

The Changing Role of the Director

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In the course of a career post-MBA it is highly likely, and generally desirable, to take on one or more company directorships. This could include a Non-Executive directorship or Trustee role for a charity. The legal landscape for company directors of all kinds has changed significantly since the passing of the Companies Act 2006. As most Commonwealth countries tend to follow UK law it won't be long before these changes are felt internationally.

Further legislation is expected in 2007 on corporate manslaughter which will have significant implications for all directors – and the likelihood of prosecution and jail sentences for indirect actions.

If you are thinking of topping up your MBA you might consider an executive education course that provides a full brief on director responsibilities and liabilities.

There has not been a substantial piece of company legislation in over 20 years. This Act is the largest (and heaviest!) ever passed at over 1,300 sections and 700 pages. It attempts to codify existing case law but there will certainly be oversights that will still rely on case law for precedents.

I have highlighted below the most important elements of the Act.

Statutory Statement of Duties. For the first time directors have a comprehensive list of seven general duties. These are:

- To act within their powers
- To promote the success of the company for the benefit of its members as a whole. (This is the most controversial aspect of the duties as for the first time directors have a legal obligation to consider those other than shareholders.)
- To exercise independent judgement
- To exercise reasonable care, skill and diligence
- To avoid conflicts of interest
- Not to accept benefits from third parties
- To declare to other directors any interest in a proposed transaction or arrangement with the company.

Other than reflecting common sense these duties now make it virtually impossible to use 'ignorance' as an excuse when a breach occurs. This puts the onus for liability firmly in the lap of the director – and it is presumed that special interest groups with an axe to grind will go after directors in a vigorous way.

Loans to Directors. The ban on loans to directors has been abolished but will require shareholder approval. Before taking a loan from a company you should ensure you have appropriate tax advice.

Payments for Loss of Office. If you are a 'fat cat' this is to prevent you from taking an excessive payment without shareholder approval.

Shareholder Action. The new Act will make it easier for shareholders to sue directors in the name of, and at the cost of, the company. It will be interesting to see if extremist groups are able to convince the courts that their actions are justified.

So what should you take into consideration before accepting a 'director' position?

- Ascertain the legal standing of the role. I was offered a 'Strategy Director' role at a FTSE250 only to find out that the role was not on the board nor was I going to be a 'director'. The official title turned out to be 'Head of Strategy'.
- Do your due diligence. Are there any outstanding lawsuits against the company? Do you understand the company's markets, customers and risks?
- Does the company offer Directors and Officers (D&O) insurance?
- Have you met your fellow directors and respect their experience and perspective?

Once you are a director what practical actions should you take?

- Read all the board papers and external announcements. If they contain things you don't understand then ensure you get clarification before any actions are taken.
- If you have a concern of any kind about the governance of the company then ensure these are addressed at the board meeting, documented in the minutes and any unresolved issues recorded.
- If you are in doubt about your position with respect to liability on any issue you should immediately seek professional guidance.
- Reduce your vulnerability to risk by reading relevant industry journals, attending conferences and reading analyst reports.
- If you find yourself in a position where you feel you have to resign you must document for the board why you are resigning and any unresolved areas. This may not absolve you of future responsibility so you should also take advice for your own protection.

For those interested in learning more about Non-Executive Director roles and responsibilities there are a series of networking seminars in the UK, Ireland and Channel Islands during 2007. For the special AMBA rate visit www.non-execs.com/affiliates/nedseminar.

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