

# Legal Update: The Companies Act



MCCLURE NAISMITH

Solicitors

GLASGOW EDINBURGH LONDON



## NOMINEE DIRECTORS: INHERENT CONFLICT?

### *Codification - A Step Forward?*

It has been widely publicised that the Companies Act 2006 codified directors' duties including, importantly, the duty to avoid a conflict of interest. How does a nominee director, appointed on behalf of an investor (to protect the interests of the investor) comply with these duties? It is a fundamental principle of company law that a director must act in the best interests of the company but how does this square with the appointment of a nominee director? Can a nominee director comply with his duties under the Act whilst carrying out the role he has been appointed to do on behalf of the investor?

The answer to this is not apparent from the terms of the Act (which does not specifically cater for nominee directors) and although recent case law sets out that a nominee director can act in the interests of his appointer this is only to the extent that these interests are not incompatible with the duty to act in the best interests of the company. The legal position is arguably at odds with the perception and practicality of an Investor director's role but

there are practical steps which nominee directors and companies can take to minimise the potential risk arising from this inherent conflict.



### *Duty to Avoid a Conflict of Interest*

This widely drafted duty applies in particular to the exploitation of **any property, information or opportunity** and applies whether or not the company has taken advantage of the opportunity and whether or not the director became aware of the information or opportunity as a result of his appointment as a director. Whilst previously directors may have excused themselves from meetings or looked to obtain shareholder consent, the Act now places an absolute duty on directors to **avoid** conflicts of interest. Nominee directors need to be particularly aware of the new conflict provisions which represent a potential hazard for them.

### *Practical Tips on Compliance*

So how do you comply? A director will not be in breach of the Act: i) if the situation 'cannot reasonably be regarded as likely to give rise to the conflict'; or ii) where the matter has been authorised by the directors of the company. Alterations to the company's Articles and/or shareholder approval may be required to permit the directors to authorise a conflict and advice should be taken in order to utilise this.

Any meeting of the directors held to authorise a conflict must be quorate without counting the interested director and any authorisation of the conflict must be made without the vote of the director concerned. Consideration should be given to whether this will cause any practical difficulties in authorising a conflict situation and if so the company's Articles may need to be altered to remedy this or shareholder approval may be required to ratify a conflict.

The following points for action should be considered:

### Points for Action

- Identify actual or potential conflict situations (including those of connected persons)
- Update Articles and pass ordinary resolution (if required) to permit authorisation of conflicts
- Review Articles of Association, internal decision-making and recording procedures
- Review training given to new and existing directors
- Minute all decisions adequately
- Review Service Agreements
- Review Board composition of group companies and review Articles and Shareholders Agreements if required
- Review D & O Insurance cover (in light of new duties)
- Take independent legal advice early



**MCCLURE NAISMITH**  
 Solicitors  
GLASGOW EDINBURGH LONDON

**EDINBURGH**  
 3 Ponton Street  
 Edinburgh EH3 9QQ  
 DX: ED135  
 T: +44 (0) 131 228 4994  
 F: +44 (0) 131 228 4260  
 edinburgh@mcclurenaismith.com

**GLASGOW**  
 292 St Vincent Street  
 Glasgow G2 5TQ  
 DX: GW64  
 T: +44 (0) 141 204 2700  
 F: +44 (0) 141 248 3998  
 glasgow@mcclurenaismith.com

**LONDON**  
 Equitable House  
 47 King William Street  
 London EC4R 9AF  
 T: +44 (0) 20 7929 3770  
 F: +44 (0) 20 7929 3466  
 london@mcclurenaismith.com

[www.mcclurenaismith.com](http://www.mcclurenaismith.com)



For further information in relation to the above please contact:

George Frier	<a href="mailto:gfrier@mcclurenaismith.com">gfrier@mcclurenaismith.com</a>	0141 303 7797
Stewart Whyte	<a href="mailto:swhyte@mcclurenaismith.com">swhyte@mcclurenaismith.com</a>	0141 303 7795
Alison Clarke	<a href="mailto:aclarke@mcclurenaismith.com">aclarke@mcclurenaismith.com</a>	0141 303 7800

Or visit our website at [www.mcclurenaismith.com](http://www.mcclurenaismith.com)

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