

UKOPA

&

THE COMPANIES ACT 2006

Company Directors

Prepared by: B.H. Accountancy Ltd, Chartered Accountants
Suite 29, Design Works, William Street, Felling,
Tyne & Wear, NE10 0JP, UK.

Dated: July 2009

Contents Page

Section
No.

- 1 UKOPA & The Companies Acts - Background Information**
- 2 The Companies Act 2006 - The Board of Directors**
- 3 The Companies Act 2006 - The Duties of Directors**
- 4 Other Legal Requirements of Directors**
- 5 Personal Liabilities of Directors**
- 6 Protective Measures - What directors should be aware of and what steps they need to take.**

SECTION 1

UKOPA & THE COMPANIES ACTS

BACKGROUND INFORMATION

UKOPA is a company which was incorporated on 9 August 2000 under the Companies Act and is limited by guarantee.

At this current time, the Board of Directors of the company consist of the following:

National Grid Gas plc
Huntsman Petrochemicals (UK) Ltd
Shell Chemicals UK Ltd
BP Exploration Operating Company Ltd

It can be seen, therefore, that the entire Board is made up of corporate directors. There are no individual persons appointed to the Board, rather each director appoints a nominated representative on their behalf.

This situation was permitted under the Companies Act 1985, which was the Companies Act in force on the date of the company's incorporation. However, this Act has now been replaced by the Companies Act 2006 which received Royal Assent on 8 November 2006.

Not all of the sections of the Companies Act 2006 come into force immediately. Various sections have been phased in over a period of time since 8 November 2006 and some have still not been phased in to date. It is anticipated that all remaining sections will be implemented by October 2009.

Of those sections which are relevant to this report, the date of implementation will be disclosed in those sections.

The new Companies Act 2006 contains new rules on the composition of a Board of Directors and also on their general duties to the company to which they are appointed. Some of these are entirely new to those previously seen under the 1985-Act and are discussed in more detail overleaf.

SECTION 2

THE COMPANIES ACT 2006

THE BOARD OF DIRECTORS

All private companies limited under the Companies Act must, at all times, have at least one director. This rule has not been changed by the Companies Act 2006.

However, the new Act introduced a new rule which was phased in and became effective from 1 October 2008. All private companies now must have at least one director who is a natural person (i.e. an individual) and who is at least 16 years old.

Any company that had only corporate directors on 8 November 2006 (the day the Companies Act 2006 received Royal Assent) will have until 1 October 2010 to appoint a natural person director. This is to allow for a transitional period for companies who suddenly find themselves in breach of company law as a result of this new rule.

UKOPA is just such a company which is directly affected by this change. As a result, it **MUST** appoint a natural person as a director by 1 October 2010 and this will require careful consideration.

Generally, it is up to the members to appoint the people they believe will run the company well on their behalf. The only other restrictions that prevent anyone becoming a director are:

- they must not have been disqualified from acting as a company director (unless the court has given them permission to act for a particular company); and
- they must not be an undischarged bankrupt (unless they have been given permission by the court to act for a particular company).

However, as discussed later, the duties of a director have also changed and it is important that these are first understood. It is also important to realise that the new rules apply to **ALL** directors, whether new or existing, and so the entire Board of Directors need to be aware of these issues.

SECTION 3

THE COMPANIES ACT 2006

THE DUTIES OF DIRECTORS

The general duties of directors were previously contained in case law. In order to overcome the inaccessibility of this case law, whereby 250 years of precedent establish that directors are (inter alia) subject to fiduciary duties of good faith and honesty, as well as separate duties of care and skill, a director's seven general duties to the company are, for the first time, set out in the Companies Act 2006. The duties are cumulative obligations: directors must comply with each one that applies to a particular case.

The Companies Act 2006 states that the seven general duties of a director are:

- 1) to act within the company's powers;
- 2) to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (inter alia) to specified matters;
- 3) to exercise independent judgement;
- 4) to exercise reasonable care, skill and diligence;
- 5) to avoid conflicts of interest;
- 6) not to accept benefits from third parties;
- 7) to declare interests in a proposed transaction or arrangement with the company.

The general duties will, as before, be owed to the company. They will apply to directors, shadow directors and, in certain cases, to former directors. The duties are the same whether a director is an executive or a non-executive.

The relevant provisions have been commenced in two stages. Most of Chapter 2 of Part 10 of the 2006 Act (General duties of directors) was commenced with effect from 1 October 2007, but the sections relating to the duties to avoid conflicts of interest, not to accept benefits from third parties, and to declare an interest in a proposed transaction or arrangement with the company (and related provisions) was commenced with effect from 1 October 2008.

Each of these seven duties are further explained below.

1) Duty to act within powers

A director of a company must:

- act in accordance with the company's constitution, and
- only exercise powers for the purposes for which they are conferred.

2) Duty to promote the success of the company

A director of a company must act in the way he considers, in good faith, most likely to promote success for the members as a whole and in doing so have regard (amongst other matters) to:

- the likely consequences of any decision in the long term,
- the interests of the company's employees,
- the need to foster the company's business relationships with suppliers, customers 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, and
- the need to act fairly as between members of the company.

Where or to the extent that the purposes of the company consist of, or include, purposes other than the benefit of its members, the above paragraph has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving these purposes.

This imposed duty has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

This duty has proved the most contentious. By enshrining a principal of "enlightened member value", the duty insists that the effect of wider corporate social responsibility factors, upon member interests, be considered by directors when making decisions.

3) Duty to exercise independent judgement

A director of a company must exercise independent judgement.

This duty is not infringed by his acting:

- in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or
- in a way authorised by the company's constitution.

4) Duty to exercise reasonable care, skill and diligence

A director of a company must exercise reasonable care, skill and diligence.

This means the care, skill and diligence that would be exercised by a reasonable diligent person with:

- 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
- the general knowledge, skill and experience that the director has.

5) Duty to avoid conflicts of interest

A director of a company 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. This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

This duty is not infringed:

- if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
- if the matter has been authorised by the directors.

Authorisation may be given by the directors:

- where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or
- where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

The authorisation is effective only if:

- any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
- the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

6) Duty not to accept benefits from third parties

A director of a company must not accept a benefit from a third party conferred by reason of:

- his being a director, or
- his doing (or not doing) anything as director.

A “third party” means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.

Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.

This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

7) Duty to declare interest in proposed transaction or arrangement

If a director of a company is in any way, 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.

The declaration may (but need not) be made:

- at a meeting of the directors, or
- by notice to the directors in writing or general notice.

If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

Any declaration required by this section must be made before the company enters into the transaction or arrangement.

This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.

For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

A director need not declare an interest:

- if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
- if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or
- if, or to the extent that, it concerns terms of his service contract that have been or are to be considered:
 - by a meeting of the directors, or
 - by a committee of the directors appointed for the purpose under the company's constitution.

SECTION 4

OTHER LEGAL REQUIREMENTS OF DIRECTORS

a) Companies House

Every company director has 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; and

notice of change of directors or secretaries or in their personal details (Forms 288a, 288b or 288c).

In addition, it is usually the directors who will give notice of a change of registered office (Form 287).

b) Other responsibilities

Directors principally owe their duties to the company itself (i.e. the company's members collectively). However, a director may sometimes owe a duty to creditors. Directors of an insolvent or near insolvent company need to consider the position and interest of creditors.

Directors are required to have regard to the interests of the company's employees in general.

As such, all company directors must also comply with employment law in all dealings with employees and ensure that procedures are in place to ensure the company complies with changes to these laws. There are also health and safety responsibilities that must be followed and, as such, risk assessments and formal health and safety policies must be implemented (these policies must be in writing where there are more than five people employed by the company).

Company directors also have a responsibility to check that the correct amount of tax (both corporate tax and income tax for employees), Value Added Tax, National Insurance etc. are paid and before statutory deadlines.

SECTION 5

PERSONAL LIABILITIES OF DIRECTORS

The personal liabilities which can be imposed on an individual director are extremely wide. They can arise both under the criminal and civil law.

a) Criminal liability

- There are numerous sections of the Companies Act which render a director liable to a fine, or in some cases to imprisonment, for non-compliance.
- There is a trend towards making directors or other individuals in senior management positions personally liable under criminal law. Many statutory provisions provide that if a company commits an offence and it is due to neglect, consent or connivance of a director, then the director will be equally liable. There are examples in the Environment Protection Act 1990, the Consumer Protection Act 1987 and the Health and Safety at Work Act 1974.
- A director can be personally liable if he aids and abets a company to commit a criminal offence.
- If a director fails to notify the Board of Directors that he is interested in a transaction involving the company, then he commits a criminal offence.
- The duties of a director towards Companies House have been explained earlier. As a director, Companies House can prosecute for not submitting these documents on time. This is a criminal offence and upon conviction the court can fine a director up to £5,000 for each offence. There is a separate, civil penalty imposed on the company for the late filing of accounts. Persistent failure to deliver statutory documents on time may also lead to the court disqualifying a director from taking part in the management of a company for a specified period. Companies House claim to prosecute, on average, more than 1,600 directors each year for failing to deliver accounts and returns to them on time.

b) Civil liability

- A director can be sued if he is in breach of his common law and statutory duties.
- A person who has been disqualified by the court from acting as a director but who continues to be involved with the company's management will be liable for all the debts of the company while he is involved with it.
- Directors will be personally liable if they contract in a personal capacity.
- A director can be held personally liable for damages for an act or omission that constitutes negligence.

c) Fraudulent Trading

- A director may be found guilty of *fraudulent trading* if he allowed the company to trade with intent to defraud creditors. In addition, a liquidator can apply to the court to make a director personally liable for company debts and to contribute towards the assets available to pay creditors.

d) Wrongful Trading

- Under the Insolvency Act 1986 (under what is known as *wrongful trading*) the courts can impose personal liability for the company's debts if it is shown that the director knew or ought to have realised that there was no reasonable hope of avoiding the company going into insolvent liquidation and the director took insufficient steps to minimise the risk to creditors.
- Section 52 of the Supreme Courts Act 1981 gives the Court discretion to award the costs of a civil action against the director, even if the limited company was the named party in the action.

SECTION 6

PROTECTIVE MEASURES

WHAT DIRECTORS SHOULD BE AWARE OF AND WHAT STEPS THEY NEED TO TAKE

All company directors should:

- Be aware of the exact nature of their responsibilities within their own company.
- Be fully aware of the obligations and responsibilities imposed on all directors. They should always consult professional advisors on specific problems.
- Always be satisfied that duties delegated to others are being properly and competently carried out.
- Ensure they are kept fully informed of company affairs and are kept up to date. They should attend all directors' meetings and make sure decisions are properly recorded (together with any reservations/disagreements they personally have).
- Seek legal advice on their service contract with the company in cases where they are also an employee.
- Take full and professional advice before giving any personal guarantees for business purposes. A guarantee may, for example, involve a charge being placed on a private residence.
- Ensure that full and regular accounting and management records are provided to them in a form readily understood. In this way, problems can be identified in their early stages. Directors need regular financial information to properly carry out their duties. Insolvency warning signs (e.g. increase in creditors, falling sales, dependence on one product) should never be overlooked.
- Take out director's liability insurance. This will provide indemnity against costs incurred in successfully defending an action brought against directors.