

## **GUIDANCE FOR COUNCILLORS APPOINTED TO REPRESENT THE COUNCIL ON OUTSIDE BODIES**

### **INTRODUCTION**

This guidance is produced to assist members with their roles and responsibilities when they sit on outside bodies. In addition there is guidance attached relating to the code of conduct on personal and prejudicial interests.

The fundamental principals of this guidance are as follows:-

- Members will act according to the rules, constitutions and frameworks set by the relevant outside body and where, possible, with those of the Council.
- Members will make independent and personal judgements based on their duty of care to the outside body
- Members will report back, on their involvement with the outside body, at least annually to the Council
- Members will comply with their obligations as far as they are applicable pursuant to the code of conduct
- Members will take an active and informed role in the management of the outside body's affairs unless they are placed as an observer
- Membership of an outside body does not include representing a political party.

### **GENERAL PROVISIONS**

There are some general provisions which apply to members who act in the role of company director, charity trustee or member of an unincorporated body.

Members are under a duty to exercise independent judgment in the interests of the organisation in which they are involved. Whilst it is recognised that members may have a commitment to representing the Council on the Outside Body, they must be aware that it is their responsibility to decide on what view to take on any question before that organisation. For example, an instruction from the Council to vote one way

or the other would put the member in breach of his/her duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them without applying one's own judgment.

Where a member is involved in an outside organisation as a representative of the Council, he/she must declare that fact to the organisation.

Members must also ensure that avoidable loss is not incurred in managing the organisation concerned. They cannot avoid this responsibility by not reading the papers or failing to ask for the appropriate report. They will be expected to seek professional advice as appropriate.

Members who represent the Council in such circumstances need to familiarise themselves with the duties they will assume and any potential liabilities they may face. It is essential that they are aware of how to deal with any conflicts of interest that may arise and they need to be sure that the proper procedures have been followed in respect of appointments to the relevant organisation.

## **COMPANIES**

Companies can be:-

- ❖ Limited by shares, usually operating a trade or business. They have shareholders and distribute profits to shareholders as dividends.
- ❖ Limited by guarantee – or so called “not for profit” organisations, which have members rather than shareholders. This type of company may also be a charity.

Companies are separate legal entities which employ staff, enter into contracts and own land/property. The day to day business of a company is managed by its board of directors.

Companies offer limited liability. This means that the members or shareholders are usually not personally liable for the company's debts and liabilities, subject to limited exceptions.

The powers of the directors are usually set out in the company's Articles of Association. These are the rules that govern the internal management of the company.

## Duties of a Company Director

- **To act in good faith and in the best interests of the company when making decisions as a director.**

This means exercising your own, independent judgment on matters and whilst factors such as the views and wishes of the Council or your political group, may be taken into account, one should avoid slavishly following the council or party group line without considering all other relevant considerations. When making decisions about the company the law also requires you to consider the interests of employees as well as the interests of members/shareholders. In certain cases you may find that the best interests of the company and the Council conflict. Guidance on conflicts of interest is included in this guidance.

- **To exercise reasonable care and skill when making decisions as a director.**

A director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. Directors are not deemed to be experts but they are expected to use due diligence and to obtain expert advice if necessary. This is very similar to the Member/Officer relationship in terms of decision making and the provision and consideration of professional advice.

- **A fiduciary duty to act honestly and in good faith and in the best interests of the company as a whole.**
- **To act in accordance with the company's memorandum and articles of association, plus any other rules, regulations or bylaws that the company may operate pursuant to. Members/Officers should ensure that they have an up to date copy of these documents and are aware of their contents.**
- **To inform the board of a company if you have any direct or indirect interest in a contract the company is considering, proposing or entering.**

For example, this will include contracts between the company and the Council. These requirements are similar to those contained in the Code of Conduct governing the declaration of personal/prejudicial interests. In other words members must notify the other directors before the company makes a decision on the matter concerned and the member should not take part in any board discussions about the contract.

- **Not to make a profit from their positions within the company.**

You must therefore declare any interests you have (or those of your family/close associates) in relation to the company's contracts. Permission to vote on a particular matter would depend on the articles of association.

- **To comply with company law.**

Directors must ensure that the Companies Acts are complied with particularly in respect of the maintenance of accounts and the submission of statutory returns to the register of companies. Failure to do so incurs fines and persistent default can lead to disqualification as a director.

## **LIABILITIES OF A DIRECTOR**

### **What are the potential liabilities when acting as a director?**

Generally, in the absence of misconduct, directors have no personal liability for the debts they build up on the company's behalf. However, directors can be held responsible for certain types of activities they are involved in on behalf of the company, which could lead to a personal liability to other people or criminal liability. Some of the more serious wrongdoings that can arise are set out below:-

#### **Wrongful trading**

- This is where a director knows or is expected to know that the company is likely to go into liquidation and he or she fails to take action to reduce the amount the company owes to their creditors.
- In other words, the directors continue trading where there appears to be no possibility of the company being able to settle its debts with its creditors within a reasonable period of time of them becoming due. It is not an option for the director to do nothing; the director must take action to protect creditors as soon as he or she becomes aware, or should have been aware, of the risk of insolvency.
- When judging whether a director should have been aware of the risk, the court will expect every director to have at least the general knowledge, skill and experience which could be expected of someone in their position.

- If a director is found to have been wrongfully trading, a court can order him or her to personally contribute to the assets of the company when it goes into liquidation.

### **Fraudulent trading**

- This arises where there is a deliberate attempt to defraud creditors and the company then fails. There needs to be evidence that the director intended to defraud; mere omissions to act are not sufficient.
- This will involve the fraudulent trader deceiving his or her creditors into believing they will be paid on an agreed date. As well as having to personally contribute to the assets of the company when it is liquidated, fraudulent trading is also a criminal offence and may lead to fines and imprisonment.

### **Breach of a warrant of authority**

- This is where a director gives someone else the impression that he or she has authority to act on behalf of the company when in fact he or she hasn't.
- An example here would be entering into a contract for supplying goods or services.
- In these circumstances, because the director held him/herself out to have authority to sign a contract and commit the company (when s/he didn't have such authority), the other person involved can claim from the director personally any loss he or she has suffered as a result of the lack of such authority.

### **Personal guarantees**

- If directors have personally guaranteed a loan to the company and the company cannot meet the conditions of the loan, the lender may choose to enforce the guarantee against the personal assets of the directors who have given the guarantee.
- In extreme cases, directors may have to sell their homes to repay the company's debt or be declared bankrupt.

### **Acting as a director whilst disqualified**

- Any director who is guilty of acting as a company director whilst disqualified from acting as a company director will be liable for the company's debts that built up during that period.

### **Failing to maintain company records**

- All directors and officers of the company must maintain up-to-date records, both at Companies House and as part of the book-keeping arrangements for the company. If they do not do this, they will have to pay a fine.

### **The environment and health and safety issues**

- By law, civil or criminal proceedings may be taken against a director for the actions of the company in relation to environmental or health and safety matters. For example, acts of pollution.

## **PROTECTION AGAINST PERSONAL LIABILITY**

### **Can nominee directors protect themselves against personal liability?**

- Generally speaking, insurance cover can be put in place to protect directors in the proper and lawful conduct of their duties. However, it may not always be the most effective protection considering that the risks which are commonly regarded as the most serious (for example criminal liability and wrongful trading) are often excluded from insurance cover.
- The **Companies Act** gives companies the right to put in place liability insurance cover for their directors and officers, and the companies may pay the premiums. Companies need to make sure that the cover is suitable because this type of policy excludes dishonesty, fraud, slander, libel, pollution, and claims or actions resulting from a director trying to benefit personally.
- For professional directors (accountants, solicitors, architects and structural engineers) providing specialist knowledge and expertise to the board and the company, professional indemnity insurance may be available at a cost.

### **Can a local authority protect members and officers nominated as directors?**

The **Local Government Act 2000** allows the Secretary of State to make regulations giving local authorities powers to provide some protection for a member or officer acting as the Council's nominated director where a claim is brought against them because of some negligent act, or failure to act, in the course of carrying out their duties as Directors. . These regulations are set out in the **2004 Indemnities Order** which came into effect in November 2004.

The measures that a local authority can take are either:

- providing a specific indemnity to the officer or member; or
- securing the provision of an insurance policy; or
- both the above

Cover can only be provided by the authority where the officer or member has been specifically appointed by the authority to act as the Council's nominated director.

Cover cannot extend to acts by the member or officer regarded as criminal e.g. wrongful or fraudulent trading. It can be used to meet the costs of defending any criminal proceedings but if convicted; the costs of the defence must be reimbursed to the Council or Insurance Company.

Cover cannot be provided where there is intentional wrongdoing, fraud or recklessness. Neither can it be provided to fund an action for defamation brought by a member or officer against a third party. (although it can extend to defending an action for defamation brought against a member or officer by a third party)

The cover also extends to members or officers doing acts which are outside the powers of the authority (i.e. ultra vires) so long as they reasonably believed what they were doing at the time was within the powers of the authority.

### **The Local Authorities (Companies) Order 1995**

This Order sets out the rules concerning Councils' involvement in "regulated companies" which are subject to extensive controls.

Regulated companies are so defined if they are "controlled" or "influenced" by the Council. Influenced companies, under the effective control of the local authority, will be subject to capital finance regimes and special property controls.

Companies are local authority "influenced" if there is at least a 20% Council interest plus a business relationship with the company accounting for over 50% of the company's turnover and/or the company is located on local authority land, leased or sold for less than the best price reasonably obtainable. Companies are local authority "controlled" if there is a local authority interest in excess of 50% and the minority interest is less than 20%.

In particular Regulated Companies are subject to the following requirements;

- Comply with limits placed on remuneration paid to Directors who are also members of an authority which is a shareholder;
- Ensure that Member Directors who become disqualified from membership of an authority are removed from the Board;

## **Conflicts of interest**

Conflicts of interest may arise between the Council and a company. Even if the Council and the company have the same overall aims and objectives you cannot assume that their interests will always be the same. The legal position and your obligations remain the same even if the company has worthy objectives or is formed in response to a Council or government initiative.

Conflicts of interest may arise: -

- ❖ If the council is selling, donating or leasing land to the company.
- ❖ If the company and the council are negotiating a contract with each other.
- ❖ If the company is seeking funding from the council.
- ❖ If there is a dispute between the company and the council.
- ❖ If the company is tendering or negotiating to provide goods, services or works to the council.

Company law requires you to act in the best interests of the company but the Council will have nominated you as a director to represent or promote the Council's interests. Accordingly, if you are uncertain whether a conflict of interest exists you should seek advice from the Monitoring Officer as soon as possible.

If you think you have a conflict of interest you should: -

- ✓ Notify the Monitoring Officer;
- ✓ Notify the company's board of directors,
- ✓ Take no further part in the matter on behalf of the company.

## **Charities**

Charities may be created by registering any of the following with the Charity Commission.

- ❖ A Trust Deed – the Trustees become charity trustees
- ❖ A company limited by guarantee – the directors become charity trustees.
- ❖ An unincorporated association – the Management Committee become charity trustees

In order to qualify for a charitable status, the Commission must be satisfied that the organisation is operating for a charitable purpose. These are:

- The relief of poverty and human suffering
- The advancement of education
- The advancement of religion



Another purpose for the benefit of the community

An organisation which operates for political purposes cannot qualify for charitable status.

### **The Duties of a Charity Trustee**

Charity Trustees must:-

- Act strictly in accordance with the charity's constitution and rules.
- Act in the best interests of the charity.
- Manage the charity's affairs prudently
- Not derive any personal benefit or gain from the charity.
- Take proper professional advice on matters you are not competent to decide yourself.
- Ensure that the charity's bank accounts are operated by more than one person.
- Ensure the trustees have proper control of the charity's property and assets.
- Ensure that the charity keeps full and accurate accounting records.
- Spend charity income solely for the purposes set out in the charity's constitution.
- Ensure charity property is properly maintained and insured.

### **Personal Liability**

Personal liability may be incurred if a trustee:

- Acts outside the scope of the trust deed
- Falls below the required standard of care
- Makes a personal profit from the trust assets

Personal liability to a third party may arise because a charitable trust, unlike a company, is not a separate legal entity.

### **Unincorporated Associations / Bodies**

Organisations which are neither charities nor companies are referred to as unincorporated associations. They usually operate pursuant to a constitution or set of rules defining the organisation's responsibilities and those of its members.

The affairs of an unincorporated association are usually governed by a management committee in accordance with the constitution of that organisation or agreed rules of procedure.

Unincorporated associations cannot do any of the following in their own name:

- Enter into contracts
- Own land
- Employ staff

Members of the organisation's management committee must act in accordance with its constitution and must take reasonable care in exercising the organisation's powers.

Generally, the members of the management committee are liable for the acts of the organisation but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall.

Members of a management committee will have personal liability if they act outside the authority given to them or if they do not comply with the relevant legal obligations.

### **Unincorporated associations – Duties**

As a matter of good practice members appointed to represent the Council on an unincorporated association (body or organisation) must:

- Act in the best interests of the association
- Use reasonable care and skill when involved in decision making on behalf of the association
- Act in accordance with the association's rules or constitution.

Members/officers are therefore encouraged to:

- Clarify the extent of any limits to their power to act on behalf of the Council
- Notify the Monitoring Officer if the association is proposing to take a course of action which is disadvantageous to the Council or which seems to involve considerable risk
- Ensure the association has clear rules and procedures for decision making, particularly for entering into contracts.

### **The Members Code of Conduct**

#### **Duty to Observe the Code**

Members are obliged to observe the provisions of the Code whenever they conduct the business of the authority including when they act as a representative of the authority except and insofar as it conflicts with any other lawful obligations to which that body is subject. So the position is that a Member would not be in breach of the Code in circumstances where they take action which would

normally constitute a breach but they are legally obliged to act in that way as a result of their position within the outside body.

It is not easy to imagine such circumstances but one example might be where an authority was proposing to take action which would have an extremely adverse effect on the financial wellbeing of a company on which a Member sat as a Director. If the Member was privy to the information concerning the authority's plans he may find himself in a position where he was compelled to disclose this potentially confidential information to the company due to his fiduciary duty to the company itself and duties arising under the companies act to avoid trading when insolvent. This is an extreme example but one which could feasibly arise.

## **PERSONAL AND PREJUDICIAL INTERESTS**

Personal Interests these are covered in paragraph 8 of the Code and are set out below:-

A member will have a personal interest in any business of the authority where either it relates to or is likely to affect –

- (a) any body of which the member is a member or in a position of general control or management and to which the member has been appointed or nominated by the Authority;
- (b) any body which exercises functions of a public nature, is directed to charitable purposes or if its principal purpose includes influencing public policy or opinion. (including any political party or trade union) and the member is in a position of general control or management.
- (c) Any employment or business carried on by the member
- (d) Any person or body who employs or has appointed the member
- (e) Any person or body, other than a relevant authority, who has made a payment to you in respect of your election or any expenses incurred by the member in carrying out the member's duties.
- (f) Any person or body who has a place of business or land in the authority's area, and in whom the member has a beneficial interest in a class of securities of that person or body that exceeds a nominal value of £25,000 or one hundredth of the total issued share capital (whichever is the lower).
- (g) Any contract for goods, services or works made between the authority and the member of firm of which the member is a partner, a company of which the member is remunerated director, or a person or body of the of the description of paragraph (f) above.
- (h) The interests of any person from whom the member has received a gift or hospitality with an estimated value of £25;
- (i) Any land in the member's authority's area in which the member has a beneficial interest

- (j) Any land where the landlord is the member's authority and the member is a firm in which the member is a partner, or remunerated director or a person/body of the description set out in paragraph (f) above is the tenant;
- (k) Any land in the authority's area for which the member has a licence (alone or jointly with others) to occupy for 28 days or longer or;
  - (i) a decision in relation to that business might reasonably be regarded as affecting the member's well being or financial position or the well being or financial position of a relevant person to a greater extent than the majority of –
  - (ii) other council tax payers, rate payers or inhabitants of the electoral division or ward, as the case may be, affected by the decision.

A 'relevant person' is a member of the member's family, or any person with whom the member has a close association; or any person/body who employs or appoints such person, any firm in which they are a partner or company in which they are directors or any person/body in whom such persons have a beneficial interest in a class of securities exceeding the nominal value of £25,000 or any body of a type described in (a) or (b) above.

## **REPORTING ARRANGEMENTS**

Members who represent the Council on outside bodies are required to submit a written report to either full council or Executive, at least annually, on the activities of the organisation.

The purpose of the reporting arrangements is to ensure that members are fully informed of the activities of the outside body or organisation concerned, the nature of the organisation's activities and the impact of such activities on the local community and Council service delivery.

Frequency of reporting will be annual, unless exceptional circumstances require a further report. Reports will be submitted in writing by the Elected Member and, so far as is reasonably practicable, limited to one side of A4.

## **Further Advice**

Advice on the application of this protocol should be sought from the Monitoring Officer.