

Appendix II

Non-statutory Guidelines on Directors' Duties issued by the Companies Registry

Introduction

In general the responsibilities and liabilities of directors derive from various sources, including the constitution of the company, case law and statute law. If a person does not comply with his duties as a director he may be liable to civil or criminal proceedings and may be disqualified from acting as a director.

Although case law sets out and elaborates on most of these significant principles, it tends to be complex and inaccessible. The objective of these guidelines is to outline the general principles for a director in the performance of his functions and exercise of his powers.

All directors should read these guidelines which are also readily accessible on the websites of the Companies Registry (www.cr.gov.hk), the Hong Kong Exchanges and Clearing Limited (www.hkex.com.hk), the Securities and Futures Commission (www.sfc.hk), the Official Receiver's Office (www.oro.gov.hk) and the Hong Kong Monetary Authority (www.hkma.gov.hk). Hard copies are also available at their offices.

Companies should give copies of these guidelines to new directors irrespective of whether they organise induction training for directors. In addition, directors are also encouraged to refer to more detailed reviews of the role and duties of directors in law. For example, the Hong Kong Institute of Directors (www.hkiod.com) has issued the Guidelines for Directors and the Guide for Independent Non-Executive Directors.

Directors should also refer to the Code on Corporate Governance Practices issued by the Hong Kong Exchanges and Clearing Limited (www.hkex.com.hk) to improve the manner in which listed companies are managed.

It is important to note that the statements in these guidelines are principles only and are not intended to be exhaustive statements of the law. Furthermore, statute or case law could require certain forms of conduct under specified circumstances. If directors are at all in doubt about the nature of their responsibilities and obligations, they should seek legal advice.

The general principles of directors' duties

Principle 1 Duty to act in good faith for the benefit of the company as a whole

A director of a company must act in good faith in the best interests of the company. This means that a director owes a duty to act in the interests of all its shareholders, present and future. In carrying out this duty, a director must (as far as practicable) have regard to the need to achieve outcomes that are fair as between its members.

Principle 2 Duty to use powers for a proper purpose for the benefit of members as a whole

A director of a company must exercise his powers for a “proper purpose”. This means that he must not exercise his powers for purposes that are different from purposes for which they were conferred. The primary and substantial purpose of the exercise of a director’s powers must be for the benefit of the company. If the primary motive is found to be for some other reasons (e.g. to benefit one or more directors and to gain control of the company), then the effects of his exercise of his power may be set aside. This duty can be breached even if he has acted in good faith.

Principle 3 Duty not to delegate powers except with proper authorisation and duty to exercise independent judgement

Except where authorised to do so by the company’s memorandum and articles of association (the “constitution”) or any resolution, a director of a company must not delegate any of his powers. He must exercise independent judgement in relation to any exercise of his powers.

Principle 4 Duty to exercise care, skill and diligence

A director of a company must exercise the care, skill and diligence that would be exercised by a reasonable person with the knowledge, skill and experience reasonably expected of a director in his position. In determining whether he has fulfilled this duty, the court will also consider whether he has exercised the care, skill and diligence that would be exercised by a reasonable person with any additional knowledge, skill and experience which he has.

Principle 5 Duty to avoid conflicts between personal interests and interests of the company

A director of a company must not allow personal interests to conflict with the interests of the company.

Principle 6 Duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law

A director of a company has certain duties where he has a material interest in any transaction to which the company is, or may be, a party. Until he has complied with these duties, he must not, in the performance of his functions as a director, authorise, procure or permit the company to enter into a transaction. Furthermore, he must not enter into a transaction with the company, unless he has complied with the requirements of the law.

The law requires a director to disclose the nature of his interest in respect of such transactions. Under certain circumstances the constitution may prescribe procedures to secure the approval of directors or members in respect of proposed transactions. A director must disclose the relevant interest to the extent required. Where applicable, he must secure the requisite approval of other directors or members.

Principle 7 Duty not to gain advantage from use of position as a director

A director of a company must not use his position as a director to gain (directly or indirectly) an advantage for himself, or someone else, or which causes detriment to the company.

Principle 8 Duty not to make unauthorised use of company's property or information

A director of a company must not use the company's property or information, or any opportunity that presents itself to the company, of which he becomes aware as a director of the company. This is except where the use or benefit has been disclosed to the company in general meeting and the company has consented to it.

Principle 9 Duty not to accept personal benefit from third parties conferred because of position as a director

A director or former director of a company must not accept any benefit from a third party, which is conferred because of the powers he has as director or by way of reward for any exercise of his powers as a director. This is unless the company itself confers the benefit, or the company has consented to it by ordinary resolution, or where the benefit is necessarily incidental to the proper performance of any of his functions as director.

Principle 10 Duty to observe the company's memorandum and articles of association and resolutions

A director of a company must act in accordance with the company's constitution. He must also comply with resolutions that are made in accordance with the company's constitution.

Principle 11 Duty to keep proper books of account

A director of a company must take all reasonable steps to ensure that proper books of account are kept so as to give a true and fair view of the state of affairs of the company and explain its transactions. To avoid breaching the fraudulent trading provisions in section 275 of the Companies Ordinance (Cap. 32), a director must not allow the company to incur further credit knowing that there is no reasonable prospect of avoiding insolvency.

*Companies Registry
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