Becoming a Director?

BECOMING A DIRECTOR?

Sean Geraghty, Christopher Brierley
and Krysia Cywinski
London Corporate and Securities
Group

Reprinted February 2009

Dechert LLP
160 Queen Victoria Street
London EC4V 4QQ
Tel: +44 (0) 20 7184 7000
www.dechert.com

1. INTRODUCTION

You have been invited to become a company director for the first time. Perhaps you are the company's sales manager or financial controller and the chairman has offered you promotion and a seat on the board. Perhaps you are a professional man or woman with a friend who runs a small family company and who has asked you to help out. Or maybe you have retired from an active career in which you established a good reputation and have been offered a non-executive directorship of a well-known public company.

In all these cases you may feel flattered by the offer. Your inclination may be to accept and enjoy the prestige, power and status linked to the title of company director. And there is the money – and perhaps the perks – to take into account as well. All very tempting. But do you know what your duties will be as a director? Must you attend board meetings? What if the company loses money or becomes insolvent? Could you find yourself criminally liable for certain activities of the company? Are your responsibilities set out by law?

In almost all cases where directors have been legally disqualified from acting, the people concerned got into trouble because they did not know what their duties as directors were and, in particular, disregarded the interests of the company's creditors. Others found their lives in ruins as a result of prosecutions or official inquiries.

This booklet is intended to explain what you are letting yourself in for. If you read it carefully and follow its advice you will be better placed to know whether or not to accept the offer. If you do accept you will be far less likely to find yourself in difficulty.

This booklet deals with the law as in force in England on 31 January 2009. It is not designed to be a comprehensive guide and cannot be relied upon as a substitute for detailed advice on the specific circumstances of a particular situation. If you would like any further advice or explanation relating to your responsibilities, please feel free to discuss these points with us.

2. WHAT ARE MY POWERS?

Your powers are summarised in the company's memorandum and articles of association – the documents which are in effect the company's constitution. Generally, the management of the company will be entrusted to the board of directors and you will share your powers with the other directors. Very often the board will delegate wide powers of day-to-day management to a managing director or an executive committee, and where this is the case the powers (but not the responsibilities) of the other directors will be lessened.

Whatever powers are entrusted to you, they must be exercised in the way and for the purpose for which they were intended. This is the case even if you think it in the company's best interests to use those powers in some other way. For example, the directors may have been granted a power to issue shares for the primary purpose of raising capital for the company. It could be a misuse of that power if the directors issued shares to block a takeover bid or to dilute the holding of a difficult majority shareholder.

3. WHAT ARE MY DUTIES?

The Companies Act 2006 (the 2006 Act) sets out, for the first time, a statutory basis for the general duties owed by you as a director to your company. There are seven such codified duties, as follows:

1. Duty to promote the success of the company

When considering how to act in the way which would be most likely to promote the success of your company, you should have regard to the following factors as set out in the 2006 Act:

- the likely consequences of any decision in the long term;
- the interests of your company's employees;
- the need to foster your company's business relationships with suppliers, customers and others;
- the impact of your company's operations on the community and the environment;
- the desirability of your company maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members of your company.

Notwithstanding this list of factors (which is non-exhaustive), you should remember that your key concern should not be to aim to have ticked off each and every item, but rather to consider properly how best to execute your judgment as a director in good faith, assessing properly what implications any action you take may have.

2. Duty to act within powers

To act within powers, you have a duty to comply with:

- your company's articles of association;
- decisions taken in accordance with your company's articles; and
- decisions taken by your shareholders where they are decisions of the company.

3. Duty to exercise independent judgment

You must exercise your judgment independently. This does not mean that you cannot take and rely

on advice, but you must exercise your own judgment in deciding whether to follow such advice. Further, you cannot do anything to fetter the future exercise of your discretion unless you are acting in accordance with an agreement duly entered into by the company, or in a way authorised by the company's constitution.

4. Duty to exercise reasonable care, skill and diligence

As a minimum, you owe a duty to your company to exercise the same standard of care, skill and diligence that would be exercised by any reasonably diligent person who has the same knowledge, skill and experience that might reasonably be expected of someone carrying out the same functions as you, as director. This objective assessment is supplemented by a subjective level of assessment of conduct: if you have specialist knowledge, that knowledge will also be attributed to the "reasonably diligent person".

5. Duty to avoid conflicts of interest

You have a duty to avoid any situation in which you have, or can have, a direct or indirect personal interest that conflicts, or could conflict, with the interests of the company, particularly applying to the exploitation of any property, information and opportunity, regardless of whether or not the company could take advantage of it. Unless the board has given prior authorisation, you must not let any such situation arise. It may also be necessary to consider the interests of those connected to you (broadly, your spouse, partner and children and step-children) as this may constitute an indirect interest.

You also have a duty to declare any interest you may have in a proposed or existing transaction or arrangement. You have a duty to keep the board updated of any changes in your transactional interests.

6. Duty not to accept benefits from third parties

You cannot accept a benefit from a third party which is offered to you because you are a director, or in connection with you doing (or not doing) anything as a director. Because this relates to third parties, any benefits from your company are excluded. It is possible under the company's articles of association to ensure that directors may

legitimately receive third party benefits up to a certain value.

7. Duty to declare interest in proposed transaction or arrangement with the company

You have a duty to declare to the board the nature and extent of any interest, direct and indirect, in any proposed transaction or arrangement with the company. It is important to note that you need not be a party to the transaction for this duty to apply; if you have an interest in someone else so transacting, you must notify the board.

However, no declaration is necessary if any of the following apply:

- where you are not aware of your interest or of the transaction (but this is subject to a reasonableness test: you will be treated as being aware of matters of which you ought reasonably to be aware);
- if the interest cannot reasonably be seen as giving rise to a conflict of interest or if the other directors are already aware of it; or
- if you are the only director of the company.

You owe your duties to the company, and only the company will be able to enforce them, but shareholders may be able to bring a derivative action on the company's behalf.

4. HOW SHOULD I EXERCISE MY POWERS/DUTIES?

Further to the codified duties as set out in the 2006 Act, you are expected to act in accordance with the principles which have developed on a case by case basis over many years.

As a director you have a duty to act in good faith. That means you must act in what you honestly consider to be the best interests of the company. You should therefore always have regard to the interests of current shareholders, future shareholders and the company's employees. If the company is or could be insolvent you must also consider, before the interests of shareholders, the interests of the company's creditors.

You will be expected to exercise a certain degree of skill and care in the performance of your powers and duties as a director. The degree of skill expected from you will depend on your knowledge and experience. If you fail in this respect a court may find you negligent.

A director will be expected to carry out his duties responsibly. If you are a non-executive director it may not be necessary for you to attend every board meeting and to be involved in the day-to-day running of the company but you should be aware of and understand the reasons behind any major transactions.

You should also always be aware of the financial position of the company. If you are an executive director you should give your continuous attention to the company's affairs. Even if you are able to delegate some of your duties you must adequately supervise those delegated responsibilities.

5. COMPANY CONTRACTS – CAN I HAVE AN INTEREST?

As previously noted, the general rule is that a director must not put or seem to put himself in a position where there is an actual or potential conflict between his personal interests and his duty to the company.

This note has already discussed your duty to declare any interest you have in a proposed transaction with the company. You must also declare to the board your interests in an existing transaction or arrangement with the company; if you fail to do so, you are liable to be fined up to £5,000. Again, if you are a sole director you need not make any declaration.

Broadly, a director may not have an interest in a contract to which the company is a party. This restriction applies whether the interest is a direct one, where you are a party to the contract, or an indirect one, for example where you are a shareholder in a company which is a party to the contract.

This general restriction is often modified by a company's articles of association which may provide that you can retain an interest in a transaction involving the company if you disclose your interest to the board of directors. This disclosure must be to the full board. It is not sufficient to disclose the interest merely to a fellow director or a committee of the directors.

You should also check the articles of association for any restrictions which may preclude you from voting or forming part of a quorum in respect of a resolution in which you have an interest.

You must always disclose to the board any interest you may have in a contract or proposed contract with the company. If the interest is material it must be disclosed in the company's accounts. Prior approval by shareholders of any substantial transaction with a director or in which a director is interested is also required.

To avoid a conflict of interest never put yourself in a position where you cannot comply with your duties to the company.

6. CAN I MAKE A PROFIT FROM MY POSITION AS A DIRECTOR?

You may receive a fee and other benefits from the company (or its holding company or subsidiaries) for carrying out your duties as a director. If you are an executive director you will be entitled, in addition to any fee you may receive for carrying out your duties as a director, to a salary or other remuneration from the company for performing the duties of your employment. Your rights and obligations as an employee will be set out in your contract of employment or service agreement with the company.

You may not accept any benefit from a third party conferred by reason of being a director or doing (or not doing) anything as a director, even if you are acting honestly and for the good of the company. However, a benefit may be accepted where its acceptance cannot reasonably be regarded as likely to give rise to a conflict of interest.

But do not despair. This general rule again is often modified by a company's articles of association which may state that a director, having disclosed an interest in a contract or arrangement with the company, will not be liable to account for any benefit which he receives from it. A company's articles of association may specifically permit the acceptance of benefits under a certain level to allow, for example, the acceptance of corporate hospitality.

You will, of course, have to account to the company for profits you receive through the misappropriation of any assets of the company. Misappropriation includes the use of confidential information of the company for your own personal advantage.

As a director you will have an obligation to make good any loss to the company in cases where the company's assets have been misapplied either by you or with your approval. Allegations of misapplication may arise in circumstances where the directors of a company have disposed of assets at less than their market value or used a company's funds for the wrong purposes.

A practical aspect of this rule is that you may find yourself personally liable for the amount of any cheque or order you sign on behalf of the company which does not mention or incorrectly mentions the company's name.

7. CAN I HAVE MORE THAN ONE JOB?

Restrictions may be imposed on you in your service agreement, if you have one. The most common restraint is to stop you doing other work. If you do not have a service contract or if it does not contain such a restraint you should bear in mind that you have a duty to act in the best interests of the company and, if your other job creates any conflict of interest or prevents you fulfilling your role as a director with sufficient skill and care, you should think carefully about whether to give up your directorship or other employment. It is common for non-executive directors to hold such directorships for a number of companies.

If you have directorships of more than one company, it is best practice to enquire whether your employer has a code of conduct for or procedure for notification of external interests.

Some restraints contained in your service agreement will apply even after your employment with the company has ended. The most common are prohibitions against soliciting customers of the company or other employees of the company or against setting up in direct competition with the company. These restraints (which are normally restricted in time and geographic scope) will be void unless they are reasonable, but never act in any way which might be a breach until you have been advised that you are able to do so.

You should always take advice before you sign any service contract and make sure that you are well aware of the terms which may affect you both during and after your employment.

8. WHAT ARE MY DUTIES IN RELATION TO THE ACCOUNTS?

A company must keep accounting records which are sufficient to show and explain the company's transactions and to disclose with reasonable accuracy the financial position of the company at any time. If a company fails to do this every officer who is in default, and this could include you as a director, is guilty of an offence, rendering you liable to a fine, imprisonment or both, unless you can show that you acted honestly and that in the circumstances the default was excusable.

Your ignorance of, or lack of interest in, the company's financial position is unlikely to excuse an offence.

As a director you have a duty, with your fellow directors, to prepare accounts of the company for each financial year. These accounts should give a true and fair view of the financial state of the company in accordance with relevant financial standards. You should not rely on your auditors to comply with this duty for you. They will only know what they have been told by you and your fellow directors.

The company's accounts must be approved by the board of directors. It will be assumed that you are a party to this approval unless you can show that you took every step possible to prevent the accounts being approved. Therefore, if you disagree with the accounts you should take action and if you do not understand them you should get them explained to you. You must ensure that you are satisfied personally with the company's accounts.

9. WHAT ARE THE COMMON OFFENCES COMMITTED BY DIRECTORS?

Most offences committed by directors arise from carelessness or ignorance. Below is a summary of the more common offences. You must also comply with various statutory requirements and may find yourself criminally liable if you do not.

Mis-statements

Be careful not to make any false or misleading statements or to permit the inclusion of a false or misleading statement in any documents issued by the company. If you allow such a statement you are committing a criminal offence. You will also commit an offence if you make an oral or written statement which is misleading, deceptive or false or which conveys a misleading impression to the company's auditors. This offence will not only affect you and possibly lead to your disqualification but it could also affect the credibility of the company generally. You may also face civil proceedings for misrepresentation if a third party has suffered loss as a result of such false or negligent statements.

Unauthorised payments

Any unauthorised payments by a company which are fraudulent carry a criminal penalty. Other types of payments by the company are also prohibited, such as payments to directors for loss of office made without shareholders' consent. If you receive a payment in connection with a take-over, details must normally be circulated to shareholders.

Loans to directors

Loans to directors of a company or of its holding company must be approved by shareholders. The same restriction applies to guarantees or other security provided in connection with a loan made by any person to any such director. There are certain exemptions to these restrictions, including loans to provide a director with funds to meet expenditure incurred to enable him to perform his duties and expenditure in connection with regulatory action or investigation.

Miscellaneous statutory requirements

The Companies Act 1985, the Companies Act 2006 and the Financial Services and Markets Act 2000 (FSMA) each contain a wide variety of statutory requirements many of which have already been touched on above. Other

requirements which a director may come across fairly frequently are that:

- a company must display legibly its registered name on the outside of every office or place of business in a conspicuous position;
- a company's name must also appear on all business letters, notices, cheques and invoices; and
- directors of a company must, subject to certain exemptions, for each financial year prepare a report for the business to include a review of the business and a statement concerning the payment or otherwise of a dividend.

Financial promotions

FSMA (and the secondary legislation made under it) provides a regulatory regime regarding financial promotions. It is a criminal offence for a person, in the course of a business, to communicate (or cause to be communicated) a financial promotion unless it is communicated or approved by an authorised person, such as a financial adviser or broker. Furthermore, breach of the financial promotion prohibition can render voidable any transaction entered into as a result.

"Financial promotion" in this context is given an extremely broad meaning, wider than the concept of investment advertisements, and is defined as an "invitation" or "inducement" to engage in "investment activity", and all of these terms are construed widely. A financial promotion can be communicated by any means, such as printed advertising, telephone calls and announcements – at meetings and via the internet.

A number of exemptions to the financial promotion prohibition are in force which will allow certain matters regularly carried out by companies to continue. It is very important that directors consult their financial advisers and lawyers for specific advice in this area.

Market abuse

Directors of listed and AIM companies must also be aware of the civil offence of market abuse introduced by FSMA which supplements the criminal offences of insider dealing and misleading statements referred to above. Being a civil offence, the standard of proof required is lower than for a criminal offence.

Market abuse is any behaviour (including taking no action) relating to investments (e.g. shares, warrants and

derivatives) which:

- is insider dealing;
- involves improper disclosure of inside information;
- consists of effecting transactions which employ fictitious devices or any other form of deception or contrivance;
- consists of the dissemination of information which gives, or is likely to give, a false or misleading impression by a person who knew or could reasonably be expected to have known that the information was false or misleading;
- is based on a misuse of information not generally available;
- creates a false or misleading impression in relation to that investment; and/or
- distorts the relevant market.

There is also a secondary offence of requiring or encouraging market abuse by another person.

The FSA has issued a Code of Market Conduct explaining how the regime will be interpreted and enforced. Certain 'safe harbours' are set out in the Code which are examples of behaviour which the FSA considers not to amount to market abuse. However, the Code of Market Conduct is not exhaustive, or, save in respect of the safe harbours, conclusive.

As a director, you will at times almost certainly be in possession of information not generally available. As with financial promotion, it is extremely important to seek specific advice if you are concerned about this area. If the market abuse regime is breached, the FSA can impose sanctions on those they find guilty including financial penalties, public censure and a requirement to pay compensation to victims. Furthermore, the London Stock Exchange and the Takeover Panel are likely to report action to the FSA which they consider falls below the expected standard of conduct in this area.

Filing accounts and reports

Directors of a company must deliver to the Registrar of Companies a copy of its annual accounts together with the directors' and auditors' reports. Failure to do this within the requisite time limit means that every director of that company is guilty of an offence and liable to a fine which increases for every day of default. This failure is also a ground for disqualification. In addition the company is liable to a civil penalty.

Liability for company's actions

There are a number of areas of business activity where a director of a company may be personally liable if his company commits a criminal offence. Successful prosecution of an individual director will usually require positive consent, specific knowledge or neglect on the part of the individual. The main areas of liability are where the company:

- fails to ensure the health and safety of its employees in breach of its statutory obligations;
- is liable for the costs of cleaning up contaminated land or water under environmental legislation;
- knowingly infringes a third party's trade marks or copyright; or
- commits a breach of its obligations under consumer protection legislation, especially with regard to food and product safety and consumer credit.

10. WHAT HAPPENS IF I COMMIT AN OFFENCE?

We have already discussed some of the common offences committed and the consequences. Where you have breached your duties as a director, in some circumstances the shareholders of the company may, by ordinary resolution, ratify these breaches of duty. It would be unwise for you to rely on ratification or a waiver of any claim against you given only by the board. You should be aware that a court may decide that the shareholders cannot ratify certain breaches. In particular, your actions cannot be ratified in circumstances where:

- fraud or dishonesty is involved;
- the transaction which you have carried out or given your approval to is unlawful;
- there is an infringement of the personal rights of the shareholders; or
- the transaction should have followed a special procedure or needed the sanction of a special resolution.

In addition, where a director exceeds his powers in a way which is beyond the company's capacity, the shareholders by special resolution may ratify his actions and by separate special resolution may absolve him from liability for so exceeding.

Set out below are some of the most serious problems which you as a director may come across and which could have a very severe effect on your pocket and on your future career as a director.

Fraudulent trading

A company will be considered to have been trading fraudulently where it appears in the course of its winding-up that business has been carried on for fraudulent purposes or with intent to defraud creditors. In these circumstances the court may declare that any directors who were knowingly parties to carrying on the business in that manner are liable to make such personal contribution to the company's assets as the court thinks proper. This means you may have personal unlimited liability.

Fraudulent trading is also a criminal offence and the directors may be punished by a fine, imprisonment or both. The criminal offence applies whether or not the company

has been or is in the course of being wound up.

You could also be disqualified from taking part directly or indirectly in the management of a company for up to a maximum of 15 years (see below).

Wrongful trading

A director may be made personally liable to contribute to a company's assets if the company has gone into insolvent liquidation. This risk arises where some time before the commencement of the winding-up of the company the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvency. A director who resigns before a company goes into insolvent liquidation may still be liable.

For these purposes a company is deemed to be insolvent at a time when its assets are insufficient for the payment of its debts and other liabilities.

You are unlikely to be liable if you have taken every step you can to minimise the potential loss of the company's creditors. In considering whether you ought to have known that the company could not avoid going into insolvent liquidation and what steps you ought to have taken, the court will look at your actual knowledge, skill and experience and that which might reasonably be expected of a person in your position. You cannot avoid this responsibility by resigning and resignation should usually only be a last resort.

Personal liability

It has already been mentioned that a director can be personally liable where he has signed a cheque on behalf of the company which does not mention the company's name or in the event of wrongful or fraudulent trading.

Other examples of directors' personal liability are:

- where directors of a public company have traded with third parties before the Registrar of Companies has issued a certificate allowing the company to do business – in these circumstances the directors are jointly and severally liable to indemnify the third parties for any losses; and
- where it appears in the course of the liquidation of a company that a director or a manager of that company has, among other acts, misapplied company property or been guilty of any breach of duty to the company, in which cases the court may determine what the appropriate repayment or contribution by the officer concerned is.

Disqualification

One of the ultimate sanctions against any wrongdoing is to disqualify you from acting as a director or from being involved in the management of a company at all for a certain period of time.

A court may make a disqualification order in circumstances which include:

- where a director has been convicted of an imprisonable offence in connection with the promotion, formation, management, liquidation or striking off of a company – a director can be disqualified for a maximum of 15 years;
- where a director has been persistently in default in relation to the provisions of the companies legislation requiring any return, accounts or other document to be filed or delivered to the Registrar of Companies – the maximum period for disqualification is five years;
- if it appears that in the course of the winding-up of a company a director has been guilty of the criminal offence of fraudulent trading or guilty of any fraud or breach of duty in relation to the company – the maximum period for disqualification is 15 years;
- if a court has made a declaration that a director must contribute to the assets of the company as a result of fraudulent or wrongful trading – the maximum period for disqualification is 15 years; and
- if, as a result of an inspector's report into the affairs of the company, the Secretary of State feels it is in the public interest to have a director disqualified – the maximum period for disqualification is 15 years.

A court must make a disqualification order against a director, ex-director or shadow director of a company which has at any time become insolvent and where that person's conduct as a director makes him unfit to be concerned in the management of a company.

In determining whether a person's conduct makes him unfit, the court will consider any wrong-doing by that director or any breach of duty in relation to that particular company and any other company of which he has also been a director. Any misapplication of funds or retention of property of the company by that director will obviously be held against him.

The court will also consider the extent of the director's responsibility for any failure by the company to comply with the provisions of company legislation and the extent of the director's responsibility for the company entering into any transaction likely to be set aside under the Insolvency Act 1986 as a transaction defrauding creditors.

Where a company is actually insolvent, the court will also consider the extent of the director's responsibility for the causes of insolvency, his responsibilities for the company entering into transactions at an undervalue or voidable preferences which are liable to be set aside, and his responsibility for the failure by the company to supply any goods or services which have been paid for.

11. CAN I INSURE AGAINST MY LIABILITIES?

It should be possible for you to obtain insurance to insure yourself against personal liability arising from most of the liabilities which can be incurred acting as a director and to indemnify you against the expense – including legal costs – of defending yourself in proceedings. However, most insurance policies will not cover actions brought against a director as a result of dishonest, fraudulent or criminal conduct. In addition, policies will not usually protect a director from claims brought against him by his fellow directors or for fines or penalties incurred by him. In addition, such policies may also contain geographical or territorial limits.

Such insurance policies normally cover all members of the board of directors. However, individual insurance is also important, particularly for a professional non-executive director who may be a director of a number of companies, and there are tailored packages to meet such directors' requirements.

For companies or groups of companies which are regulated by the FSMA there are particular compliance duties for which a director may be specifically responsible, and speciality insurance cover is also available for these obligations.

12. SHARES IN THE COMPANY – WHAT ARE MY OBLIGATIONS?

Notification of interest in shares

The Disclosure and Transparency Rules set out when interests in shares must be notified. Directors of UK incorporated issuers of financial instruments admitted to trading on a regulated market must disclose to the issuer transactions conducted on their own account by them or their connected persons (which includes spouses, partners and children and step-children) in the shares of the issuer or derivatives or any other financial instruments relating to those shares within 4 business days of the day on which the transaction occurred. The company must announce the disclosed information as soon as possible and no later than the end of the business day following receipt of the information by the company.

Most persons, including directors but excluding certain investment managers (where the relevant interest is not notifiable until it is equal to or more than 5 per cent.), come under an obligation to notify a company whose shares are admitted to trading on a regulated market or a prescribed market (including AIM) when an interest in that company's voting rights is equal to or more than 3 per cent. There is also an obligation to notify the company when such a person ceases to be interested in a holding of 3 per cent. or more of the voting rights or that holding is altered by at least 1 per cent. The notification must be made as soon as possible and no later than two trading days following the relevant person learning of the change.

The annual financial report of a listed company incorporated in the UK must also include a statement of all the interests disclosed pursuant to the requirements set out above in respect of directors at the end of the relevant financial period.

13. WHAT IS INSIDER DEALING?

Where a director has "inside information" it is an offence to deal in "price affected securities" on a regulated market or by or through a professional intermediary.

"Inside information" is information which relates to particular securities or to particular issuer(s) but not to securities generally or to the issuers of securities generally; is specific or precise; has not been made public; and, if it were made public, would be likely to have a significant effect on the price of any securities.

Securities are "price affected securities" in relation to inside information if and only if the information would, if made public, be likely to have a significant effect on the price of the securities.

For these purposes "dealing" includes buying or selling securities whether as principal or agent, agreeing to buy or sell and procuring directly or indirectly acquisitions or disposals of securities by any other person. Entering into a contract which creates the security or bringing to an end such a contract is also treated as acquiring or disposing of securities.

Securities means company shares, debt securities, warrants, depository receipts, options, futures and contracts for differences.

It is also an offence to communicate inside information to someone else other than in the proper performance of one's employment or office or encourage someone else to deal in those securities while in possession of inside information.

Apart from the prohibitions set out above, contained in the Criminal Justice Act 1993, various other regulations also prohibit or restrict dealings by those who could be considered 'insiders'.

As already described, there are various reporting and disclosure requirements relating to transactions by directors and their families (such as in the Disclosure and Transparency Rules). The City Code on Takeovers and Mergers also forbids those who are aware that there is an intention to make an offer, or who are privy to preliminary

negotiations, from dealing in the relevant securities or making any recommendation to any other person to deal in the relevant securities until a press announcement has been made. It also includes disclosure obligations where dealings are permitted.

The Listing Rules provide that a fully listed company must require each person discharging managerial responsibilities (including directors) to comply with the Model Code, a guide of minimum standards annexed to the Listing Rules; a listed company may choose to impose a higher standard than required by the Model Code. Likewise the AIM Rules for Companies require directors to desist from dealing in their company's securities during market-sensitive periods of the year, known as "close periods". On either market, restrictions on dealing extend to family members of and trusts associated with the directors.

Finally, as already described, there is a civil offence of market abuse which relates to, among other things, the misuse of inside information.

14. OTHER RULES AND REGULATIONS FOR A PUBLIC COMPANY

A listed or quoted company is subject to many more legal controls and restrictions than a private company for the protection of a wider number of shareholders who may have little control over its daily management. These controls relate principally to corporate governance, the allotment and issue of shares, maintenance of capital, accounts, substantial transactions and transactions with directors.

Listing Rules, Disclosure and Transparency Rules and Prospectus Rules

The Financial Services Authority, as the United Kingdom Listing Authority (UKLA), publishes Listing Rules, Disclosure and Transparency Rules and Prospectus Rules, which must be complied with by companies whose securities have been admitted to the Official List of the UKLA and, to a limited extent, admitted to trading on AIM.

AIM Rules

A company which obtains the privileges and benefits of entry to AIM must comply with the rules and regulations set out in the AIM Rules for Companies published by the London Stock Exchange. In addition, nominated advisers to AIM companies must comply with the AIM Rules for Nominated Advisers.

General requirements

If you are a director of a listed or quoted company, you should familiarise yourself with the Model Code, the Listing Rules, the Disclosure and Transparency Rules and the Prospectus Rules and the rules of the London Stock Exchange or the AIM Rules for companies (as the case may be). Apart from the specific requirements which they set out, there are various general requirements briefly outlined below. The Listing Rules emphasise that observance of the continuing obligations by listed companies is essential to the maintenance of a fair and orderly market in securities and to ensure that all users of the market have simultaneous access to the same information. Both the Listing Rules and the AIM Rules for companies require, broadly, the following:

- a company must notify a regulatory information service approved by the London Stock Exchange for the distribution of announcements (known as

an RIS) without delay of any major new developments in its sphere of activity which are not public knowledge and which may by virtue of their effect on it lead to substantial movement in the price of its listed securities;

- where there is a change in the company's financial condition or in its performance or expectation of performance and such knowledge if made public is likely to lead to substantial movement in the price of its listed securities, the company must notify to an RIS without delay all relevant information concerning the change which is not public knowledge;
- information that is required to be notified to an RIS must not be given to anyone else before it has been so notified save as referred to below. Where it is proposed to announce at any listed company's shareholders' meeting information which might lead to substantial movement in the company's share price, the information must be published to the market first or at least simultaneously; and
- a company need not notify to an RIS:
    - information about impending developments or matters in the course of negotiation and may give such information in confidence to its advisers, persons with whom the company is negotiating, employee or trade union representatives and government officials and regulatory authorities; or
    - information it considers if disclosed to the public might prejudice the company's legitimate interests where the UKLA grants a dispensation from the relevant requirement.

If the company has reason to believe there has been a breach of confidence or one is likely to occur in the circumstances referred to above and, in either case, the development or matter in question is such that knowledge of it would be likely to lead to a substantial movement in the price of its listed securities, the company must without delay notify to an RIS at least a warning announcement to the effect the company expects shortly to release information which may lead to such a movement.

Specific requirements

- Apart from notification to an RIS a fully listed company must, in some circumstances such as acquisitions, disposals, takeovers, mergers and offers, send a circular to its shareholders. Such circulars must be generally submitted to the UKLA in draft form for approval before they are published.

- Listed companies have to state how they have applied the corporate governance principles of the Combined Code (which brings together the work of the Hampel report, Cadbury report, Greenbury report, Higgs report and Smith report). The Listing Rules do not require compliance with the Combined Code: listed companies must state whether they have complied with the Combined Code and explain any non-compliance. The principles of good governance set out in the Combined Code deal with composition of the board and directors' remuneration, communications with shareholders and accountability and audits.

The detailed rules can be found in the rules published by the UKLA or AIM Rules for Companies. If in any doubt you and the company should consult your broker, financial adviser or solicitor or the UKLA or the London Stock Exchange directly.

15. CONCLUSION

The law has become tougher on directors and is designed to protect shareholders and public alike from breaches of duties and responsibilities, whether a one-off event or a persistent default.

The rules you must follow as a director are set out in various statutes, including the Insolvency Act 1986, the Company Directors Disqualification Act 1986, the FSMA, the Criminal Justice Act 1993 and the Companies Act 2006.

If you do decide to become a director we suggest you follow these three basic maxims:

- use your common sense;
- be aware of and take an active interest in your company's activities, especially its financial and trading position, at all times; and
- if you are ever unsure or in doubt about any matter relating to the company or your duties and responsibilities, consult your legal or financial advisers immediately.

For Further Information

If you would like further information on any of the matters discussed in this note, please contact Sean Geraghty (sean.geraghty@dechert.com) on 020 7184 7540.

EUROPE Brussels • London • Luxembourg • Munich • Paris • **U.S.** Austin • Boston • Charlotte • Hartford • Newport Beach • New York • Philadelphia • Princeton • San Francisco • Silicon Valley • Washington, D.C. • **ASIA** Beijing • Hong Kong