



DIRECTORS' Duties, Liabilities & Responsibilities

Respective duties, responsibilities, and liabilities of all Directors of a DIFC Private Company.

April 2020

The information set forth in this document is for informational purposes only and does not and is not intended to constitute legal advice, and therefore should be used as a guide and modified to meet your Company's statutory and regulatory obligations. For clarity, some wording has been modified for ease of understanding.

This document provides a summary of the respective duties, responsibilities, and liabilities that each Director of a DIFC Private Company should be aware of. It is noteworthy that additional duties apply to a Director of DIFC Companies that hold a DFSA authorization, primarily related to obligations to the DFSA for additional reporting, cooperation, and client matters. (The latter are communicated and approved by the Board in the Compliance Manuals and other Policies). The proposed amendments to the Data Protection regime in 2020 have been included as the likelihood of issuance is high.

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Duties of a Director as per the DIFC Companies Law

Duty to act within powers

A Director of a Company should act in accordance with the Articles of Association and must only exercise powers for the purposes for which those powers have been conferred. This involves the duty to manage the Company's affairs and act on the Company's behalf with a view to achieving its objectives.

Any limitations contained in the Company's Articles of Association and Shareholder's Resolutions have to be observed.

Duty to promote the success of the company

A Director is required to take such actions that he considers appropriate, acting in good faith to promote the success of the Company and for the benefit of all the Company's Shareholders in a fairway.

Given the above, considering short term financial success may not be enough, and a Director should consider matters such as:

- employee's interests.
- impact of actions on business relationships with customers, suppliers and other third parties.
- long term consequences of decisions.
- the possible impact of the Company's operations on society and the environment.
- the Company's reputation.
- business conduct standards.

Duty to exercise independent judgment

A Director is duty-bound to always exercise independent judgment, and decisions need to be based on the overriding success of the Company and not on particular Shareholders' interests.

Duty to exercise reasonable care, skill and diligence

All actions undertaken by a Director in relation to managing the business and affairs of a Company are carried out on the Company's behalf. Therefore, a Director must act as a reasonably diligent person at all times.

To meet the duty to exercise reasonable care, skill, and diligence, a Director should have adequate knowledge of the Company's business and its management.

Duty to avoid conflicts of interest

A Director is essentially acting as an agent of the Company and occupying a position of trust. Apart from a few exceptional cases (as per the Company's Articles of Association and applicable Laws), a Director, therefore, needs to avoid situations in which he has or can have, direct or indirect competing interests with the Company.

This duty continues to exist even after a Director ceases to be an officer of the Company.

Duty not to accept gifts from third parties

A Director is prohibited from receiving a benefit from a third party where the benefit is conferred on the Director either due to his position as a Director of the Company or for doing (or not doing) anything in their function as a Director unless the acceptance of such benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

Duty to declare interest in proposed transaction or arrangement

A Director should make a declaration of the nature and extent of their interest in a proposed transaction or arrangement in the Company to the other Director(s) of the Company, before entering into such a transaction or arrangement.

Duty to declare interest in existing transaction or arrangement

A Director should make a declaration to the other Director(s) of the Company of the nature and extent of any interest in any existing transaction or arrangement which, to a material extent, conflicts or may conflict with the interests of the Company or any Subsidiary. The Director should do this as soon as they become aware of the conflict of potential conflict.

Prohibition of financial assistance

A Director has a duty not to enter into any arrangements with the DIFC company that would provide financial assistance to a Director or certain persons connected to a Director unless at least 90% of the Company's Shareholders have given their consent and giving the financial assistance does not materially prejudice the Company's or Shareholders' interest, or the Company's ability to discharge its liabilities as they fall due.

Responsibilities of a Director in accordance with the DIFC Companies Law, DFSA General Rulebook and DIFC Data Protection Law

1. Ensure the Company's accounts comply with the Companies Law and are prepared in relation to each financial year of the Company.
2. Prepare and approve the Company's accounts within six (6) months after the end of the financial year-end.
3. Appoint an auditor of the Company to hold office from such date until the end of the next period for appointing auditors, within six (6) months after the end of the financial year or, if earlier, before the date on which the accounts are sent to Shareholders.
4. Cooperate with the appointed auditors, including taking reasonable efforts to provide such information and assistance as required by an auditor for the purposes of the auditor carrying out its duties under the Companies Law and Companies Regulations.
5. Appoint a replacement within thirty (30) days if an auditor for any reason ceases to hold office.
6. Participate in a meeting by phone or other similar means of communication.
7. Put together a solvency statement in accordance with Chapter 7- Reduction of Capital: Section 57 of the Companies Law.
8. Sign a certificate whenever a Company intends to redeem any of its shares as per Chapter 6- Redemption and Purchase of Shares: Section 52 of the Companies Law.
9. Defining and setting the objectives of the Company and the strategies for achieving those objectives.
10. Ensure adequate apportionment and recording of responsibilities between Board Members and Senior Management Team.
11. Ratifying sufficient policies, processes, procedures, systems, and controls and ensuring the formal process to review the effectiveness of policies, processes, procedures, systems, and controls.
12. Review the risks determined by the Risk Committee to which the Company is exposed.
13. Embedding a culture of compliance into the overall structure of the Company.
14. Make sure that the Company's internal audit has unrestricted access to relevant records and to review the reports provided by the internal audit.
15. Review and approve on a periodic basis, the business plan and strategies established within the Company.
16. Adherence to the Code of Conduct Policy of the Company.
17. Review and approve the Business Continuity Plan and Disaster Recovery Plan and any subsequent amendments.
18. Take reasonable steps to avoid and identify any conflicts of interest.
19. Ensure that the remuneration structure and strategy comply with the requirements of DFSA GEN Rulebook Section 5.3.31. (1).
20. Provide to the DFSA and relevant stakeholders sufficient information about its remuneration structure and strategies.

21. Properly understand the requirements needed to comply with the DIFC Data Protection Law No. 1 of 2007 (as amended).
22. Ensure appropriate technical and organizational measures are in place to be able to demonstrate that Processing of Personal Data is performed in accordance with the Data Protection Law. This may include the implementation and maintenance of secure IT systems, training, and policies on all aspects of data handling.
23. Designate a qualified individual with substantial knowledge to act as a Data Protection Officer (DPO) to supervise compliance with the Data Protection Law and any other data protection provisions applicable to the Company.
24. Review the annual Controller data protection assessment (Annual Assessment) prepared by the DPO before submitting it to the Commissioner of Data Protection. (**Proposed amendment*)

Liabilities and Penalties

1. A Director who signs a certificate in relation to a Company that intends to redeem any of its shares without reasonable grounds for the opinion expressed in the certificate is liable to a fine of USD10,000.
2. A Director who fails to comply with the requirements relating to the purchase of the Company's own share is liable to a fine of USD10,000.
3. A Director who makes a declaration in connection with a reduction of share capital without having reasonable grounds for the opinion expressed in the declaration is liable to a fine of USD10,000.
4. Where a Director breaches their duties, the consequences can be serious, including personal civil liability with fines and/or an obligation to pay damages to the Company in respect of any loss suffered by the Company.
5. A Director is liable to account to the Company any benefit he has acquired in consequence of any breach of their duties.
6. A Director can be disqualified from their position based on a breach of their duties.
7. A Director can face criminal proceedings against himself in certain instances that would qualify as a criminal offence under the UAE Federal Penal Code.

Provisions that apply to a Director under the DIFC Insolvency Law

Company Voluntary Arrangements

Director(s) of a Company may propose a scheme of arrangement of its affairs or voluntary arrangements to the shareholders and creditors of the Company. In such circumstances, the Director(s) will appoint a nominee to act in relation to the voluntary arrangement and supervise its implementation. If the Company is eligible for voluntary arrangements, the Director(s) of a Company may take steps to obtain a moratorium from the court.

Rehabilitation Regime

Director(s) of a Company may propose a rehabilitation plan where the Company is, or is likely to become, unable to pay its debts, and there is a reasonable likelihood of a successful rehabilitation plan. Prior to the rehabilitation plan notification, the Board of Directors of a Company shall appoint one (1) or more rehabilitation nominee(s). Upon the appointment of the rehabilitation nominee, the Directors are still and all authorized to continue managing the Company's affairs and shall continue to be responsible and liable for any actions taken in such capacities except in cases where there is evidence of the Company or its management, officers, directors being guilty of fraud, dishonesty, incompetence, mismanagement, or any of the offences set out in Chapter 7 of Part 6 of the Insolvency Law.

Voluntary Winding-up

Director(s) of a Company who proposes to wind up voluntarily shall deliver a statutory declaration of solvency to the Registrar or DFSA for regulated entities, which illustrates that they have made a full

inquiry into the Company's affair and have formed the opinion that the Company will be able to pay its debts in full not exceeding twelve (12) months from the commencement of the winding-up. Director(s) of a Company making a declaration without having reasonable grounds that a Company will be able to pay its debts in full together with any interest with the period specified in the statutory declaration commits a contravention and is liable to a fine of USD20,000. When a Company appoints one or more liquidators for the purpose of winding up the Company's affairs and distributing its assets, the Director(s) powers will cease except to the extent that the liquidator sanctions their continuance.

Fraud in anticipation of winding-up

Any past or present Director (or other officers) of the Company who, within the twelve (12) months immediately preceding the commencement of the winding-up, has committed one of the following acts in each case with the intention of defrauding the creditors of the Company or concealing the state of the Company's affairs will be guilty of a delinquent action:

- concealed any part of the Company's property to the value of USD1,000 or more, or concealed any debt due to or from the Company;
- fraudulently removed any part of the Company's property to the value of USD1,000 or more;
- concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the Company's property or affairs;
- made any false entry in any book or paper affecting or relating to the Company's property or affairs;
- fraudulently parted with, altered or made any omission in any document affecting or relating to the Company's property or affairs; or
- pawned, pledged or disposed of any property of the Company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the Company's business)

Remedies against delinquent Director(s)

Any Director or officer of a Company guilty of fraudulent trading, wrongful trading, or any other of the delinquent actions set out above risks court sanction. The court may, on application by an aggrieved person (including a liquidator or administrative receiver) make any order as it sees fit in relation to the delinquent Director or officer including one or more of the following:

- an order to repay, restore or account the money or other property of the Company which he has misapplied or retained or become accountable for, with interest at such rate as the court determines;
- an order to compensate the Company in respect of any misfeasance or breach of any fiduciary or other duty in relation to the Company;
- an order to make such contributions (if any) to the Company's assets as the court thinks fit; or
- an order requiring the person to do, or not to do, any act or thing.

Winding-up

Any Director (secretary or employee) who has been involved in the management of the Company who fails to do whatever the liquidator reasonably request to assist in the winding up, fails to comply with any reasonable direction by the liquidator under the insolvency regulations and hinders or obstructs a liquidator in the performance of their powers or functions, commits a contravention and is liable to a fine of USD15,000.

For any further queries, please contact the Capital Advantage team via info@capitaladvantage.ae.