in part.

Additional directors' responsibilities

Directors' compliance statement

The Act re-introduces directors' compliance statements for public limited companies and large private companies limited by shares or by guarantee with an exception for unlimited companies and investment companies. A large private limited company is

a company with a balance sheet total exceeding €12.5 million (total assets rather than net assets) and turnover exceeding €25 million.

The compliance statement should be included in the directors' report in the financial statements. Directors will be required to acknowledge their responsibility for securing the company's relevant obligations under law (Companies Acts and Tax Acts) and will be required to confirm that certain things have been done (or if they do not have an explanation, they will be required to explain why these things have not been done referred to as the "comply or explain rule").

The three things that the directors are required to address in the compliance statement are:

- draw up a company policy statement;
- confirm what structures or arrangements have been put in place to ensure the company's compliance with its relevant obligations; and
- conduct a review of those structures, arrangements or procedures during the course of the financial year.

In putting such measures in place the directors may rely on the advice of any employee or consultant who appears to the directors to have requisite knowledge and experience to advise the company on compliance with its relevant obligations.

Disclosure of directors' remuneration

The Act now requires all remuneration in relation to directors to be disclosed in the notes to the statutory financial statements and must include the amounts of the directors':

- emoluments for qualifying services;
- gains made on the exercise of share options;
- amount of the money or value of other assets, including shares, in respect of qualifying services;
- contributions paid to a retirement benefit scheme; and
- compensation for loss of office or other termination payments.

It should be noted this information will also be included on the accounts filed on public record in the Companies Registration Office.

Confirmation to statutory auditors

The Act introduces a new disclosure in the directors' report about the information that has been provided to the statutory auditors. The statement must confirm that, in so far as the director is aware, there is no relevant audit information of which the company's statutory auditors are unaware and that the director has taken all necessary steps to make themselves aware of any relevant audit information and to establish that the company's statutory auditors are aware of that information.

Conclusion

The Act clarifies and develops directors' duties and provides much needed transparency in the operations and expectations of companies and their members on directors. The existing common law and equitable principles will continue to be used as interpretive tools and reinforce the purpose of the legislation. The introduction of declarations and compliance statements should also increase director awareness and accountability for the obligations and restrictions imposed on them.

Directors should now consider the implications of the Act on the companies in which they are directors and familiarise themselves with their new and varied obligations to ensure both they and their companies are in compliance with the Act.

Contact

If you require assistance or want to learn more about the Companies Act 2014, please refer to our other publications at www.grantthornton.ie or contact our Companies Act 2014 team at companiesact2014@ie.gt.com.

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