

PART 9.4 GUIDANCE FOR MEMBERS AND OFFICERS APPOINTED TO OUTSIDE BODIES

CONTENTS

1. Introduction
2. Companies
3. Charities
4. Unincorporated Associations
5. Registration and Disclosure of Outside Interests for Members
6. Disclosure of Outside Interests for Officers
7. Gifts, Hospitality and Bribery

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GUIDANCE FOR MEMBERS AND OFFICERS APPOINTED TO OUTSIDE BODIES

I. INTRODUCTION

- I.1 This guide is intended to give a general overview of the issues which affect Members and officers who are appointed to outside bodies. The council's Monitoring officer or legal team will be able to provide further advice to expand upon any of the issues raised.
- I.2 Each year, either at the council's annual meeting or cabinet meetings, Members are appointed to a range of outside bodies. The list of appointments is published in the minutes of those meetings.
- I.3 The roles of Members or officers on outside bodies will depend upon the legal nature of that organisation and the capacity in which they are appointed to act. It may, for example, involve acting as a company director, the trustee of a charity, or a member on a management committee.
- I.4 In participating in outside bodies, Members and officers may take account of the council's wishes but they must ultimately make independent judgements in line with their duty of care to the outside body. They must also act according to the framework set by the outside body and take an active and informed role in the management of the outside body's affairs. This involves attending meetings on a regular basis and carrying out their duties to the best of their abilities. In addition, they must follow as far as applicable the council's Code of Conduct for Members or the Code of Conduct for Officers.
- I.5 Members should be aware that they will have to disclose membership of the outside body in their dealings with the council and where a conflict of interest arises it is likely that they will have to withdraw from any consideration by the council of any matter affecting the outside body. Members should bear this in mind when deciding whether or not to accept a particular nomination. In the case of officers, arrangements should be made to refer the matter to another officer to deal with whenever a conflict of interest arises.
- I.6 Whilst there is no legal obligation on Members or officers to report back to the council on their involvement in outside companies to which they have been nominated by the council, it is good practice to do so; this is best achieved by way of an annual report to the relevant committee or cabinet meeting. In the case of officers, their participation should be discussed on a more regular basis with their line managers at supervision or appraisal meetings.
- I.7 The most common types of outside bodies in which Members or officers may become involved are considered in more detail below and include:-

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- (a) Limited Liability Companies
- (b) Charities
- (c) Unincorporated Associations

1.8 Indemnities and Insurance.

1.8.1 The primary responsibility for providing proper indemnities and insurance cover to protect Members and officers when acting for outside bodies lies with those bodies. However, officers will assist in checking that there is a corporate or organisational structure which, on its face, appears adequate and that some form of indemnity exists to provide protection to the council's appointee or nominee.

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1.8.2 As there may be occasions when the insurance or other indemnity arrangements made by the outside body prove inadequate to protect the council's appointee or nominee from liability, the council has put in place a general indemnity for its Members and officers so appointed or nominated. It would only apply where the indemnity or insurance offered by the outside body did not provide adequate cover.

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2. COMPANIES

- 2.1 The obligations imposed by company law are onerous and there are severe penalties for non-compliance with many of the duties imposed on directors. It is important for Members and officers appointed to act as company directors to ensure that they understand the duties and obligations which the law imposes on them.
- 2.2 A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. A company is distinct from its members, who may be either shareholders or guarantors.
- 2.3 Whether a company is limited by shares or by guarantee, the day to day management of the company is usually vested in the directors. The members ultimately control the company by electing the directors and deciding the major issues at general meetings. The main differences are as follows:-
- in a company limited by shares the shareholders share the ownership of the company and its profits and if the company is wound up each shareholder is liable to pay an amount equivalent to the nominal value of his or her shareholding;
 - a company limited by guarantee does not normally seek to make a profit and in the event of the company being wound up, the members guarantee to

make a payment to the level of their guarantee (usually a nominal figure of £1.00). Hence companies limited by guarantee are more commonly used for voluntary and public bodies, especially where charitable status is sought.

- 2.4 A company is controlled by reference to its 'constitution', which is contained in the Memorandum and Articles of Association. These documents will set out the powers of the company, and the rules by which it is to be managed. Any act carried out by the company that is outside the powers set out in the Memorandum will be unlawful, and a director involved in such an act may be personally liable for any resulting losses.
- 2.5 In general Members and officers should avoid taking executive or managerial responsibility for the company's activities because the duties of executive or managing directors can be particularly onerous. This is because executive directors are directly responsible for particular aspects of the company's affairs. For example, a finance director will have responsibility for the company's financial position, which could give rise to liability for allowing the company to trade while insolvent if the company goes into liquidation. However, all directors, including part-time and non-executive directors, are required to make themselves fully aware of the company's financial position and should attend Board meetings regularly. Ignorance of transactions entered into by the company through a failure to make proper enquiries may not be an adequate defence to a charge of negligence brought against such a director.
- 2.6 In some situations, the Council may nominate Members or officers to act as "observers" on the board of directors of a company. Although such observers have no specific legal status, Members and officers should be aware that if an observer's involvement increases to such an extent that it could be said that there is an active engagement in the management of the company, he or she may be deemed to be a "shadow director" which may entail liabilities. Any person appointed to this role should therefore ensure that the extent of their role as an observer is clearly defined and agreed to avoid involvement in managing or directing the management of the company.

- 2.7 Under the Companies Act 2006 ('the Act'), directors owe a number of legal duties to their company. These are duties to:
- Act within powers (section 171 of the Act)
 - Promote the success of the company (section 172)
 - Exercise independent judgement (section 173). Although it is permissible to take account of the interests of a third party (in this case the council) a director cannot vote simply in accordance with the council's instructions.
 - Exercise reasonable skill, care and diligence (section 174)
 - Avoid conflicts of interest (section 175). There may be actual or potential conflicts between the interests of the company and those of the

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council. A Member or officer cannot waive their statutory responsibilities as a director, hence they may have to cease to act as a Member or officer in relation to the particular matter. In extreme cases, the only proper way for the conflict to be resolved may be for the Member or officer to resign either from the company or from the council.

- Not accept benefits from third parties (section 176)
- Declare interest in a proposed transaction or arrangement with the company (section 177). Directors must therefore disclose any interests they or their family may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the company's Articles of Association. Equally, officers are not allowed under cover of their office to take any more than their proper remuneration so they must obtain the consent of the Council if they are to receive any remuneration from a company to which they have been appointed by the Council.

Members acting as directors should be aware of these duties, particularly those which could lead to:

- A conflict with their role as member of the local authority (for example, the duties to promote the success of the company, to exercise independent judgement, and to avoid conflicts of interest).
- Personal liability for the debts of the company

▼ The fact that a director is appointed to a company board as a representative of the council does not diminish these duties.

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▼ Liabilities and Indemnities

2.8 Directors cannot be indemnified by a company against liability arising out of negligence, fraud or breach of duty or trust. The company's Articles of Association may however allow for directors to be indemnified by the company in respect of the cost of defending such proceedings, where the director concerned is granted relief by the court or acquitted.

2.9 The Council does have limited powers to provide indemnities for Members or officers when appointing them to act as directors, and to buy insurance to cover any losses which they may suffer through acting conscientiously as a director

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¶ Directors' Duties ¶
¶
(1) A fiduciary duty to the company to act honestly and in good faith and in the best interests of the company as a whole. ¶
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A general duty to exercise reasonable care and skill in acting in the company's affairs, commensurate with his or her knowledge and experience, including seeking professional advice when necessary.

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(see paragraph 1.8.2 above). It is also appropriate for a company to purchase insurance to protect its directors against claims of negligence, breach of trust or duty, or other default. Before taking up an appointment, directors should ensure that such insurance is in place and that the provision of the insurance is within the powers of the company.

3. CHARITIES

- 3.1 Many outside bodies with which Members or officers will be involved will be charities.
- 3.2 A charitable organisation is one which is formed for one or more of the following charitable purposes:
- the relief of poverty and human suffering
 - the advancement of education
 - the advancement of religion
 - another purpose for the benefit of the community.
- 3.3 It must operate for the public benefit and have exclusively charitable purposes. It must be registered with the Charity Commissioners. The Commissioner oversee the operations of all charities, and grant consent to various transactions involving charities, where the law requires this.
- 3.4 The law relating to charities imposes a number of duties and liabilities on those controlling the organisation. They are normally referred to as 'trustees' which will include the directors (of a company limited by guarantee) and the management committee of an unincorporated association.

Trustees' Duties

- 3.5 Trustees have the following duties:
- (1) A duty to act in accordance with the charities governing instrument and to protect the charity's assets.
 - (2) A duty to comply with the Charities Acts and other legislation affecting the charity.
 - (3) A duty not to make a private profit from their position.
 - (4) A duty to act with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals, and in relation to investment matters.

- (5) A duty to ensure that the information relating to the trust and trustees is registered with the Charity Commissioners and that annual accounts and returns are completed and sent.
- (6) Where charitable income exceeds £10,000, a duty to ensure that letters, adverts, cheques etc. bear a statement that the organisation is a registered charity.

Trustees' Liabilities and Indemnities

3.6 Trustees have the following liabilities:

- (1) To make good any deficiency where trust property has been used for the trustee's own purposes, or for purposes not in accordance with the purposes of the trust.
- (2) Personal liability for losses or claims where the trustee has acted outside the scope of the trust deed.
- (3) Personal liability where the trustee has not shown the required standard of care.

3.7 An indemnity may be given from the trust fund provided the trustee has acted properly and within his/her powers. Trustees may take out insurance to protect themselves against personal liability but not for criminal acts. If premiums are to be paid out of the charitable funds the trustees will need the consent of the Charity Commissioners unless the trust deed allows it.

3.8 Further guidance and advice can be obtained from the Charities Commission. A trustee who seeks advice from the Charity Commissioners in a particular situation and acts on that advice will generally avoid personal liability.

4. UNINCORPORATED ASSOCIATIONS

4.1 An unincorporated association is an informal organisation which may arise whenever several people join together, with the intention of creating legal relations, to carry out a mutual purpose otherwise than for profit.

4.2 The rules governing the members' duties and liabilities will usually be set out in a written constitution, which is simply an agreement between the members as to how the organisation will operate. Usually the constitution will provide for the election by the members of a management committee, which will be responsible for the everyday running of the organisation. The constitution may also provide for members to have annual general meetings, to deal with business such as the accounts and the appointment of the management committee.

- 4.3 As the association is not a separate legal entity from its members, it cannot hold property in its own name. Any property which it controls will therefore have to be vested in an individual, or individuals, who are usually called the trustees of the association. They will hold the asset, subject to the direction of the members, or (more usually) the management committee.
- 4.4 Where an unincorporated association is a registered charity the members of the management committee may also be charity trustees. As such their role and responsibilities will be determined not only by the association's constitution but also by the general law relating to trusts and charities as referred to above.

Duties

- 4.5 The members of the management committee, and the trustees appointed to hold any assets for the association, must act within the constitution, and must take reasonable care in exercising their powers.

Liabilities and Indemnities

- 4.6 Generally management committee members are liable for the acts or omissions of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall.
- 4.7 Management committee members will have personal liability if they act outside the authority given to them or if they do not comply with the law.
- 4.8 It is possible (subject to the rules in the constitution) for insurance to be taken out, to cover trustees and members of the management committee for their potential liabilities. As with other outside bodies, Members and officers should satisfy themselves that the organisation has adequate insurance cover in this respect.

5. REGISTRATION AND DISCLOSURE OF OUTSIDE INTERESTS FOR MEMBERS

- 5.1 In accordance with Part III of the Local Government Act 2000, the Council has adopted a Code of Conduct for Members. Each Member of the authority, elected or co-opted, has signed an undertaking to observe the provisions of the Code. The Code of Conduct for Members is set out in full in the Council's constitution (Part 9) and its provisions continue to apply to Members in respect of their appointments to outside bodies.

Registration of Interests

- 5.2 The Code of Conduct for Members requires every Member to notify the Monitoring Officer of any registrable interests which he/she holds, within 28 days of election or appointment. In addition, the Member must notify the Monitoring Officer of any change in his/her registrable interests within 28 days of becoming aware of that change. A copy of the relevant declaration form and a form for amendments are set out in the Council's constitution at Part 9.2.

Disclosure of Interests

- 5.3 There are a number of rules which Members must be aware of, which may limit the extent to which they are able to take part in debates or votes on issues. These rules extend to matters involving outside bodies. The rules require that, in certain situations, Members should disclose the fact that they have an interest in the matter under discussion. They may also be required not to take part in any debate or discussion on the matter, and may have to leave the meeting during the item.

Personal Interests

- 5.4 A Member appointed to an outside body will have a personal interest in that body. Provided that it is not also a prejudicial interest (see below), the Member only needs to declare the personal interest if and when he/she speaks on the matter at a Council meeting.

Prejudicial Interests

- 5.5 A Member will probably have a prejudicial interest in a matter relating to the outside body if he/she is a member of or in a position of general control or management on the outside body and the interest falls into one of the following two categories:-
- (a) the matter affects the financial position of the outside body (e.g. an application for grant funding to the outside body); or
 - (b) the matter relates to an approval, consent, license, permission or registration that affects the outside body (e.g. an application by the outside body for planning permission).
- 5.6 If a Member has a prejudicial interest in a matter under discussion he/she must declare the nature of that interest as soon as it becomes apparent to him/her. The Member should then leave the meeting room, unless members of the public are allowed to make representations, give evidence or answer questions about the matter. If that is the case, the Member can make his/her representations, in accordance with the decision making bodies rules, but must then immediately

leave the meeting room. A Member with a prejudicial interest cannot remain in the public gallery to observe or vote on the matter.

Bias

- 5.7 Where there is no prejudicial interest in a matter, a Member's duties as a director or trustee or a member of a management committee may still mean that he/she should not participate in a decision because of a legitimate fear of lack of impartiality, or bias, which could potentially invalidate the decision.
- 5.8 Bias will not be assumed by mere membership of an outside body. However, where the outside body has a line which is being advocated by the Member, it is likely that the Court would find bias on that issue and therefore the Member should not take part in a discussion or decision at a Council meeting on that issue. In such circumstances, it would be appropriate to seek advice from the Council's Monitoring Officer or Head of Law.

6. DISCLOSURE OF OUTSIDE INTERESTS FOR OFFICERS

Declaration of Interests

- 6.1 Section 117(1) of the Local Government Act 1972 requires that if it comes to the knowledge of any officer of a local authority that the authority has entered or proposes to enter into any contract in which he/she has a pecuniary interest, whether or not he/she would actually be a party to the contract, he/she must give notice in writing to the authority. A pecuniary interest should be interpreted as any circumstance in which he/she or a member of his/her immediate family stand to gain or lose financially as a result of the contract.

Conflicts of interest

- 6.2 Where an officer has been appointed to an outside body by the Council and a conflict of interest arises, this should always be disclosed to the officer's immediate manager who should, in appropriate cases, seek advice from the Council's Corporate Law Team. Such conflicts may be dealt with in a number of different ways, depending on the nature and seriousness of the conflict. If the conflict is insubstantial then it should simply be recorded and no further action need be taken. Where there is a discrete conflict this may preclude the officer from undertaking a particular discrete task, such as dealing with the administration of a planning application, but would not be incompatible with the general performance of their job. In the case of a more serious incompatible conflict it may be determined that the nature of the conflict of interest is such

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that the officer must resign their position on the outside body and/or re-arrange their duties in a manner which avoids the conflict.

7. GIFTS, HOSPITALITY and BRIBERY Deleted: AND

7.1 Members and officers must never accept any gift or consideration as an inducement for doing or forbearing to do anything in their roles as Councillors or officers of the authority. In the case of officers accepting any such gift or consideration from anyone who has or is seeking a contract with the authority, the gift or consideration is deemed to have been accepted corruptly unless the officer can prove the contrary. It is therefore very important to be completely open about any significant gift or hospitality to avoid the suspicion of misconduct.

7.2 Members are required by the Code of Conduct for Members to notify the Monitoring Officer, in writing, on receipt of any gift or hospitality with a value of more than £25, whatever the motivation for such a gift. Members should note that they only need to register gifts and hospitality worth more than £25 that are received in connection with their official duties as a Member. Gifts received by Members in a personal/private capacity do not need to be registered.

7.3 Officers are required to disclose offers and receipts of gifts and hospitality which must be recorded in the register of gifts and hospitality, in accordance with the Code of Conduct for Employees. Officers should read the detailed guidance in the Code of Conduct for Employees which explains what must be declared and where there is discretion to declare. Deleted: held by their director
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7.4 A particular issue arises for officers seconded to work on outside bodies, as section 117(2) of the Local Government Act 1972 provides that an officer shall not, under colour of his office or employment, accept any fee or reward whatsoever other than his/her proper remuneration. Where an officer is to be seconded and might be in receipt of any remuneration, bonus or allowances from the authority to which he/she is to be seconded, the seconding authority must agree that his/her proper remuneration shall henceforth include any remuneration, bonus or allowances paid to the officer by the body to which he/she is seconded.

7.5 Members and officers appointed to outside bodies need also to be aware of their potential liability under the Bribery Act 2010. This Act created a number of new criminal offences, of which the most relevant in the context of this guidance are: Formatted: Indent: Left: 0 cm, Hanging: 1.27 cm

- bribing another person

- receiving a bribe

- failure by a commercial organisation to prevent bribery

The Act defines bribery as offering, promising or giving someone a financial or other advantage either –

to encourage that person to perform their functions or activities improperly or to reward that person for having already done so; or

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in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of the recipient's functions or activities

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7.6 Personal liability. Where any of the offences referred to in paragraph 7.5 are committed by a company, a senior officer of that company is liable to be prosecuted for the same offence if it is proved to have been committed with their consent or connivance. No indemnity or insurance is available to Members or officers found guilty in this situation.

7.7 As regards the offence of a commercial organisation failing to prevent bribery, Members and officers should note the following (taken from Ministry of Justice guidance): so long as the organisation is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

7.8 Members and officers should also refer to the council's counter-fraud strategy for further details of (i) the bribery risks facing the council, its Members and officers, and (ii) advice on the measures that Members and officers should take to mitigate the risks identified.

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A duty to exercise independent judgement when dealing with the company's affairs. Although it is permissible to take account of the interests of a third party (in this case the Council) a director cannot vote simply in accordance with the Council's instructions.

A duty to avoid conflicts of interests

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Directors must therefore disclose any interests they or their family may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the company's Articles of Association. Equally, officers are not allowed under cover of their office to take any more than their proper remuneration so they must obtain the consent of the Council if they are to receive any remuneration from a company to which they have been appointed by the Council.

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A duty to ensure compliance with the Companies Acts in relation to the keeping of accounts, and that the relevant returns are made to the Registrar of Companies.

