



# STEPHENSON SMART

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# Your responsibilities as a director

In today's highly regulated business climate, it is vital to understand the responsibilities involved in taking on the role of company director.

The Companies Act 2006 sets out seven major responsibilities. These requirements are supplemented by many others, including responsibilities around accounts and records. Serving as a director entails risk and responsibility as well as reward, and imposes a high standard of behaviours. In this briefing, we provide an overview of key areas.

## Directors defined

A director is a person responsible for the management of a company. Anyone can be a director, subject to certain exclusions. You can be eligible if you are over 16 years old; and very broadly speaking, have neither been bankrupt nor the subject of a disqualification order.

Being a director is far more than simply a matter of holding an official title. Acting as a director is just that: it involves carrying out a role. You can be appointed as director, and this will be the case for most directorships. You can also be considered a director if you act as one. This is known as being a 'de facto' director. You could be a de facto director if, for instance, you carry on acting as a director after your formal appointment has ended. Directors in family companies may need particular care in this area.

## Shadow directors

You could be considered a 'shadow' director if you have a commanding influence on the directors. The Companies Act defines a shadow director as 'a person in accordance with whose directions or instructions the directors of a company are accustomed to act'. Shadow directors are subject to many of the statutory responsibilities that apply to appointed directors. They can also be subject to director disqualification proceedings.

The type of factors which might indicate that someone is acting as a shadow director were highlighted in a recent tax tribunal case,

concerning a company which had failed to register for VAT. HMRC successfully held that a key employee was in fact a manager of the company. He had responsibility for company financial affairs, particularly for calculating company income and expenditure; involvement in earlier businesses operating from the same premises; and his name was used as a contact by suppliers. The tribunal stopped short of holding the individual in question a shadow director, but did consider him a manager. And this was sufficient to give liability for a significant penalty.

## Responsibilities in company law

The Companies Act imposes seven general duties on directors. These duties should also be considered by shadow directors, and even if you are no longer a director, some duties (highlighted below) will still apply. You have a duty to the company to:

### 1. Act within powers

You must act in accordance with the company's constitution, using your powers only for the purpose for which they are given. The constitution consists of a company's articles of association and any resolutions or agreements related to them.

### 2. Promote the success of the company

You must act in the way that you consider, in good faith, most likely to promote the success of the company, for the benefit of its members as a whole. 'Success', measured as long-term increase in value, must be balanced by other factors. Such factors include the likely long-term repercussions of company decisions; the interests of company employees; the fostering of business relationships with suppliers, customers and others; as well as the company's operating impact on community and environment. You should also remember the need to act fairly as between members of the company.



### 3. Exercise independent judgment

You must act independently, making your own decisions. This does not stop your acting in accordance with the company's constitution, or an agreement entered into by the company.

### 4. Exercise reasonable care, skill and diligence

You must exercise reasonable care, skill and diligence. This involves not just the general knowledge, skill and experience that might reasonably be expected of someone carrying on your role in the company, but also the general knowledge, skill and experience you actually have. If for example, you are particularly skilled in finance or IT, more could be expected of you in these areas.

### 5. Avoid conflicts of interest

You must avoid any situation where there could be a direct or indirect interest conflicting with the company's interests: even a situation where there may possibly be a conflict of interest. This has a particular bearing on the exploiting of any property, information or opportunity, whether or not the company could actually take advantage of it. Former directors have responsibilities around the exploitation of property, information and opportunities they became aware of during their directorship.

Visibility around decision-making is needed here. Think carefully about occasions when you might take on personally an opportunity the company has turned down; or any situations where you are a director of more than one company, where there could be a possible clash of interests. A situation where you act as an advisor to the company, or to a competitor, say, as an accountant or consultant, might also need close scrutiny. Look out, too, for situations involving someone connected with you, such as a spouse, partner or close family member.

You should not be at risk if the situation cannot reasonably be regarded as likely to occasion a conflict of interest, or if it has been authorised by the directors. Conflict of interest in relation to a transaction or arrangement with the company is covered by a different Companies Act requirement (7 below).

### 6. Not to accept benefits from third parties

You should not accept any benefit from a third party given because you are a director: or because of anything you do – or don't do – in that capacity. This covers for example, taking bribes, but is more far-reaching than this. The provision of hospitality or gifts, for instance, should be considered carefully. Former directors still have responsibilities in this area.

### 7. Declare interest in a proposed transaction or arrangement

If you are in any way – directly or indirectly – interested in a proposed transaction or arrangement with the company, you should declare this to the other directors before the company proceeds. Formalities prescribe how this should be done.

## Responsibilities for accounts and records

As director, you are responsible for the general management of the company. Even if delegating some activities, ultimate responsibility still lies with you. Directors have particular responsibilities for accounts and records, especially the keeping of 'adequate accounting records' and preparation of accounts in accordance with the Companies Act. Having adequate accounting records essentially means a body of information sufficient to provide details of the company's transactions, assets and liabilities, so that you could disclose, with reasonable accuracy, at any time, the company's financial position. They should also be such that you can ensure the company's accounts comply with relevant accounting requirements.

All companies have to submit accounts to Companies House, although the detail varies for micro-entities, small, medium and dormant companies. Running a limited company also involves keeping records

about the company, such as a register of 'people with significant control'. Directors are responsible for submitting timely information to Companies House. Failure to do so can be a criminal offence. Required information includes the annual confirmation statement, annual accounts, and notice of change in company officers or their personal details. To discuss requirements here, please do not hesitate to get in touch.

## Transactions between company and directors

Even where you are both a shareholder and director, it is important to remember that the company is a distinct legal entity; thus some transactions between the company, and you as director, are regulated by law. These include rules about directors' remuneration and service contracts; loans to directors; the sale of company assets to a director; and purchase by the company of assets owned by a director.

The terms of directors' remuneration are determined by the company's articles of association. Historically, this has needed shareholder approval, but since 2009, it is sufficient for the directors to approve remuneration. Some, though not all, directors, have service contracts, which are also subject to specific company law requirements. The terms of a service contract must be open to inspection by shareholders, and shareholder approval is needed for contracts exceeding two years. Generally, companies must not make loans to directors without prior shareholder approval. There are exceptions for loans of up to £10,000 for any purpose, and loans for company business up to £50,000 in value. Prior approval from shareholders is needed where company assets are sold to a director, or assets are purchased from a director, if the asset value is more than 10% of the company's net assets and more than £5,000 in value. Any transaction over £100,000 needs prior approval.

## Other responsibilities

As director, you are responsible for making sure the company complies with relevant legislation. Necessary due diligence ranges from accountability under the General Data Protection Regulation (GDPR), to limiting the risk of your business representatives criminally facilitating tax evasion, under the Criminal Finances Act 2017. There are also requirements for company officers under Landfill Tax legislation, imposing the duty to prevent disposal at unauthorised sites, with potential liability for tax where such officers are deemed to have 'knowingly caused or knowingly permitted' such disposal to be made. Directors are also responsible for compliance with employment law, such as health and safety legislation. This overview is not exhaustive, but does underline the key role directors have in compliance.

## Minimising risk: how we can help

The risk attaching to failure to exercise responsibility can be significant. In the most serious instances, improper conduct can lead to disqualification from serving as a director, or being in any way concerned in the promotion, formation or management of a company, for up to 15 years. It is particularly necessary to exercise care if the company encounters challenging trading conditions, and there is any question as to potential solvency. In these circumstances, your responsibilities may change, requiring you to prioritise the interests of creditors rather than shareholders. Directors can be personally liable for wrongful or fraudulent trading if the company becomes insolvent. This is a specialist area, where professional advice should be sought.

Directors acting with prudent and timely regard to their responsibilities should be able to minimise risk. We can advise on easily implemented risk-reduction strategies, such as making sure the company complies with filing deadlines, and being aware of the state of the company finances on an ongoing basis. Another very simple way to evidence that you have met your responsibilities is to hold regular board meetings and minute your decision-making. Minutes must be kept for ten years, providing a safeguard for years to come. We are always on hand to discuss any aspect of company administration or profitability. Please do contact us for further assistance and advice.