

**Guide to Directors' Conflicts of Interest
and Declarations of Interest
following implementation of
the Companies Act 2006**

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Guide to Directors' Conflicts of Interest and Declarations of Interest following implementation of the Companies Act 2006

1 Introduction

This guide is to help directors understand their duties, with effect from 1 October 2008, under Companies Act 2006 ("Act") to:

- avoid conflicts of interest;
- declare their interest in existing and proposed transactions or arrangements with the company; and
- not accept benefits from third parties.

Appendix 1 summarises all of the codified directors' duties brought into force by the Act, including those in relation to conflicts of interest and acceptance of benefits.

Please read the contents of this guide carefully and complete the declaration of interests and authority attached as Appendix 3 and return it to the LEP Secretariat at the address below as soon as possible

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The duty to avoid conflicts of interest

From 1 October 2008, a director has a duty under section 175 of the Act to 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 of which he is a director unless:

- the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
- the matter is authorised in advance by other directors who do not have a similar conflict of interest.

This duty to avoid a situation in which a director has or possibly may have a conflict of interest ("situational conflict") does not apply to a conflict of interest arising in relation to a transaction or arrangement between the director and the company ("transactional conflict"), to which different rules apply (see section 2 below).

A conflict of interest includes a conflict between a director's personal interest and his duty as a director, as well as a conflict between the duties he owes to different companies of which he is a director.

The duty to avoid situational conflicts applies in particular to the exploitation by the director of any property, any information or an opportunity which either belongs to the company or is in the company's normal line of business, regardless of whether or not the company could have taken advantage of it.

It is not necessary for the director to have any control or management influence over a particular situation for a situational conflict to arise.

A personal interest of a director may include indirect interests arising from the interests of a range of persons who are deemed by the Act to be connected with the director. Appendix 2 lists the categories of "connected persons" and gives guidance on identifying an interest.

A director must disclose a situational conflict and obtain board authorisation before he allows it to arise.

Failure to disclose a situational conflict is not a criminal offence but may give rise to a civil claim by the company against a director to account to the company for any profit made by him or his connected persons or for any loss suffered by the company, in either case as a result of the undisclosed situational conflict.

In the case of a private company incorporated before 1 October 2008 directors may only authorise a situational conflict if an ordinary shareholder resolution is passed authorising them to do so. In the case of a public company, directors can only authorise a situational conflict if its articles of association specifically allow for authorisation of conflicts by the board (and, if necessary, have been altered by special shareholder resolution in order to do so).

The process for identifying, disclosing and, possibly, authorising situational conflicts is not intended to be a substitute for managing an actual conflict of interest if one arises, for example, by excluding the conflicted director from board meetings and discussions and not sending him certain board papers (see section 5

below for further information on authorisation of situational conflicts and management of conflicts of interest).

Examples of where situational conflicts may arise are:

- if a director of the company is a competitor of the company;
- if a director of the company is a major shareholder in the company;
- if a director of the company is a customer of, or a supplier to, the company;
- if a director of the company owns property adjacent to the company's property, the value of which could be affected by the activities of the company;
- if a director of the company has an advisory relationship (for example, financial or legal) with the company or a competitor of the company;
- if a director of the company is a director of the company's pension trustee company;
- if a director of the company is interested in taking up an opportunity that had been offered to, but declined by, the company;
- if a director of the company is appointed as a director of another company which competes with, is a major shareholder in, is a customer of or a supplier to, owns property adjacent to, or has an advisory relationship with the company;
- if a director of the company is appointed as a director of another company that is interested in taking up an opportunity that had been offered to but declined by the company;
- if a director of the company is a shareholder in a competing company or a company that is customer of or a supplier to the company;
- if a director of the company is nominated to represent the company on the board of a joint venture company in which the company has invested;
- if a director of the company sits on the board of a statutory or non-statutory body which has a relationship with or advises the company or one of its subsidiaries;
- if a director of the company is in a situation where he can make a profit as a result of his directorship, whether or not he discloses this to the company;
or
- if a director of the company is a director of another company which the company is proposing to acquire or which is proposing to make an offer for the company.

In each example, reference to a "director" includes the director's connected persons (see further Appendix 2 below).

2 The duty to declare a personal interest arising in relation to a transaction or arrangement between the director and the company

Conflicts arising in these circumstances are covered by two separate provisions of the Act:

- under section 177, a director has a duty to declare an interest, either direct or indirect, in a proposed transaction or arrangement with the company (a transactional conflict); and
- under section 182, a director must declare an interest, either direct or indirect, in an existing transaction or arrangement with the company, unless he has already declared that interest under section 177,

unless, in either case, the interest cannot reasonably be regarded as likely to give rise to a conflict of interest or if, and to the extent that, the other directors are already aware of it or ought reasonably to be aware of it.

Failure to declare a transactional interest may give rise to a civil claim against a director of the same kind as described in section 1 above. In addition, failure to declare an interest in an existing contract under section 182 is a criminal offence punishable by a fine.

A situation in which a director has or possibly may have a conflict of interest that initially falls within section 175 (a situational conflict) may evolve into a matter falling within section 177 (a transactional conflict), in which case section 175 will no longer apply. For example, if a director of the company is also on the company's list of preferred suppliers, that relationship may fall within section 175, but the proposed entry into of a supply contract between the company and the director would then fall within section 177.

The declaration of an interest in a proposed transaction (governed by section 177) must be made in advance of the transaction being entered into, whereas the declaration of an interest in an existing transaction or arrangement (governed by section 182) must be declared as soon as reasonably practicable, in both cases to the other directors, either at a board meeting or by a written notice. Care may be needed if a declaration is made at a meeting where not all other directors are present; written notice to absent directors may be required (possibly in the form of copy board minutes). Notice may be given by email to directors who have agreed to receive notices in this way.

The interested director will need to provide the other directors with sufficient details of the nature and extent of his personal interest as are necessary for them to assess and to decide how to address the matter.

3 The duty not to accept benefits from third parties

Under section 176 of the Act a director 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 a director, unless the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

A third party means a person other than the company of which he is a director and any other company within the company's group.

The acceptance of a benefit which would breach a director's duty under section 176 cannot be authorised by the company's board of directors.

If a director is in any doubt whether a benefit is permitted he should [refer to the company's entertainment policy and/or] [seek guidance from [the Company Secretary]].

4 Authorisation of situational conflicts and management of conflicts of interests

Board authorisation of a situational conflict under section 175 is required before it can be allowed to arise. There is no statutory requirement for authorisation or approval of an interest in a transaction or arrangement declared by a director under sections 177 or 182, although the board will usually want to consider the implications of a declaration and take appropriate steps to manage any actual conflict of interest which is apparent from it.

In the following circumstances, board authorisation of a situational conflict will not be possible:

- in the case of a public company, because its articles of associations do not permit it or, in the case of a private company incorporated before 1 October 2008, because a shareholder resolution has not yet been passed to allow board authorisations (see section 2 above);
- if a director has already allowed a situational conflict to arise in breach of section 175 as retrospective board authorisation is not permitted by the Act; or
- if there are insufficient non-conflicted directors to convene a quorate board meeting to consider authorisation of the conflict.

In those circumstances, if the company wishes to approve the conflict situation, it must pass a shareholder ordinary resolution to do so. Neither the conflicted director nor his connected persons will be able to vote any shares in the company held by them in favour of such an approval resolution.

The following matters should be considered by a board when considering authorising a situational conflict:

- only non-conflicted directors can count towards the quorum and vote on any resolution giving the authorisation;
- although the task of reviewing authorisations and making recommendations may be delegated to a committee, authorisations should be granted at a quorate meeting of the full board;
- in taking the decision on whether or not to authorise a conflict the directors must exercise independent judgment and act in a way they consider, in good faith, will be most likely to promote the company's success for the benefit of its members as a whole; and
- the interested director(s) should normally be excluded from all discussions concerning the situational conflict and all related voting.

If it is decided to authorise a conflict, then a board should also consider if it is appropriate to attach any limits or conditions to the authorisation. Matters that may be relevant are:

- where the director is connected with a third party, an acknowledgement that where he obtains information that is confidential to that third party, he will not be obliged to disclose that information to the company or use it in

relation to the company's affairs in circumstances where to do so would amount to a breach of that confidence;

- confirmation from the director that any confidential information of the company relating to the situational conflict will not be disclosed to any third party;
- an acknowledgement that the interested director will not be in breach of duty when the relevant situation arises due to his being a director, secretary or shareholder of any group company of the company; and
- where the interested director takes mitigating action when the actual relevant situation arises by agreeing not to receive related board papers or other information and not to attend board discussions (or participate in votes on the relevant matter) he will not be in breach of duty in respect of the relevant situation.

5 Declarations of interest

Each board of directors will need to consider the situation of each of its directors to determine if there are:

- any actual or potential situational conflicts that need to be disclosed to and authorised by that board; and/or
- any direct or indirect interests in proposed or existing transactions with the company.

Directors will therefore be requested to complete declaration of interest [and authority] forms and return them to the [Company Secretary]. The forms will be in three parts:

Part 1 will list the directorships and other relevant situations of which the company is already aware.

Part 2 is for the director to add any directorships and other relevant situations not listed in Part 1, including the nature and extent of any direct and indirect interest and any background information that the director considers may be relevant to the board's assessment.

Part 3 is for the director to notify of any direct or indirect interests in proposed or existing transactions with the company. This can be a general notice that the director is also a director or shareholder in another organisation or otherwise is directly or indirectly interested in it, and should be regarded as interested in any transaction or arrangement with that organisation. Again, the director should give details of the nature and extent of the interest.

A personal interest of a director may include an indirect interest arising from the interest of a connected person (see section 2 below).

Directors will need to consider carefully whether any of their connected persons hold positions of which they are aware that:

- (a) conflict or possibly may conflict with the interests of the the company leading to them being in breach of section 175 of the Act, unless declared to and authorised by the board; or
- (b) mean that the director is directly or indirectly interested in a proposed transaction or arrangement which must be declared to the directors in accordance with section 177 of the Act before such transaction or arrangement is entered into; or
- (c) mean that the director is directly or indirectly interested in an existing transaction or arrangement which must be declared to the directors in accordance with section 182 of the Act as soon as reasonably practicable.

Appendix 2 contains guidance to assist directors in identifying connected persons and interests.

If a director is in doubt as to whether an interest needs to be included he should seek guidance from the [Company Secretary].

Appendix 1

Directors' General Duties under the Companies Act 2006

s.171 Duty to act within powers (in accordance with company's constitution)

s.172 Duty to promote the success of the Company

A director must act in a way he considers in good faith, would most likely promote the success of the Company for the benefit of its members as a whole, and in doing so have regard to:

(a) the likely consequences of any decision in the long term;

(b) the interests of the Company's employees;

(c) the need to foster the company's business relationships with suppliers, customers and others

(d) the impact of the company's operations on the community and the environment

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

s.173 Duty to exercise independent judgment.

s.174 Duty to exercise reasonable care, skill and diligence.

s.175 Duty to avoid a conflict of interest.

s.176 Duty not to accept benefits from third parties.

s.177 Duty to declare interest in proposed transaction or arrangements.

s.182 Duty to declare interests in existing transactions or arrangements.

The section 175, 176, 177 and 182 duties are not infringed if the interest, or in the case of section 176 the acceptance of the benefit, cannot reasonably be regarded as likely to give rise to a conflict of interest.

Appendix 2

Connected persons and interests

Persons connected with a director

- the director's spouse
- the director's civil partner
- any other person (a "Partner"), whether of a different sex or the same sex, with whom the director lives as partner in an enduring family relationship (but not grandparents, grandchildren, siblings, aunts, uncles, nieces or nephews)
- the director's children or step-children (including adults)
- the children or step-children of a Partner if they live with the director and are under the age of 18
- the director's parents
- a company if the director and his connected persons together can exercise more than 20 % of the voting power at a general meeting of the company
- a person acting in his capacity as a trustee of a trust the beneficiaries of which include the director, his family members or a connected company (excluding a trust for employees' share scheme or pension scheme)
- a person acting in his capacity as a trustee of a trust the terms of which confer a power on the trustee that may be exercised for the benefit of the director, his family members or a connected company (excluding a trust for employees' share scheme or pension scheme)
- a person acting in his capacity as partner of the director, his family member, a connected company or a connected trustee
- a firm which is a legal person and in which a partner is the director, his family member, a connected company or a connected trustee
- a firm which is a legal person and in which a partner of that firm is itself a firm in which the director (or his family member or a connected company or a connected trustee) is a partner.
- Are you in a position such that you (or another company you are a director or material shareholder of) could make a profit as a result of your directorship of the company of which you are a director?
- Do you know of any other circumstances that could give rise to a potential or actual conflict of interest or duties?

Matters to take into account

There is no breach of duty when a situation cannot reasonably be regarded as likely to give rise to a conflict of interest. To identify situational conflicts, directors may find it helpful to ask themselves the following questions:

- Is your role/connection with the third party likely to prevent you, when acting as a director of the company of which you are a director, from giving sole consideration to the interests of that company?
- Is your role/connection with the other party likely to involve consideration of actions that could be adverse to the interests the company of which you are a director or to put you in a position where information that you know as a result of being a director of the third party would be relevant to the decision to be taken?
- Are you part of the decision making process of the third party?
- Particularly in relation to any perceived conflict, what is the justification for the company of which you are a director to authorise it?
- Do the interests of the two companies compete, either in their product markets or in relation to strategic opportunities?
- Would the activities undertaken in one role be likely to have a material impact on the other?

Appendix 3

Pro forma Declaration of Interests [and Authority]

In order to assist you in complying with sections 175, 177 and 182 of Companies Act 2006 please list any existing interests in the declaration form below and return to us

Part 1 - Direct or indirect interests which conflict or possibly may conflict with the interests of the proposed Company to assume the activities of The Greater Birmingham and Solihull Local Enterprise Partnership Limited

Name of entity	Nature and extent of conflict/possible conflict (e.g. yours or connected persons' directorship/shareholdings etc)
Tamworth Borough Council	Currently Leader of Tamworth Borough Council. Potential conflict in regards Economic aims of GBSLEP
Stoke on Trent and Staffordshire LEP	Currently a Board member of this LEP. Potential conflict in regards Economic aims of GBSLEP


Part 2 - Directorships and other relevant situations not listed in Part 1

Name of entity	Nature and extent of Interest (position e.g. yours or connected persons' directorship/shareholdings etc)
<u>None I am aware of</u>	

am a director, I will disclose that interest or interests and seek prior authorisation from my fellow directors.

In relation to declarations of interest by other directors of companies of which I am a director made by notice in writing to me in accordance with section 184 Companies Act 2006 I hereby irrevocably:

- agree to receive such notices by electronic means at [INSERT EMAIL ADDRESS] (or such other email address as I shall notify to Mark Rogers in writing from time to time); and
- authorise the Company Secretary to receive such declarations on my behalf, on the understanding that copies will be forwarded to me in due course.

Signed 

Print Name DANIEL C. COOK

Date 28TH NOVEMBER 2016

