

# User Guide

## Guidance for Newly Appointed Directors.

### 1. INTRODUCTION

These notes are issued as guidance to the company director(s) of a recently incorporated private company limited by shares.

Obviously these notes can not cover every aspect and are also only providing generic advice and therefore care should be taken before relying on them. Please note that the Company's Articles of Association (Articles) also provide rules on the administration and management of the Company and therefore this document should be referred to, prior to taking any action. If at any time the Company is unsure of how it should proceed please do not hesitate to contact us for further advice.

### 2. GENERAL

A company is a separate legal entity, in that it is recognised as a legal person in its own right and is separate from those who run it. A company can therefore enter into contracts in its own name and sue and be sued in its own name. A limited company is limited by its shares, so that should the company fail the shareholders are protected from being liable subject to the money that they have invested in their shares.

### 3. NOTEPAPER, WEBSITE AND PUBLICITY FOR NAME

One of the first steps now that the Company has been incorporated will be to prepare stationary for the same.

On all the Company's business letters and order forms; all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by, or on behalf of, the Company; all its bills of parcels, invoices, receipts and letters of credit; and on all its websites, the following information needs to be included:

- The full name of the Company, as shown on the Certificate of Incorporation.
- The fact that the Company was "Registered in England".
- The Company's registration number, which will be shown on the Certificate of Incorporation.
- The Registered Office of the Company, as given to Companies House.

If you wish to ensure that any customers/clients are clear with whom they are dealing with, then you may also wish to consider listing the names of the Company's directors, if you wish to do this then the Company must list the names of all the directors.

It should be noted that emails also constitute business letters and therefore the above information should be included in email footers.

Every company must paint or affix its name on the outside of every office or place in which its business is carried on and it must be both conspicuous and legible.

## Contents

1. INTRODUCTION
2. GENERAL
3. NOTEPAPER, WEBSITE AND PUBLICITY FOR NAME
4. DIRECTORS AND SECRETARIES/DIRECTORS
  - 4.1 DUTIES TO THE COMPANY
  - 4.2 DIRECTORS DUTIES TO COMPANIES HOUSE
  - 4.3 COMPANY SECRETARY
  - 4.4 APPOINTMENTS, RESIGNATIONS AND CHANGE OF DETAILS OF DIRECTORS AND SECRETARIES
  - 4.5 BOARD MEETINGS
  - 4.6 DELEGATION OF POWERS
  - 4.7 EXECUTIONS OF AGREEMENTS
  - 4.8 BANKING
  - 4.9 DIRECTORS REPORT
5. SHAREHOLDERS
  - 5.1 MEMBERSHIP
  - 5.2 MEETINGS

#### 4. DIRECTORS AND SECRETARIES

##### 4.1 Directors' Duties to the Company

The director(s) of the Company must ensure that the Company is run in compliance with the law and the Company's Articles. Note that the new Companies Act 2006 has brought in significant changes to the way that directors' duties are defined, also note that further provisions of the Companies Act 2006 are still to come into force (1<sup>st</sup> October 2008).

##### Duty to act within powers

A director must act within the law and the provisions of the Articles of Association of the Company. Further a director may only exercise his or her power for their proper purpose. Note that the liability is strict, if the director's main purpose was not the purpose for which the power was conferred then it does not make any difference that he was acting in good faith or in the belief that his actions would promote the success of the Company for the benefit of the members as a whole.

employees

- The need to foster the Company's business relationships with customers, suppliers and others
- The impact of the Company's operations on the community and the environment
- The desirability of the Company maintaining a reputation for high standards of business conduct
- The need to act fairly as between the members of the Company.

Obviously all of the above is also subject to the directors' duty to consider or act in the interests of the creditors of the Company.

In order to document the director(s) compliance with this section it is advisable that the board minutes states that the director(s) have taken the factors set out in section 172 into account, and if felt necessary noting any detailed consideration of any relevant factor.

##### Duty to exercise independent judgment

This is fairly self explanatory, however please note that this duty will not be infringed by a director acting in accordance with an agreement entered into by the Company that restricts his discretion (e.g. Shareholders Agreement) or in a way that's authorised by the Articles of Association.

##### Duty to exercise reasonable care, skill and diligence

A director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both:

- 5.3 the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the Company; and
- 5.4 the general knowledge, skill and experience that the director actually has.

So this is both an objective and subjective test and when applying the tests, regard must be had to the director's specific responsibilities and the circumstances of the Company, thus putting it into context.

##### Duty to avoid conflicts of interest

The provisions relating to conflicts of interest are due to change on the 1<sup>st</sup> October 2008. Currently a director must not, without the Company's consent (i.e. the shareholders), place himself in a position where there is or may be a conflict, between the duties he or she owes to the Company and either his or her personal interests or the duties he or she owes to a third party. Under section 317 of the Companies Act 1985 any director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the Company must declare the nature of his or her interest at a board meeting.

What is going to change under the new Companies Act 2006 is the ability for independent directors to authorise the conflict in a board meeting, provided they make up a quorum, rather than the shareholders (who may still have to approve it if there are not enough independent directors making up a quorum to do so). Note, however, this only applies when the conflict related to the personal exploitation by a director of any property, information or opportunity of the Company and does not apply to a conflict arising in relation to a transaction or arrangement with the Company.

Note that the duty to avoid a conflict of interest continues after a person ceases to be a director with regards to the exploitation of any property, information or opportunity that he or she became aware of whilst a director.

##### Duty not to accept benefits from a third party

This ties in with the duty to avoid conflicts of interest. Note that this duty is currently only an equitable rule (i.e. one that has not been legislated on but founded in common law), but from the 1<sup>st</sup> October 2008 will be set out in s176 of the Companies Act 2006, which states that a director must not accept any benefit (including obviously a bribe) from a third party which is conferred because of his being a director of his doing or not doing anything as a director. Don't panic though, this will not include corporate hospitality so long as it is moderate and proportional and does not give rise to any conflict of interest, so the odd free drink

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##### Duty to promote the success of the Company

Section 172 Companies Act 2006

A director must act in good faith to promote the success of the Company for the benefit of its members as a whole, having regard to:

- The long term likely consequences of his decision.
- The interests of the Company's

or umbrella won't count. Further it does not apply to benefits conferred by the Company itself (or a parent or subsidiary) or benefits received from a person who provides the director's services to the Company.

Note that the duty will apply after a person ceases to be a director in relation to things done or omitted by him or her before he or she ceased to be a director.

Duty to declare interest in proposed transaction or arrangement with the Company s177.

On the 1<sup>st</sup> October 2008 this will replace the equitable rule that directors may not have an interest in a transaction with the Company unless the interest has been authorised by the shareholders. Under section 177, a director must declare to the other directors the nature and extent of any interest, direct or indirect, in a proposed transaction or arrangement with the company. Note that until this time section 317 of the Companies Act 1985 (as discussed above) will continue to apply.

Most importantly please note that no declaration is necessary where the company has only one director.

#### 4.2 A Director's Duties towards Companies House

Directors have a personal responsibility to deliver statutory documents to Companies House as and when required by the Companies Acts. These include, in particular:

- accounts
- annual returns
- allotment of shares
- notice of change of directors or secretaries or in their personal details (see below)
- notice of change of registered office
- notice of change of accounting reference date
- special resolutions and some ordinary resolutions along with relevant documentation
- mortgages and charges.

Please note that directors can be prosecuted for not submitting these documents to Companies House on time.

This is a criminal offence and upon conviction a director can be fined up to £5,000 for each offence. There is a separate, civil penalty imposed on the company for the late filing of accounts.

#### 4.3 Company Secretary

Since the 6<sup>th</sup> April 2008 a private company is no longer required to have a Company Secretary, but can of course still have one if it so chooses and it may be advisable to have one to ensure that the relevant paperwork is completed.

The role of a Company Secretary will usually include:

##### (a) Maintaining the statutory books of the Company

The Statutory Books will include a register of members, registers of allotments and transfers, a section for recording the details of the directors and secretary, and a section for filing minutes. These should be maintained so that the statutory books are clear as to who the current shareholders and officers of the Company are, and you should be able to trace past share transfers so that there can be no doubt as to who is entitled to rights in the Company.

##### (b) Ensuring that the Company files statutory information promptly

These will include those documents listed above. Note that generally a time limit of 14 days from the date when the relevant event took place is specified by Companies House.

The Company's annual return (Form 363) must be filed no later than the anniversary of the Company's incorporation each year. The annual return is designed to show any changes in the details of the Company in the previous 12 months. Note that the Return must be delivered to Companies House within 28 days of its completion together with the statutory filing fee.

The Company's annual accounts must be submitted within 9 months of the Company's financial year end, failure to do so will incur a fine.

##### (c) Providing members and directors with

notice of meetings.

(d) Providing members with proposed written resolutions and auditors with any passed resolutions.

(e) Sending copies of resolutions and agreements to Companies House, where necessary.

(f) Supplying a copy of the accounts to every member of the company, every debenture holder and every person who is entitled to receive notice of general meetings.

(g) Keeping, or arranging for the keeping, of copies of all resolutions of members passed otherwise than at general meetings, minutes of all proceedings and general meetings.

These should be placed within the Statutory Books. (i.e. collectively the

## Solutions

registers of members, mortgages, directors etc and the minutes of meeting.)

(h) Ensuring that people entitled to do so can inspect company records.

This is why it is important that the Statutory Books are kept at the Registered Office of the Company.

(i) Custody and use of the company seal. Companies no longer need to have a company seal, but if they do, the secretary is usually responsible for its custody and use.

A Company Seal is used to execute documents under seal.

Please note that as the secretary is an officer of the Company, they may be criminally liable for defaults committed by the Company. For example failure to file - in the time allowed - any change in the details of the Company's directors and secretary, and the Company's annual return.

#### 4.4 Appointments, Resignations and Change of Details of Directors and Secretaries

Careful reference should be made to the Company's Articles to check the provisions relating to the appointment and retirement of officers of the Company. Note also whether the Articles specify a minimum or maximum number of directors.

If anyone is appointed as a director or secretary then Form 288a must be prepared and signed by both the appointee, consenting to their appointment, and by a serving director or secretary.

If a director or secretary wishes to resign (or is deemed to have resigned) then a Form 288b must be prepared, signed by a serving director or secretary and lodged at Companies House.

If a serving director's or secretary's details change, for instance they move house, then Form 288c must be completed and signed by any serving director or secretary.

#### 4.5 Board Meetings

Any requirements relating to board meetings will be set out in the Articles, for instance provisions relating to the quorum (the minimum number of directors present to constitute a valid meeting). Subject to those provisions, the directors of the Company are free to decide how meetings should be conducted.

When it has been decided to call a board meeting every director in the UK should be provided with notice of the meeting. If at the meeting the specified quorum is not met then the meeting must be postponed. If for some reason it is unfeasible to hold a meeting where everyone is physically present it may be possible (check your articles) to have a director deemed present

via electronic or telephonic means and counted in the quorum. Alternatively a written resolution can be prepared proposing a decision and if signed by all the directors is deemed to constitute a valid decision.

Decisions are taken on a majority basis; however note that some Articles provide that the Chairman is to have a casting vote.

Note that written minutes taken at the board meetings are a requirement under the law. These should be signed by the



Chairman and inserted into a minute book kept by the Company.

#### 4.6 Delegation of Powers

Note that, subject to the Articles, it is perfectly acceptable for the board of directors to delegate any of its powers to a sub-committee; however, it should be noted that the liability remains with the directors and therefore you should consider carefully whether such delegation is appropriate.

#### 4.7 Execution of Agreements

Following the introduction of the Companies Act 2006 and the fact that it is no longer necessary for a private company to have a Company Secretary and therefore the possibility that there may only be a single director capable of signing on the Company's behalf, the rules on the execution of documents have changed. Previously documents would be signed by any two directors or any one director and the Company Secretary, now there is the ability for a director to sign as the only signatory, provided that their

signature is witnessed.

Note that prior to the signing of any document to which the Company is a party, the contents of the same should have been approved by the board of directors.

#### 4.8 Banking

Your bank will assist you in relation to setting up a bank account for the Company. You will need to decide who will have the authority to sign cheques on behalf of the Company and what combination can do so, any two directors, any director and secretary etc. The decision must be made at a board meeting and minuted accordingly. A decision to change the bank mandate must also be made at a board meeting and minuted.

Note, as specified above, any cheques should bear the full name of the Company.

#### 4.9 Directors Report

When the annual accounts are prepared the directors must prepare a report on the same and present it to the shareholders of the Company for approval, along with the accounts themselves. The Company's accountants/auditors will be able to advise you of the contents required in the report.

## 5. SHAREHOLDERS

### 5.1 Membership

As a private company no shares can be offered to the general public. Note the provisions of the Articles which may limit membership of the Company and/or may specify the procedure for making someone a shareholder. Often the founding shareholders of the Company will wish to restrict who can enter the Company in the future, and therefore there may be pre-emption rights attached to the existing shareholders (i.e. they have first refusal on the allotment or transfer of any shares).

The Articles may also specify the rights of the shareholders, as if there are different classes of shares available, the likelihood is that each class has different rights attached to them. The standard class of share are Ordinary shares and usually

shareholders are able to vote and be entitled to a dividend, though this can be amended.

## 5.2 Meetings

The Companies Act 2006 specifies that it is no longer necessary for private companies to hold Annual General Meetings (AGM) and meetings other than AGM's are no longer known as Extraordinary General Meetings (EGM), but just general meetings. However, please note carefully the provisions of the Company's Articles which may require the Company to hold AGMs and some Companies may wish to keep AGMs as an effective method of communicating with its shareholders; advice should be sought as to the effect of dispensing with the need to hold AGMs.

AGMs, if held, are for the purpose of considering and approving the Company's annual accounts, its balance sheet and the reports of directors and, if applicable, auditors. It also deals with the appointment of directors in place of any retiring (the Articles should be checked to see if this is necessary) and the appointment and fixing the remuneration of the auditors (if applicable).

General meetings are held as certain decisions can only be made with the approval of the shareholders. Generally, ordinary resolutions can be passed by the consent of a majority of the shareholders, whilst special resolutions can only be passed by 75% of the shareholders. General meetings may also be held to clarify the views of the shareholders on potentially contentious matters.

It is usually the board of directors who will call a general meeting, however, it should be noted that if shareholders holding at least 10% of the paid up capital of the Company, carrying the right to vote at general meetings, request a general meeting, the directors are obliged to organise such a meeting. Please note that there are other circumstances when shareholders can request general meeting but these are rarer.

Once the directors have received such a request they must call a general meeting within 21 days of receiving the same,

providing for the general meeting to be held on a date not more than 28 days after the date of such notice. Note that should the directors fail to call such a meeting, then the shareholders who requisitioned the meeting may themselves call the meeting.

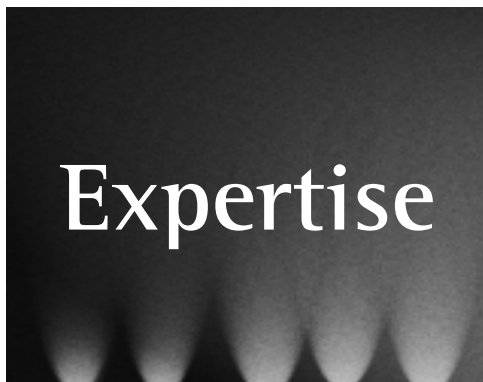
In a private company generally only 14 days clear (don't count 2 days for posting, the date of delivery or the day of the meeting) notice must be given for both AGMs and general meetings, although please note whether the Company's Articles state differently. There is the possibility to call a meeting on short notice if shareholders holding at least 90% of the shares giving the right to attend and vote at the meeting consent (note that the Articles may raise this to 95%).

Notice of any meeting needs to state the date, time and location of the meeting, it must also state the general nature of the business to be dealt with (note whether the Company's Articles vary this to distinguish between ordinary and special business), if an AGM it must state as much. The text of any special resolutions should be included and specifically state the intention to propose the resolution as a special resolution. Although not required, it would be advisable to set out the full text of any ordinary resolution also. Notices should also contain a statement of rights (i.e. explaining the shareholders entitlement to appoint a proxy).

The notice should be sent to every shareholder and every director as well as to the Company's auditors (if applicable). They should be approved by the board, and recorded as having been approved in the minutes, and signed by the Secretary or a Director if there is no Secretary. The procedure to be followed at any meeting should be specified in the Articles, which will provide a quorum for the meeting, the method(s) of voting, the procedure for a vote by proxy and whether the chairman has a casting vote.

Alternatively, and only really feasible in companies with few shareholders, a written resolution may be drafted and if signed by the same majority as would be required in a general meeting can be passed accordingly. Please note that that

although written resolutions can be used in relation to most decisions there are exceptions which must be put to a general meeting.



### DISCLAIMER

The information contained in this document is for general guidance on matters of interest only. The application and impact of laws can vary widely based on the specific facts involved. While we make every effort to ensure that the information given is accurate given the changing nature of laws, rules and regulations, and the inherent hazards of electronic communication, there may be delays, omissions or inaccuracies in information contained in this document. We make no guarantee of its accurateness, comprehensiveness, suitability or timeliness or of the results obtained from the use of this information, express or implied, including, but not limited to fitness for a particular purpose. In no event will Pearson Hinchliffe Commercial Law, or the partners or employees thereof be liable to you or anyone else for any decision made or action taken in reliance on the information in this document or for any consequential, special or similar damages, even if advised of the possibility of such damages. Accordingly, the information on this document is provided with the understanding that the authors and publishers are not herein engaged in rendering legal advice. As such, it should not be used as a substitute for legal advice. Before making any decision or taking any action, you should consult a Pearson Hinchliffe Commercial Law solicitor."

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