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Investments

Shareholder NED Induction Pack

An introduction to your roles and responsibilities acting as a Government-appointed shareholder non-executive director

Version 3.0

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Powers and duties: key points to be aware of when becoming a non-executive director



Your duties under the Companies Act 2006

Powers

Directors manage the company and act as its agents – you can bind the Company

Important decisions should be taken **collectively** as a board

The Articles give directors wide powers to act, but you must be sure to only act within the powers that are delegated to you

The directors **remain responsible** – even when authority has been delegated

Duties

Duties are owed to **the company** (not the group or shareholders)

Seven general duties are set out in the **Companies Act 2006** – see [Companies Act 2006 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2006/46)

*For NEDs appointed to ALBs which are not Companies Act companies (e.g. **advisory boards of public bodies**), similar fiduciary duties arise under common law. Where this document refers to directors of companies, the same principles should be taken to apply to those appointed to the boards of other such entities.

Your seven core duties under the Companies Act 2006* are to:

S.171	...act in accordance with the company's constitution and only exercise powers for the purposes conferred
S.172	...act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and with regard to certain factors
S.173	...exercise independent judgment
S.174	...exercise reasonable care, skill and diligence
S.175	...avoid situations in which they have or can have a direct or indirect interest which conflicts , or may conflict, with the company's interests
S.176	...not accept benefits from third parties conferred because they are directors or do something as directors
Ss.177 & 182	...declare the nature and extent of any interest , whether direct or indirect in a proposed or existing transaction or arrangement with the company



NOTE: Breach of duty is not established by the result but from the **process** and **reasoning** behind actions taken / not taken

Duty to exercise independent judgment (s. 173 CA 2006)



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A director must exercise independent judgment. This is of particular relevance for nominee NEDs and in a JV context.

- Directors must exercise their powers independently without subordinating their powers and discretions to the will, instruction or direction of another – by delegation or otherwise – unless authorised to do so by the company either expressly or under the company's constitution.
- Directors must not **blindly follow** instructions from their appointers or a third party – even if taking such step or voting in the instructed way would not otherwise breach his or her duties to the company.
- In particular, NEDs cannot re-agree with their appointer to vote in a certain manner irrespective of whether it promotes the company's success

But directors CAN:

- take and rely upon advice – as long as the director exercises his or her own judgment in deciding whether or not to follow the advice
- discuss issues with fellow directors – provided the director exercises his or her own judgment in making decisions
- take the interests of his or her nominator into account, particularly if authorised to do so (either by agreement entered into by the company or by the company's constitution)

Independence

It can be a struggle to fulfil duty of **independence** if the appointer has particular views/interests

Balance

How can the benefit of the company be **balanced** with the obligation not to frustrate the policies or instructions of Government?
Weighting of this balance can be affected by the constitution and terms of appointment

Company Constitution

How far directors can consider and/or protect **Government interests** and in the articles is key.
Steps can be taken to protect independence of NOD e.g. (operational independence undertaking)
Conversely, the Articles can acknowledge the "partisan" position the NOD is in



A director's **primary loyalty** is to the company and the company's interests must ultimately prevail.

For Government-appointed NEDs, where a Minister is very clear on a desired outcome that is contrary to the company's proposed course of action, the director may need to resign or recuse him/herself to avoid taking an action which frustrates State policy (contrary to obligations under the Civil Service Code).



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Key duty: Duty to promote the success of the company (s.172 CA 2006)

A director of a company must act in a way he or she considers, in **good faith**, would be **most likely to promote the success of the company** for the **benefit** of its members **as a whole**...

... with regard (amongst other matters) to:

likely **long term** consequences

fostering **business relationships**

impact on the **community** and the **environment**

employees' interests

reputation for high standards of business conduct

need to act **fairly** between members

Having regard to these factors is **not just a box ticking exercise** (i.e. paying them lip service is not enough)

There should be a degree of balance between acting in the benefit of current **and future** members

Key point: you must act in the interests of **all** shareholders, not just your appointer

If the company hits the "**zone of insolvency**" there is also a duty to consider the interests of the **creditors** – see next slide for further details



When do directors need to take account of creditors?

Directors owe a duty to have regard to the interests of creditors.

The duty is triggered when the company is insolvent, or where insolvency is **probable** or **imminent**.

If triggered, directors must give appropriate consideration to creditors' interests and balance those interests against those of other stakeholders.

The interests of creditors become **paramount** when an insolvent liquidation or administration becomes inevitable. This is also when insolvency law rules apply, e.g. to avoid **wrongful trading**.

Directors should monitor the solvency of the company on an on-going basis, using up-to-date financial information and by **taking professional advice**.



Duty to exercise care and skill (s. 174 CA 2006) and to not accept third party benefits (s. 176 CA 2006)

A director must exercise **reasonable care, skill and diligence**.

This includes acting as a reasonably diligent person with:

- the **general knowledge, skill and experience that may reasonably be expected** of *any person* carrying out the functions of a director **AND**
- the general **knowledge, skill and experience** that the director *actually has*.

Non-executive directors – in theory they have the same responsibilities as executive directors. In reality they may have less involvement or information.

Professionally-qualified directors – more is expected of a director with particular expertise in certain areas.

A director must not accept **third party benefits** conferred by reason of his being a director or his doing (or not doing) anything as director.

- This is essentially a rule against accepting **bribes** (see also the section on the Bribery Act 2010, below)
- The duty is not infringed if the acceptance of the benefit **cannot reasonably be determined to give rise to conflict**
- Compliance with hospitality policies doesn't necessarily cure a breach of this duty
- "Benefit" is **widely construed**
- The duty **continues after a directorship ceases** in relation to things done / omitted to be done before a person ceased to be a director
- This is of particular sensitivity due to your position vis a vis HMG



Conflicts of interest – the three types (ss. 175, 177 and 182 CA 2006)

Duty to avoid conflicts of interest (s. 175)

Where company **is not** a party
e.g. multiple directorships,
corporate opportunities.

Related duty: NOT to accept
benefits from third parties

Duty to declare interest in proposed transaction or arrangement (s.177)

Where transaction proposed and
company **will** or **may** be a party

Duty to declare interest in existing transaction or arrangement (s. 182)

Existing transaction where
company **is** a party



Safe harbours:

1. The situation cannot reasonably be regarded as likely to give rise to a conflict
2. The matter has been authorised by the board

In either situation the director should disclose his/her interest to the board



There is more information on conflicts of interest below – including the potential difficulties of reconciling your other roles and duties with your directors' duties

Reconciling your directors' duties and your obligations as Civil Servant and / or employee



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As a UKGI NED you have multiple roles that do not always align and may give rise to conflicts: your role as a UKGI employee, as a member of the Civil Service, as a Government employee and as a NED. As a refresher, some of the other obligations that apply to you by virtue of being a Government-appointed NED are set out below. Please discuss these points with UKGI Legal if you are unsure.

Civil Service Code

“must not seek to frustrate the policies, decisions ... of Government ... by unauthorised disclosure ... of any information to which they have had access as civil servants”

UKGI Framework

“same degree of **confidentiality** as that Minister might expect of his or her own officials, in accordance with the Civil Service Code” (5.11)

The Official Secrets Acts

A **criminal offence** of disclosing information relating to international relations – information relating to BREXIT would probably qualify under this heading

Tort of Breach of Confidence

It is a tort (**actionable in damages**) to disclose confidential information conveyed in confidence



Duty to Avoid Situational Conflicts (s.175 CA)



A director must **avoid a situation** in which he has, or can have, **a direct or indirect** interest that conflicts, or possibly may conflict, with the interests of the company.



Public Sector Examples

Acting as official/agent for department which :

- determines policy on energy when you are a NED in green energy business
- has a supplier, customer or financing relationship with the company of which you are a director

Private Sector Examples

Director or exec of another company which is in a partnership or JV with the company of which s/he is director

Director or exec of a third party which has a supplier, customer, competitor, distributor, financing or other material relationship with the company of which s/he is director



Safeguards

- A situational conflict of interest can be authorised in articles, or by other directors or shareholders.
- It is good practice to seek such authorisation of interests between appointer and company in advance.

Options

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How can these potential conflicts be squared with your duties to the company?

Company Articles

Company Articles can contain provisions for dealings with situational conflicts, the duty will not be infringed by anything the directors do (e.g. when to withhold or share information) in accordance with the provisions.

Terms of Appointment

Terms of appointment can make clear that the Company can have no expectation that NED will share confidential information received in capacity as civil servant that will assist the Company where this would not otherwise be available.

Shareholder Authorisation

The shareholders can authorise something that would otherwise be a breach of duty – so if the state is a 100% shareholder this can assist, but not if insolvency is a possible outcome, as the interests of the creditors need to be factored in.

Safeguards

- Where the conflict is extreme (i.e. SoS deciding whether to fund a business or not), Information barriers are needed so that the individual is protected from the conflict/knowledge
- Recusal may also be an option
- Consider Ministerial Code and Employer obligations



Duty to Avoid Transactional Conflicts (s.175 CA 2006)



If a director is directly or indirectly interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors

What kind of transactional conflicts are covered?

- Section 177 requires declaration to Board of any interest in a proposed transaction or arrangement with the company
- Section 182 requires declarations in relation to existing transactions
- CA 2006 requires both the nature and the extent of the interest to be declared

What actions can be taken?

- Declaration must be made:
 - at a meeting of the directors
 - by notice to the directors in accordance with the CA 2006

A director's ability to count in quorum and vote at the meeting at which the transaction is considered will depend on the company's articles. Therefore it is essential to also check the company's articles.

Case study: Transactional conflicts

Company A forms a specialist subsidiary, company B.

Under the articles of company B, company A is entitled to appoint 3/5 directors of Company B.

Company A appoints 3 of its own directors (out of 12) to the board of Company B.

Company B turns out to be highly successful and profitable, and Company A seeks to acquire it fully for its own benefit by buying out the remaining shares in Company B (owned by the two independent directors, who are the controlling minds of Company B with very valuable relevant expertise and contacts relevant to company B's successful business). The offer is refused.

Company A then sets up its own internal branch of the same business, in direct competition with Company B and engages in a series of transactions intended to take as much business from company B as possible.

(Based on *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324).

What should the three nominee directors of Company B do:

- 1 In relation to the deliberations of the board of company A on setting up the rival businesses to Company A?
- 2 In relation to the deliberations of the board of Company B in response to that action?



Overarching principles to be aware of with respect to your directors' duties

CARE

- **Act within powers** and for purpose for which conferred
- **Promote the success** of the company
- Exercise **independent judgment**
- Exercise **reasonable skill, care and diligence**

LOYALTY

- **Avoid conflicts** of interest
- **Do not accept benefits** from third parties
- **Declare interests** in proposed transactions or arrangements

Former directors:

- The below duties continue to apply even when a person ceases to be a director
- This is intended to stop directors from resigning simply to be able to take advantage of opportunities available to them because of their role as directors

Duty to avoid
conflicts of interest
(S.175 CA 2006)

Ban on accepting
third party
benefits (S.176 CA
2006)

Practical tips



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General / behavioural:

- Be aware of **limitations on powers** (e.g. any borrowing limits or other restrictions in the articles)
- **Constructively challenge** proposals (unitary board so necessary to do this if directors disagree with proposals – challenge is also part of the NEDs role)
- Make sure **sufficient time** is allocated to duties (Corporate Governance Code – principle H)

Specific:

- Ensure **sound risk management** and **internal control systems** exist
- **Formal and transparent** arrangements for dealing with auditors and corporate reporting and signing off accounts and reports
- Ensure public documents are appropriately verified

Decisions which
were taken in
good faith will not
be impugned

Breach of duty is
not established by
the result but from
the **process** and
reasoning behind
actions taken / not
taken

The interests of
shareholders
should be
considered as a
whole

Directors should
also be aware of
and consider
other
stakeholders

Courts will be
looking to support
the **sensible board**

If in doubt about
a conflict, **disclose**
it and, if relevant,
gain approval

Summary in layman's terms. Ministerial statement by Margaret Hodge of the Department for Trade (2007)



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Shortly after the publication of the Companies Act 2006, the Government provided a simple summary of the principles underlying directors' duties as follows:

1. Act in the company's best interests, taking everything you think relevant into account.
2. Obey the company's constitution and decisions taken under it.
3. Be honest, and remember that the company's property belongs to it and not to you or to its shareholders.
4. Be diligent, careful and well informed about the company's affairs. If you have any special skills or experience, use them.
5. Make sure the company keeps records of your decisions.
6. Remember that you remain responsible for the work you give to others.
7. Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly.
8. Seek external advice where necessary, particularly if the company is in financial difficulty.

Full statement at

[\[ARCHIVED CONTENT\] \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)



Corporate Governance

The UK Corporate Governance Code – The Main Principles



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The UK Corporate Governance Code (the “**Code**”) sets out standards of good practice for listed companies on board composition and development, remuneration, shareholder relations, accountability and audit – and many unlisted companies use it as standard.

The most recent version of the Code was published in July 2018 and applies to accounting periods beginning on or after January 1, 2019. Its purpose is to “*facilitate effective, entrepreneurial and prudent management that can deliver the long-term success of the company*”. The latest updates to the Code place greater emphasis on relationships between companies and their stakeholders and workers. They also expand on the existing framework for issues such as Board independence and the role of the Remuneration Committee.

The first version of the Code was produced by the 1992 Cadbury Committee. Its paragraph 2.5 remains the classic definition of the context of the Code:

“Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders’ role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company’s strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board’s actions are subject to laws, regulations and the shareholders in general meeting.”

The Code consists of five sections, which encompass 18 “Principles” of good governance and 41 more detailed “Provisions”. The five sections are:

Section 1: **Board Leadership and Company Purpose**;
Section 2: **Division of Responsibilities**;
Section 3: **Composition, Succession and Evaluation**;
Section 4: **Audit, Risk and Internal Control**; and
Section 5: **Remuneration**.

Links:

[UK Corporate Governance Code](#) – July 2018

FRC explanations of the 2018 Code:

- <https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code>
- <https://www.frc.org.uk/news/july-2018/a-uk-corporate-governance-code-that-is-fit-for-the>

Highlights of the changes in the 2018 Code:

- <https://www.frc.org.uk/getattachment/524d4f4b-62df-4c76-926a-66e223ca0893/2018-UK-Corporate-Governance-Code-highlights.pdf>
- <https://www.dentons.com/en/insights/newsletters/2018/october/23/uk-corporate-briefing/uk-corporate-briefing/the-2018-uk-corporate-governance-code>
- <https://www.twobirds.com/en/news/articles/2018/uk/the-uk-corporate-governance-code-2018>

[FRC Guidance on Board Effectiveness](#) – July 2018 (which replaces Good Practice Suggestions from the Higgs Report (known as the Higgs Guidance)).

[UK Corporate Governance Code](#) - April 2016 (applies to accounting periods beginning on or after 17 June 2016 and ending on or before 31 December 2018)

There is a summary of the **roles of committees** in the context of good governance in the appendix to this pack.

The UK Corporate Governance Code – The Main Principles (2)



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Sections 1 and 2 of the Code focus on the leadership and effectiveness of a company's board. The Code places great importance on the clarity of the roles and responsibilities of the board and its members, and on accountability and transparency.

Section 1: Board Leadership and Company Purpose	Section 2: Division of Responsibilities
<ul style="list-style-type: none"> A successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society. The board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned. All directors must act with integrity, lead by example and promote the desired culture. The board should ensure that the necessary resources are in place for the company to meet its objectives and measure performance against them. The board should also establish a framework of prudent and effective controls, which enable risk to be assessed and managed. In order for the company to meet its responsibilities to shareholders and stakeholders, the board should ensure effective engagement with, and encourage participation from, these parties. The board should ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success. The workforce should be able to raise any matters of concern. 	<ul style="list-style-type: none"> The chair leads the board and is responsible for its overall effectiveness in directing the company. They should demonstrate objective judgement throughout their tenure and promote a culture of openness and debate. In addition, the chair facilitates constructive board relations and the effective contribution of all non-executive directors, and ensures that directors receive accurate, timely and clear information. The board should include an appropriate combination of executive and non-executive (and, in particular, independent non-executive) directors, such that no one individual or small group of individuals dominates the board's decision-making. There should be a clear division of responsibilities between the leadership of the board and the executive leadership of the company's business. Non-executive directors should have sufficient time to meet their board responsibilities. They should provide constructive challenge, strategic guidance, offer specialist advice and hold management to account. The board, supported by the company secretary, should ensure that it has the policies, processes, information, time and resources it needs in order to function effectively and efficiently.

The FRC's *Guidance on Board Effectiveness* addresses questions raised by stakeholders on Sections 1 and 2 of the Code: <https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF>. The Guidance describes an **effective board** as one that *"defines the company's purpose and then sets a strategy to deliver it, underpinned by the values and behaviours that shape its culture and the way it conducts its business"*. It emphasises that challenge is as important as teamwork and, as such, an effective board will **not always be a comfortable place**.

The FRC Guidance contains a section entitled the "Role of Non-Executive Directors" which sets out the relevant responsibilities as follows:

75	A non-executive director should, on appointment, devote time to a comprehensive, formal and tailored induction which should extend beyond the boardroom . Initiatives such as partnering a non-executive director with an executive board member may speed up the process of him or her acquiring an understanding of the main areas of business activity, especially areas involving significant risk. The director should expect to visit, and talk with, senior and middle managers in these areas.
76	Non-executive directors need to make sufficient time available to discharge their responsibilities effectively . The letter of appointment should state the minimum time that the non-executive director will be required to spend on the company's business, and seek the individual's confirmation that he or she can devote that amount of time to the role, consistent with other commitments. The letter should also indicate the possibility of additional time commitment when the company is undergoing a period of particularly increased activity, such as an acquisition or takeover, or as a result of some major difficulty with one or more of its operations. Non-executive directors should devote time to developing and refreshing their knowledge and skills, including those of communication, to ensure that they continue to make a positive contribution to the board. Being well-informed about the company, and having a strong command of the issues relevant to the business, will generate the respect of the other directors.
77	Non-executive directors should insist on receiving high-quality information sufficiently in advance so that there can be thorough consideration of the issues prior to, and informed debate and challenge at, board meetings. High-quality information is that which is appropriate for making decisions on the issue at hand – it should be accurate, clear, comprehensive, up-to-date and timely; contain a summary of the contents of any paper; and inform the director of what is expected of him or her on that issue.
78	Non-executive directors should take into account the views of shareholders and other stakeholders , because these views may provide different perspectives on the company and its performance.

The UK Corporate Governance Code – The Main Principles (3)



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The Guidance specifies that it is the role of NEDs to uphold high standards of integrity and probity and, critical to the performance of their role, they should ensure they are devoting adequate time to the discharge of their responsibilities. Questions that it would be helpful for a NED to ask themselves at the outset are as follows:

Induction and training	Time commitment	Information flow
On appointment, did you participate in a formal and tailored induction and how comprehensive did you think it was?	How much time are you required to devote to your role and how much time do you devote to it?	Do you receive adequate high-quality information to enable a thorough discussion of the issues at board meetings?
If any improvements could be made, have you communicated these to the chairman?	Are you required to commit additional time in certain circumstances, such as an acquisition or takeover or as a result of a major difficulty with operations?	Are you informed of what is expected of you on a particular issue? If not, have you communicated any deficiencies to the chairman or SID?
Is there an initiative to partner you with an executive board member to assist you in acquiring an understanding of the main areas of business activity, especially areas involving significant risk?	Did you appreciate the time commitment involved prior to taking on the role and did you assess the likelihood of you being able to make a positive contribution in your role as a member of the board?	How are the views of shareholders and other stakeholders communicated to you and to what extent do you take these into account in board discussions on a particular issue?
Have you visited and talked with senior and middle managers in those areas?		To what extent does the assessment of risk form part of the decision making process? Is an expert's opinion obtained on all matters where you consider it appropriate?
How much time do you devote to developing and refreshing your knowledge and skills and how do you go about doing this?		Is there ever any reluctance to involve the non-executive directors in decision-making or are matters brought to the board for sign off rather than debate?
		Do you consider sufficient time is made available to debate significant issues at board meetings?

Sections 3, 4 and 5 of the Code relate to how a board considers composition, succession, evaluation, audit, risk, internal control and remuneration, as set out below:

Section 3: Composition, Succession and Evaluation

- Appointments to the board should be subject to a **formal, rigorous and transparent procedure**, and an effective succession plan should be maintained for board and senior management. Both appointments and succession plans should be **based on merit and objective criteria** and, within this context, should **promote diversity** of gender, social and ethnic backgrounds, cognitive and personal strengths.
- The board and its committees should have a combination of **skills, experience and knowledge**. Consideration should be given to the length of service of the board as a whole and membership regularly refreshed.
- **Annual evaluation** of the board should consider its composition, diversity and how effectively members work together to achieve objectives. **Individual evaluation** should demonstrate whether each director continues to contribute effectively.

Section 4: Audit, Risk and Internal Control

- The board should establish **formal and transparent policies and procedures** to ensure the **independence and effectiveness** of internal and external audit functions and satisfy itself on the integrity of financial and narrative statements.
- The board should present a **fair, balanced and understandable assessment** of the company's position and prospects.
- The board should establish procedures to manage risk, oversee the internal control framework, and determine the nature and extent of the principal risks the company is willing to take in order to achieve its long-term strategic objectives.

Section 5: Remuneration

- Remuneration policies and practices should be designed to support strategy and promote long-term sustainable success. Executive remuneration should be **aligned to company purpose and values**, and be clearly **linked to the successful delivery** of the company's long-term strategy.
- A formal and transparent procedure for developing policy on executive remuneration and determining director and senior management remuneration should be established. No director should be involved in deciding their own remuneration outcome.
- Directors should exercise **independent judgement and discretion** when authorising remuneration outcomes, taking account of company and individual performance, and wider circumstances.

Refresher: (i) The Bribery Act; (ii) political donations; and (iii) Environmental and social responsibilities



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The Bribery Act 2010 – criminal offence

- The Bribery Act introduces two key **criminal** offences: (i) bribery; and (ii) failing to prevent bribery (which is a corporate offence). Bribery goes beyond just public officials (i.e. BA 2010 is broader than the USA's Foreign Corrupt Practices Act). The BA covers offences committed by UK persons and residents *wherever committed*.
- You must have adequate procedures to protect against Bribery Act offences (e.g. additional checks where dealing with foreign officials; including anti-corruption warranties in contracts and provide training to "at risk" employees).
- Always consider how a gift/hospitality might be perceived. Must be reasonable and proportionate (and in good faith).
- Other legal consequences of bribery may also include offences under the Proceeds of Crime Act (e.g. (i) money laundering; (ii) benefit arising from criminal conduct; (iii) failure to report / tip off).

Political donations – civil offence

- Companies are greatly restricted from being able to make political donations (to parties, organisations, independents) or incur political expenditure by s. 366 of the Companies Act. "Political expenditure" is broadly defined as expenditure on "advertising or other promotional or publicity material" or on "activities" intended to create public support for a party, organisation or independent candidate or referendum.
- Due to your connection to HMG and your duties under the Civil Service Code you should be clear to recuse yourself from any such decisions (including decisions on whether to seek authorisation for donations).

Environmental and social responsibilities – directors' duty to act in the best interests of the company (s. 172 CA 2006)

- Although the majority of environmental reporting obligations are focused on listed companies (e.g. guidance provided by the shareholder groups ABI and PIRC), you must consider the impact of decisions on the environment and community as part of your duty to promote the success of the company as a whole under s.172 CA 2006 (see above).
- Some companies are choosing to have their reports of corporate social responsibility policy implementation audited (or verified) by external third parties.
- Recent updates provided by external legal advisers have suggested that environmental pressure is likely to rise in the future and, consequently, Boards should take care to consider their environmental responsibilities when taking decisions. In particular, any investigation of such decisions will be taken in hindsight: i.e. they will apply a future (likely higher) standard.



What can companies do?

What can you ask for and what behaviours should you encourage to support fellow directors?

- **Training** – you should be offered training on induction and also refresher training
- **Board mix** – make sure there is an appropriate balance of skills, experience, independence and knowledge of the company (UK CGC Principle K)
- **Information and support (e.g. board packs)** – the board should be supplied in a timely manner with information to enable it to discharge its duties (UK CGC Principle F)
- **Board minutes** – shouldn't contain a verbatim account of all deliberations. On an important / controversial transaction, however, may be useful evidence that different factors were considered.
- **Best practice** – be aware of relevant guidance (especially the UK CGC, FRC Board Effectiveness 2011, ICSA guidance)
- **Evaluation** – carry out internal and external evaluations of the board (UK CGC Principle L and Provision 21)
- **Re-election** – all directors should be subject to annual re-election (UK CGC Provision 18)
- **Terms of reference** – make sure these are clear where there are committees and any board reserved matters. If you are unclear on any ToRs, you should seek clarification
- **Strategic report** – should allow shareholders to assess S.172 CA 2006 compliance



Key topics to be aware of: current and future issues

Key topics to be aware of: current and future issues



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Human rights

5-step guide published by the Equality and Human Rights Commission (May 2016)
https://www.equalityhumanrights.com/sites/default/files/business_and_human_rights_web.pdf. The Board should ensure the Company:

1. embeds the responsibility to respect human rights into its culture, knowledge and practices
2. identifies and understands its salient or most severe risks to human rights
3. systematically addresses risks identified above and remedies where needed
4. engages with shareholders to inform its approach to addressing human rights risks
5. reports on its salient or most severe human rights risks and meets regulatory reporting requirements

“Look back” principle applies: an action brought in 2027 for a breach in 2017 will use the standards of 2027, **not** 2017 – which are likely to be higher. There is a growing trend towards creating a **duty** to prevent human rights impacts.

Health and safety at Work Act 1974

Applies to individual directors and companies. Directors are personally liable where the company is found guilty of a health and safety offence or a breach is committed with the “consent, connivance or neglect” of the director.

Preventing prosecution and investigation by the Health and Safety Executive (the “HSE”)

The number of senior managers prosecuted by the HSE has increased in recent years. Boards should:

1. Ensure health and safety is taken seriously throughout the company and that risks can be reported to the highest level
2. Review policies on an ongoing basis
3. Consider running a mock investigation or mock incident
4. Employees should be provided with relevant information and training on the risks they face and preventative measures they can take

Gender pay gap reporting

Employers with 250 or more employees are required to publish calculations every year showing the pay gap between their male and female employees.

There are six statutory calculations to carry out and the results must be published on the employer’s website and a government website on an annual basis. For further information, see ACAS’ website guidance: <http://www.acas.org.uk/index.aspx?articleid=5768>

Payment reporting

Regulations made under section 3 of the Small Business, Enterprise and Employment Act 2015 introduce a duty on the UK’s largest companies and LLPs to broadly report on a half-yearly basis on their payment practices, policies and performance for financial years beginning on or after 6 April 2017. Find more information [here](#).

The Modern Slavery Act 2015

Requires an annual human trafficking and slavery statement. The Business and Human Rights Resource Centre provides a registry of such statements to show what is required - <http://www.modernslaveryregistry.org/>.

Ergon associates also provide a helpful note on what companies are reporting on and provide update emails called the Modern Slavery Review <http://www.ergonassociates.net/component/content/article/41-selected-reports/287-what-are-companies-reporting-on-modern-slavery>

Board independence

The revised UK CGC retains the existing position that at least half of the board, excluding the chair, should be independent.

It is still at the board’s discretion to determine whether a director is independent despite not meeting all of the indications of independence.

There is however a new level of focus on director independence and boards must give the issue serious consideration.

The Finance Act 2016

Requirement to publish UK tax strategy online for entity/group turnover of more than £200m or balance sheet of more than £2bn.

Details of what to include are at: <https://www.gov.uk/guidance/large-businesses-publish-your-tax-strategy>

Key topics to be aware of: current and future issues (2)



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AML and PSC registers

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force in the UK on 10 January 2020. The purpose of the Directive is to further strengthen transparency and counter-terrorism initiatives. Find out more [here](#) and [here](#). Note that companies are now required to report discrepancies in their PSC registers.

Audit, corporate reporting and corporate governance systems

The Government has announced the proposed establishment of a new regulator, The Audit, Reporting and Governance Authority (ARGA), which will have the stated objective of protecting and promoting the interests of investors, other users of corporate reporting and the wider public interest. See more [here](#).

Cyber risk and cyber insurance

Corporates of all sizes are subject to increasingly frequent and sophisticated digital attacks with the aim of extracting information or money. It is important for directors to be aware of this and for companies to have in place and to stress-test incident response plans, and to pre-engage with service providers.

Corporates can also take out cyber insurance, with key features such as first-party loss and third-party liability cover, incident response services and business interruption cover. There can be significant complexity in the handling of multiple regulators, crime agencies and other stakeholders in the context of a major data breach.

Reporting on directors' duties compliance

Following a BEIS Select Committee Corporate Governance Report, the government introduced The Companies (Miscellaneous Reporting) Regulations 2018, which apply in relation to the financial years of companies beginning on or after 1 January 2019.

These Regulations introduce a requirement for large companies to explain how their directors' section 172 duties were discharged.

The Regulations also introduce other reporting requirements, such as for large companies to include statement as part of their directors' report summarising how the directors have engaged with employees, how they have had regard to employee interests and the effect of that regard, including on the principal decisions taken by the company in that financial year.

Activist Shareholders

There has been a notable trend in recent years of shareholders of public companies pushing back more strongly at AGMs against remuneration policies or director appointments which are perceived to be detrimental to shareholder value. Many high-profile FTSE 100 companies have received large numbers of votes opposing their remuneration policies at their latest AGMs. Similarly, remuneration reports are frequently subject to challenge across the FTSE 100 and 250. Director appointments are often challenged due to concerns around over-boarding, independence, remuneration or audit.

Climate-related financial disclosures

The FSB task force released its [fifth Status Report providing an overview of current disclosure practices in September 2022](#).

Also see their advice regarding [climate-related performance disclosures and reporting / net zero disclosures](#).



Helpful Resources

Helpful resources



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Resource	Why?	Link
Companies House	Allows you to check web filings for your company	https://beta.companieshouse.gov.uk/
The Corporate Governance Code	Provides the latest version of the CGC to check the exact wording of the requirements. See also the Norton Rose microsite (below) for analysis	UK Corporate Governance Code
Norton Rose Corporate Governance Portal	Provides helpful analysis of important trends and obligations, including diversity, executive pay, risk management, upcoming briefings and essential news	http://www.nortonrosefulbright.com/knowledge/technical-resources/the-uk-corporate-governance-portal/
Reporting on stakeholders, decisions and Section 172	Contains the Financial Reporting Council's report on reporting on stakeholders, decisions and Section 172.	https://www.frc.org.uk/getattachment/d0470ab4-f134-4584-9f54-a48a8bfcd62d/FRC-LAB-Stakeholders-Report-s172.pdf
BEIS FAQ on the Companies (Miscellaneous Reporting) Regulations 2018	Provides an overview of the corporate governance reporting requirements set out in that Act.	BEIS FAQs on the Companies (Miscellaneous Reporting) Regulations 2018
Guidance on human rights and your company's obligations	Provides a five step guide boards should follow to satisfy themselves that their companies identify, mitigate and report on the human rights impacts of their activities	https://www.equalityhumanrights.com/sites/default/files/business_and_human_rights_web.pdf
UK tax strategy publication requirements	Government guidance on the new reporting obligation for companies to publish their UK tax strategy	https://www.gov.uk/guidance/large-businesses-publish-your-tax-strategy
Gender pay gap reporting guidance	Provides guidance on how you can meet your company's obligations to report on gender pay gaps, including the calculations and publishing requirements	http://www.acas.org.uk/index.aspx?articleid=5768
Register of modern slavery reports	Provides an index of companies' modern slavery reports: helpful if your company is preparing one and you would like to check recent practice	http://www.modernslaveryregistry.org/
The Companies Act 2006	Includes the majority of legislation governing ALBs which qualify as Companies Act companies, including your Companies Act directors' duties.	http://www.legislation.gov.uk/ukpga/2006/46/contents/cgiuki-directors-general-duties-under-the-companies-act-2006(1).pdf
The Bribery Act 2010	Sets out the primary legislation dealing with the criminal offences relating to bribery.	http://www.legislation.gov.uk/ukpga/2010/23/contents
Resources for NEDs appointed to boards of public bodies (e.g. Advisory Boards of NDPBs)	NEDs of public bodies are bound by the principles and codes of conduct set out in these documents.	The Seven Principles of Public Life - GOV.UK (www.gov.uk) Code of conduct for board members of public bodies - GOV.UK (www.gov.uk) 12 Principles of Governance for all Public Body NEDs - GOV.UK (www.gov.uk)



Liability and protections



Your liability and protections – what the company can and can't do

- Breach of a director's duty gives rise to a range of potential remedies, including damages, restitution of property and accounting for profits made. The remedy for a breach of the duty of care and skill would be damages.
- Failure to disclose an interest in an existing transaction or arrangement with the company also carries the risk of a criminal fine.
- Directors are trustees of company property and will be liable if they knowingly participate in a misapplication of company property or ought to have known of the disapplication.

Indemnity

- The Companies Act 2006 allows a company to indemnify its directors against liability **to third parties** for negligence, default, breach of duty or breach of trust.
- Companies **CANNOT** indemnify directors against:
 - Actions brought by **the company itself**.
 - **Fines** imposed in **criminal proceedings**.
 - **Costs of defending criminal proceedings**, where judgment is given against the director.
 - **Penalties** imposed by **regulatory bodies**.
 - Liability in connection with an **application for relief**, which the court refuses to grant.
- **NOTE** UKGI NEDs receive indemnities from the Home Department of the relevant company, which are effective from the date of the NED's appointment. You may **also** receive an indemnity from your company – this will depend on the company in question.
 - A template of this indemnity is available on the shared drive at: [Project Support Info Store - A. Indemnity letter templates - All \(sharepoint.com\)](#)

D&O insurance

- Companies are permitted to take out Directors' and Officers' liability insurance to cover directors for liability arising out of their role as directors.
- D&O cover **protects a director's personal assets** if claims are made against him.
- Criminal penalties and sanctions are **uninsurable** but legal or investigative costs incurred in defending a prosecution may be covered.
- Although you will be covered by an indemnity from the Home Department of your company, you may also benefit from D&O insurance, which may require drafting adjustments to your indemnity letter.

Although D&O policies and Home department indemnities are typically broad, be sure to check the specific terms of your indemnity and ensure that you always act within your delegated powers to reduce the risk of losing your cover.



Appendix: Corporate Governance – Roles of committees and key individuals (prepared by UKGI Legal and Linklaters)

Roles of committees – governance (best practice for ListedCos)



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	Composition	Role	Meetings
Board	<ul style="list-style-type: none"> > Executive Directors > NEDs > At least half the board should be independent NEDs. > SID 	<ul style="list-style-type: none"> > Directors are collectively responsible for the long-term success of the company. > Responsible for matters specified on the board's Schedule of Reserved Matters, e.g. disposals, acquisitions and investment matters. > Determines significant risks the company is willing to take to achieve its objectives. 	<ul style="list-style-type: none"> > Corporate Governance Code ("UK CGC" or "CG Code") requires board to meet sufficiently regularly to be able to discharge its duties effectively. > Procedure for calling/holding board meetings governed by the Articles – no specific Companies Act 2006 requirements. > The company's annual report should state how the board operates and the decisions reserved to it.
Remuneration Committee	<ul style="list-style-type: none"> > At least 3 members. > UKGI Guidance: UKGI NEDs can be members, but should not chair. If possible, avoid membership where Govt is not sole SH. > No director should decide his own compensation. 	<ul style="list-style-type: none"> > Sets remuneration for executive directors and Chairman (NED remuneration set by board/shareholders/CEO, Managing Director). > Recommends and monitors remuneration of senior management. 	<ul style="list-style-type: none"> > No specific Companies Act 2006 or CG Code provisions as to procedure. > Frequency/conduct of meetings determined by committee chairman (although investor bodies recommend at least 2 per year). > Procedure for calling/holding committee meetings governed by the Articles.
Audit Committee	<ul style="list-style-type: none"> > At least 3 members, entirely composed of independent NEDs. > At least 1 member to be competent in accounting or audit/members as a whole must have sectoral competence. > UKGI Guidance: UKGI NEDs can be members, but should not chair. 	<ul style="list-style-type: none"> > Monitors integrity of company's financial statements > Reviews financial controls and audits. > Makes recommendations re auditor appointment. > Reviews arrangements for staff to raise concerns about possible financial impropriety etc. 	<ul style="list-style-type: none"> > No specific Companies Act 2006 or CG Code provisions as to procedure. > Frequency/conduct of meetings determined by committee chairman (although investor bodies recommend at least 3 per year). > Procedure for calling/holding meetings governed by the Articles
Nomination Committee	<ul style="list-style-type: none"> > Majority of independent NEDs. > Chairman should be board Chairman (unless dealing with chairmanship) or an independent NED. 	<ul style="list-style-type: none"> > Leads process for board appointments. > Evaluates skills, experience, independence and knowledge required for an appointment. > Conducts searches based on objective criteria and with regard to diversity and gender in particular. 	<ul style="list-style-type: none"> > No specific Companies Act 2006 or CG Code provisions as to procedure. > Frequency/conduct of meetings determined by committee chairman (although investor bodies recommend meetings to deal with re-elections/specific appointments). > Procedure for calling /holding meetings governed by the Articles.

Roles of the Chairman and CEO



	Chairman	CEO / Managing Director
Key responsibilities	Governance-based: <ul style="list-style-type: none"> > Leadership of the board. > Ensuring that the board as a whole plays a full and constructive part in determining and developing strategy and commercial objectives. 	Operational / strategy-based: <ul style="list-style-type: none"> > Running the business. > Proposing and developing strategy and commercial objectives. > Ensuring board decisions are implemented at operational level
Other responsibilities	<ul style="list-style-type: none"> > Setting the agenda for board meetings (in consultation with the CEO). > Proposing a Schedule of Reserved Matters and terms of reference for committees (in consultation with the CEO). > Ensuring accurate and timely information about performance, challenges and reserved matters provided to the board. > Ensuring effective communication with shareholders. > Arranging informal meetings of NEDs without executive directors. > Arranging tailored inductions for each new director, plus on-going training. > Ensuring external evaluation of the board at least every 3 years. 	<ul style="list-style-type: none"> > Providing input to the agenda for board meetings. > Providing input to the Schedule of Reserved Matters and terms of reference for committees. > Maintaining a dialogue with the Chairman on important strategic issues. > Alerting the Chairman to any forthcoming complex, contentious or sensitive issues, of which the Chairman might not otherwise be aware. > Ensuring the executive team give appropriate priority to providing reports to board. > Ensuring effective communication with shareholders (together with the Chairman and the rest of the board). > Arranging appropriate on-going training for executive team as required.
Reporting line	> Reports to the board.	> Reports to the Chairman (acting on behalf of the board).
General	<ul style="list-style-type: none"> > There should be a clear division of responsibilities between the Chairman and the CEO, which is agreed and set out in writing. > Some matters require input from both the Chairman and the CEO, e.g. setting the agenda for board meetings. > Both the Chairman and the CEO can use the Company Secretary to execute their duties, and both should allocate sufficient time to their roles to be able to discharge their duties effectively. 	