

Risk Management Best Practice

Global Director's Checklist

Risk

Your Duties

Liability for Loss

Company indemnification

Ensure you are fully aware of:

- the circumstances in which the company will indemnify you
- the circumstances in which your decisions may be ratified by the company
- D&O insurance in place to cover you as a director of the company
- exclusions in the policy— for example, it is common for insurance to exclude cover for loss due to fraud, dishonesty, wilful default or criminal behavior
- the fact that penalties imposed are often uninsurable.

Civil liability

Be aware of the following possible claims against directors:

- **Claims by the company** for breach of any duty owed to the company whether under company documents, statutory duties or fiduciary duties
- **Derivative actions** brought by one or more shareholders against the company's directors, seeking redress on behalf of the company for a wrong committed by those directors
- **Shareholder oppression** brought by one or more shareholders against directors and/or the company itself where the conduct of a company's affairs has been unfairly prejudicial or discriminatory against the interest of members
- **Claims by third parties**, though rarer, can be brought in contract, tort or under statute. The following are a few examples of where liability may be established:
 - in contract, if a director personally guarantees his/her company's debts
 - in contract, if the director does not make it clear that s/he is contracting as the agent of the company, and not on a personal basis
 - in contract, if the director enters into a contract on behalf of the company but exceeds his/her authority and the company sets it aside
 - in tort, if the director makes a fraudulent or negligent misstatement which induces a third party to enter into a contract with the company or otherwise acted to their detriment.

Criminal liability

There are a number of criminal exposures for directors, including but not limited to:

- wrongful trading
- money laundering
- theft
- bribery
- fraud
- market manipulation.

Regulatory liability

In addition to civil and criminal liabilities, note that directors are also subject and face potential exposure to liability under financial, competition, health and safety and environmental regulations.

Company duties

Review company documents carefully and ensure you understand:

- the duties you owe to the company
- which powers may be exercised and in what circumstances
- what restrictions are placed on you
- whether you face personal liability
- whether directors' liability is joint or several.

Statutory duties

Directors will often be subject to legislation governing directors' duties to the company and its members.

Ensure that you:

- understand and comply with the duties in force in your jurisdiction
- consider how they can apply to all aspects of your role
- consider to whom the duties are owed – the company or its shareholders?
- consider what duties will be owed if the company faces financial difficulties.

Do you have to act in the best interests of creditors?

- if you possess a specialist skill which you utilize in conducting your duties as a director, be aware you may be held to a higher standard
- keep detailed records of meetings and decisions taken

Breach of statutory duties potentially exposes directors to claims from the company and/or its shareholders and, in some cases, its creditors. It may be possible in some jurisdictions for directors to be personally liable for the loss.

Fiduciary duties

Directors owe fiduciary duties to their companies. When carrying out your duties as a director, bear the following in mind:

- you may not be able to delegate without express authority
- you must understand and consider the overall risks that impact upon the company's position in performing your role
- advice provided to you by third parties or advisers (such as accountants or lawyers) should not be relied on unless you have independently understood and considered the relevant issues
- you should not bind yourself as to how you will exercise your discretion in future e.g. by making an agreement to vote in a certain way
- you should consider whether to exercise your discretion where to do so would be advantageous to the company
- you should not personally exploit or take advantage of information or opportunities that you are made aware of due to your role as a director
- where a company is part of a consolidated group, directors must act in the interests of the company itself, as opposed to the group's interests.

This checklist has been designed as a practical guide to the potential duties and liabilities of directors of companies. It is a general non-exhaustive checklist and is not jurisdiction-specific. It should not be used as a substitute for professional advice on issues within your jurisdiction and should not be taken as providing legal advice on any of the topics addressed.