

DISCUSSION PAPER

Resigning From a Board: Guidance for Directors

ACKNOWLEDGEMENTS

This paper was prepared by the ACCA Corporate Governance and Risk Management Committee, which exists to contribute to the improvement of knowledge and practice in corporate governance and risk management and to guide and shape ACCA's global strategies and policies in these areas. The Committee, chaired by Professor Andrew Chambers, comprises experts from business, the public sector, academia and ACCA Council.

For more on ACCA's work in this area visit
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ABOUT ACCA

ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

We support our 122,000 members and 325,000 students throughout their careers, providing services through a network of 80 offices and centres. Our global infrastructure means that exams and support are delivered – and reputation and influence developed – at a local level, directly benefiting stakeholders wherever they are based, or plan to move to, in pursuit of new career opportunities. Our focus is on professional values, ethics and governance, and we deliver value-added services through our global accountancy partnerships, working closely with multinational and small entities to promote global standards and support.

We use our expertise and experience to work with governments, donor agencies and professional bodies to develop the global accountancy profession and to advance the public interest.

Our reputation is grounded in over 100 years of providing world-class accounting and finance qualifications. We champion opportunity, diversity and integrity, and our long traditions are complemented by modern thinking, backed by a diverse, global membership. By promoting our global standards, and supporting our members wherever they work, we aim to meet the current and future needs of international business.

Resigning From a Board: Guidance for Directors

Preface

One of the activities of ACCA's Corporate Governance and Risk Management Committee, since it was established in 2006, has been to formulate ACCA's corporate governance and risk management principles. These are to be found within ACCA's *Corporate Governance and Risk Management Agenda*¹

Principle 2 is that boards should lead by example. Boards should set the right tone and pay particular attention to ensuring the continuing ethical health of their organisations. Non-executive directors should regard one of their responsibilities as being guardians of the corporate conscience. Boards should ensure they have appropriate procedures for monitoring their organisation's ethical health.

Principle 5 is that boards should be balanced. Boards should include both outside non-executive and executive members in the governance of organisations. Outside members should challenge the executives but in a supportive way. No single individual should be able to dominate decision making. It follows that the board should work as a team, with outside members contributing to strategy rather than simply having a monitoring or policing role.

These and other principles now belong to ACCA's policy framework, to be used by the Committee, and ACCA more generally, in developing ACCA's specific policies on corporate governance and risk management for different sectors and regions; and in enabling ACCA to respond coherently to corporate governance and risk management issues as they arise.

This guide on directors' resignations is one of a series of monographs planned by the Committee to further the ACCA's corporate governance aims – particularly in relation to aspects of the two Principles set out above – and to provide practical guidance and make a contribution to the debate.

¹ ACCA, *Corporate Governance and Risk Management Agenda*, (2008), available from www.accaglobal.com/governance

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Executive Summary

All directors will, at some time, leave the board. This guide is about when directors resign. As prevention is better than cure, this guide also suggests what a prospective director should consider before joining a board to spot potential issues which might later lead to resignation. The guide is written with UK listed companies mainly in mind but much of it is also relevant to directors of other types of organisation and in other parts of the world.

DUE DILIGENCE ON JOINING THE BOARD

It makes sense to undertake general due diligence thoroughly and carefully before joining a board. Uncovering a potential resignation issue at this stage may enable it to be addressed in a non-contentious way. For example, a change to a problematic set of board procedures can more easily be changed before a problem becomes a board dispute. A prospective director should also form an appreciation of the financial statements, review management accounts, recent minutes of board and board committees and key supporting papers. An accountant joining the board may also want to speak to the audit engagement partner.

The prospective director should understand why he or she is being invited to join the board. Such due diligence should help to gauge the integrity of the board and of the senior management team.

ROLE OF THE CHAIRMAN AND GETTING ADVICE

A director's resignation is also often linked to a failure of chairmanship. Good chairmen chair the whole board, not a particular group of directors on the board. Yet, at times, chairmen side with a faction of directors to the detriment of board cohesion. An effective chairman will ensure that all directors know that they can discuss concerns at any time in confidence with him or her and with certain others, including the company secretary. The company secretary could be viewed as the agent of the board rather than as a member of the executive team.

Directors should have access to independent professional advice at the company's expense where they judge it necessary to discharge their responsibilities as directors. A prospective director should establish discreetly whether provision for this financial support exists.

Professional bodies such as ACCA offer an advisory service. While no substitute for specialist legal advice, such advisory services can be invaluable.

CONSIDERING THE RISKS

A resignation may be influenced by questions about the personal risk that may result from continuing on the board of a company that is in difficulty. An ex-director has no responsibility for the decisions of the board or for the actions of the company after his or her resignation, but the ex-director continues to have potential liability for what

occurred before his or her resignation. In practice a resigning director may well have accrued some culpability for the issue(s) that eventually led to resignation.

RECORDS

The records of board meetings can be important evidence, so a director considering resignation should be careful to check that board minutes accurately record the matter which may lead to his or her resignation. A director may be able to avoid or limit personal culpability by ensuring that his or her dissent is recorded within the board minutes. Ideally this should be done every time the subject has been discussed at the board.

In practice it is quite likely that a director may fail to ask for his or her concerns to be minuted initially. As a result, the director may later feel obliged to stay on the board to play a part in extricating the company from the difficulties it finds itself in.

HAVING THE SKILLS AND TIME REQUIRED

More is expected from a director with particular skills and experience than from one without those skills and experience. A director who does not have, and cannot acquire, the skills needed to discharge his or her particular roles should probably resign. Similarly, for a director who is unable to put in the time needed, resignation usually becomes appropriate. Evaluation of the performance of each director can enable these issues to be addressed so that resignation is not necessary.

CONSIDERING RESIGNATION

There is little point in a dissenting director remaining on a board which is seriously divided on fundamental issues. The more difficult issue is where there is suspected or known breaking of law, regulations, accounting standards or similar. A resignation on a point of principle draws attention to a divided board, diverts management and board attention to handling the resignation and its aftermath, and can damage the company commercially. Directors who resign run the risk, like whistle blowers, of being viewed as difficult.

Whether a resignation should be judged appropriate may vary according to the role of the director on the board. For instance, independent non-executive directors should consider the implications if their resignation would be likely to result in a weakened independent element on the board.

DECIDING OBJECTIVELY

Directors must take decisions objectively in the interests of the company. They may need to be firm with themselves not to allow their pecuniary interests in the company to interfere with making the correct decision whether to resign.

The special role of independent directors on the board is safeguarded when their pecuniary interest in the company is not at a level which interferes, or might be seen as potentially interfering, with their exercise of independent judgement. An executive director's livelihood, however, may depend on the job. Unfortunately executive directors are just as likely to face issues of principle.

Whistle blowing can severely limit career advancement. A director faced with a concern about a matter of principle is probably best advised to discuss those concerns with the chairman, other directors or the company secretary, but may have little option but to resign. ACCA members can contact ACCA's advisory service, which can provide objective support in such situations.

MAKING THE RESIGNATION

Most directors ultimately leave the board through resignation. Companies may have policies that require directors to resign if particular circumstances arise and setting these out in advance will help to avoid acrimony.

Written resignation is deemed to be effective 48 hours after dispatch. It is wise to follow up an oral resignation in writing. A director resigning at a board meeting should make clear whether the resignation is with immediate effect or from the end of the meeting, as he or she is a party to the decisions of the board up until resignation. Directors need to be aware of what, if anything, the articles of the company set out with regard to how a resignation should be made. Notice given to the company secretary will normally be appropriate.

AFTER RESIGNATION

A director may be concerned about whether his or her resignation is being explained to and interpreted appropriately by the board. We would say that any director who resigns on a matter of principle should be able to have a statement circulated to the board, setting out the reasons for resignation. A director who resigns at a board meeting should ask for a copy of the minutes of that meeting. A director's legal rights cease when cessation of office takes effect and he or she will no longer have a right to inspect the minutes or do anything else as a director.

When directors resign on a point of principle, it will be prudent of them to retain their personal copies of records relating to the resignation issue. Other board papers may be disposed of by them. Care may need to be taken so as to avoid the appearance of still being a director. They should not act in any way which could be construed as damaging the company. It is advisable not to make any statements which might be interpreted as impugning the integrity of past colleagues within the company.

There is no general right to insist that the company release an announcement of the resignation: the company may prefer to delay the announcement, perhaps until the time it reports to the members in the form of the next annual report. It is unlikely, however, to be in the best interests of the company for the members of the company not to be informed promptly of the resignation, and it would be regrettable if the company were to fail to ensure that members became aware promptly if resignation were on a point of principle.

A director who has resigned may be approached by his or her possible replacement about the circumstances surrounding the resignation. Care must be taken to guard against the risk of discussing company affairs with an impostor who has a private agenda. It is safer ground to stick to factual material, especially that which is in the public domain, leaving the candidate to draw his or her own conclusions.

Introduction

This guide focuses, largely but not exclusively, on resignations by directors, whether executive or non-executive, on matters of principle over which the board is divided. This guidance is not intended to be used in lieu of seeking legal advice. Directors may well need to take advice according to their particular circumstances when facing the prospect of resigning and their need to manage that process and its aftermath appropriately.

We refer frequently to the UK's *Combined Code*.² The FSA's UK Listing Rules allow companies wide flexibility in applying the *Code*. While the *Code* has been developed for listed companies it is widely seen as being best practice. Many countries have adopted codes which are similar and the *Code* is also recognised as having wider applicability to other types of entity, such as mutuals and UK National Health Service (NHS) bodies.

Although the guide is most relevant to directors of UK listed companies, we hope that it will also be useful to directors and prospective directors of other companies in the UK and around the world and to members, and potential members, of the governing bodies of other organisations such as the public sector, not for profit sector and parastatal organisations.

² Financial Reporting Council, *The Combined Code on Corporate Governance* (June 2008), is available from <http://www.frc.org.uk>

Due diligence when joining a board

Even when considering whether to join a board, a prospective director should have in mind the possibility of resignation some time in the future. It is as well to appreciate that it may not be straightforward to resign from the board. The prospective director's initial due diligence should be targeted partly at minimising the potential need for resignation later and also partly at establishing the particular process to be followed by a member of this board should resignation become necessary.

This section applies particularly to directors, executive and non-executive, considering joining a board from outside the organisation, but it also applies to a member of the management team who has been invited to join the board. Such an invitation may represent the achievement of a career ambition but the invitee would do well to be equally diligent before accepting, as things at board level may be different from how they appear from below.

In part because it may not be straightforward to resign from the board, it makes eminent sense to undertake one's general due diligence thoroughly and carefully before accepting an invitation to join a board. Ensuring that the due diligence uncovers what might later become a resignation issue is not straightforward and cannot be guaranteed to be successful, especially when it is unrelated to the recent departure of another director.

Uncovering a potential resignation issue at the due diligence stage may enable it to be addressed in a non-contentious way before accepting an invitation to join the board. For instance, although a requirement of the UK's *Combined Code*,³ there may be no board policy empowering individual directors to take outside advice at the company's expense should they feel the need arise; the board may, however, be willing to rectify that omission. In another example, the chairman of an audit committee was advised by the company chairman that under board standing orders the audit committee chairman had no authority to convene a meeting of the audit committee; these standing orders required that all meetings of board committees had to be convened by the company secretary, and the chairman of the board disagreed that a special meeting of the audit committee was required. Had the chairman of the audit committee studied the standing orders before joining the board he or she could, in all probability, have negotiated a change to those standing orders before the matter became enmeshed within a board dispute.

A prospective director's due diligence should, *inter alia*, also involve obtaining an awareness of other matters that might bear upon subsequent resignation. These will include the existing policies of the board, the articles of the

company and the terms of reference of board committees. An appreciation of the financial statements of the company over the past few years and a review of up-to-date management accounts are also essential. Not only will this work have the potential to highlight the key areas of weakness and strength; it will also enable the prospective director to identify key performance indicators that he or she will be able to track over time after joining the board.

Boards that are hidebound by complex standing orders are likely to be problematic boards to belong to: certainly the standing orders should be understood before joining the board. Even more important are the articles of Association, especially those articles which deal with the composition of the board and resignation from the board. Prospective new directors also should ask to review recent minutes of board and board committees as well as key supporting agenda papers.

The prospective director should enquire directly why he or she is being invited to join the board. Enquiry should be made as to how the board vacancy has arisen. It is partly a matter of ensuring that the prospective director can bring to the board the skills and commitment that are being sought. The prospective director should use his or her best endeavours to meet separately with each member of the board, executive and non-executive, before accepting an invitation to join the board. It would be a matter of concern if they saw no need to meet up. He or she should also make enquiry of recent past directors, especially of the director, if any, who is being replaced. The purpose, of course, is to learn directly their reasons for leaving the board – especially whether it was a matter of principle – and the substance of that disagreement, so as to ascertain whether there are grounds for declining to join the board. In some cases it may be possible for the incoming director to negotiate changes in board policy or practice that remove the causes of the previous director(s)' resignation and thus enable the invitation to join the board to be accepted.

Consideration should also be given to arranging to speak to the audit engagement partner, particularly in the case of those with financial and accounting experience who are being invited to join the board.

While careful due diligence can significantly reduce the likelihood of later finding oneself in a resignation situation, it will not eliminate the risk. There may be a reluctance on the part of the company to be fully open with a prospective director until he or she has accepted the invitation to join the board. Issues may only come to light in the course of the first few board meetings thereafter.

Apart from teasing out specific issues, careful due diligence along the lines suggested above should also be used to try to gauge the integrity of the board and of the senior management team. There may be no apparent specific issues but just an uncomfortable feeling, a feeling which should not be put to one side.

³ *The Combined Code on Corporate Governance* (FRC 2008), Code Provision A.5.2: 'The board should ensure that directors, especially non-executive directors, have access to independent professional advice at the company's expense where they judge it necessary to discharge their responsibilities as directors. Committees should be provided with sufficient resources to undertake their duties.'

Senior executive directors being sought for non-executive roles in other companies may, by agreement with the company whose board they may be joining, delegate some of the due diligence to their staff or to a firm of accountants.

Due diligence enquiries that may alert you to extra risks of later resignation are summarised in Table 1. They are not intended to be exhaustive.

Table 1

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1. Is there anything in the articles of association that you are uncomfortable about?

 2. Is there anything in the board's standing orders, the director's letter of appointment or within the terms of reference of the board's committees, which you are uncomfortable about?

 3. Does the company have any policies that require directors to resign in particular circumstances?

 4. Do your discussions with directors and your review of recent board agenda papers and minutes indicate:
 - a divided board?
 - a balanced board?
 - a poorly led board?
 - excessive concentration of power?
 - a company in serious difficulty?

 5. Does your review of past published financial statements and recent management accounts and forecasts raise serious concerns that remain unsatisfied?

 6. Have you asked if there are any significant disputes affecting the company and are you satisfied that the board's stance on these is ethical?

 7. Are you clear why you are being invited to join the board and are you confident you can bring to the board what the board is expecting – in terms of:
 - time commitment?
 - skills?
 - diligence?
 - care?
 - inter-personal relationships?

 8. Has the company adequate directors' insurance in place?

 9. Why did recently departed directors resign from the board?

Before joining a board, it is also wise be clear about the possible resignation exit strategy. Table 2 lists some of the questions to consider.

Table 2

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1. Is there anything in the articles or in your letter of appointment that could restrict your freedom to resign?

 2. What is the company's laid down procedure for a director to resign?

 3. Does the company have a protocol for notifying shareholders when a director resigns?

 4. Is there a satisfactory board policy for directors to take independent professional advice at the company's expense, and would this cover costs associated with resignation?

 5. Are you confident that the company secretary can be relied upon when necessary to keep matters confidential between the two of you?

 6. Do you have the contact details of all members of the board and the company secretary?

 7. Do you know which specialist lawyer you could turn to in case of need with respect to resignation?

 8. Are the above matters, to the extent appropriate, set out in writing so that you will be able to refer to the policy?

 9. Is there a risk that your dependence on the income which comes with this board appointment could cloud your judgement when deciding whether to resign?

Dialogue, the role of the chair and getting advice

Dialogue and taking advice are powerful means of resolving issues having an impact on the board.

All political careers are said to end in failure and all directors, in time, will leave their boards. Resignation over a matter of principle is usually, in a very real sense, a tacit acknowledgement of failure – a failure to carry the board on a particular issue by the director(s) who resign(s), albeit an issue which has led the board to follow a course of action which the dissenting director considers to be fundamentally wrong or misguided. It is not uncommon for several contentious issues to coalesce so that, together, they amount to grounds for resignation.

Director resignation is also often linked to a failure of chairmanship. Those who chair boards are responsible for the effectiveness of their boards. Good chairmen of boards interpret their role as being to chair the whole board, not a particular group of directors on the board. Yet, frequently, chairmen of boards tend to side with the same faction of directors on the board, often the executive directors, to the detriment of board cohesion. This is less likely to be the case if, as the UK Code counsels,⁴ the chairman is independent at the time he or she was appointed to that position. When divisions threaten a board, the chairman as leader of the board has a key role in healing these rifts, but may not always be successful despite the best of endeavours. The UK Code provides that the chairman should hold meetings with the non-executive directors without the executives being present; and also that, led by the senior independent director, the non-executive directors should meet without the chairman present on such other occasions as are deemed appropriate.⁵

An effective chairman of the board will ensure that all directors know that they are at liberty to discuss their concerns at any time, not only with the chairman of the board and with other directors but also with senior executives, the external auditor, the head of internal audit and the company secretary. The company secretary is responsible for serving the board as a whole. It may be helpful to view the company secretary as the agent of the board rather than as a member of the executive team. The chairman of the board should make it clear to the company secretary that the confidence should be respected of a director who asks the company secretary

for advice, and this request should not be relayed directly to the executive team where that would undermine the director concerned.

As already mentioned, the UK Code counsels that directors, especially non-executive directors, should have access to independent professional advice at the company's expense where they judge it necessary to discharge their responsibilities as directors.⁶ It is a moot point as to whether this facility should be available in connection with a director's resignation and also whether it should extend to support from, for instance, a communications consultant in handling relationships with the media post-resignation. As part of a prospective director's due diligence when being invited to join a board, it may be wise to establish discreetly whether the provision of this financial support has been approved by formal board resolution and whether it will be available, according to the director's judgement of need, to cover professional fees relating to a resignation, both before and after the resignation.

Such policies often require that one other director should approve the utilisation of this facility by another director. Even if the policy does not cover resignation per se, it may be a valuable means of resolving a contentious issue so as to make resignation unnecessary. For instance, if a director has an anxiety about an aspect of financial reporting, which it has not been possible to resolve to the director's satisfaction internally through the normal channels, taking independent outside advice may be sufficient to allay the director's concerns. Nevertheless, in most cases a concerned director should be able to persuade his or her colleagues that the board should collectively seek this outside advice.

Many professional bodies also offer an advisory service. While no substitute for specialist legal advice, such advisory services can be invaluable, particularly when a director can benefit from discussing an issue with an independent, sympathetic and knowledgeable advisor.

4 *The Combined Code on Corporate Governance* (FRC 2008), Code Provision A.2.2: 'The chairman should on appointment meet the independence criteria set out in A.3.1 below. A chief executive should not go on to be chairman of the same company. If exceptionally a board decides that a chief executive should become chairman, the board should consult major shareholders in advance and should set out its reasons to shareholders at the time of the appointment and in the next annual report.'

5 *The Combined Code on Corporate Governance* (FRC 2008), Code Provision A.1.3: 'The chairman should hold meetings with the non-executive directors without the executives present. Led by the senior independent director, the non-executive directors should meet without the chairman present at least annually to appraise the chairman's performance (as described in A.6.1) and on such other occasions as are deemed appropriate.'

6 *The Combined Code on Corporate Governance* (FRC 2008), Provision A.5.2: 'The board should ensure that directors, especially non-executive directors, have access to independent professional advice at the company's expense where they judge it necessary to discharge their responsibilities as directors. Committees should be provided with sufficient resources to undertake their duties.'

Considering the risks

The need to resign may be influenced by a matter of principle or concerns about personal risk such as may result from continuing on the board of a company that is in difficulty. Both are in a sense exceptional in that they are unrelated to the normal turnover of members of the board. While an ex-director has no responsibility for the decisions of the board or for the actions of the company after his or her resignation, the ex-director continues to be responsible for his or her own actions, and the actions of the board, in the period up until the resignation takes effect. In practice it will be unusual for a resigning director not to have accrued a degree of potential culpability for the issue(s) that eventually led to resignation since these types of matter often have a long fuse but tend to start in an anodyne way.

A failure to act appropriately in the face of knowledge inevitably leads to the conclusion that directors have become part of the problem instead of the solution. If the other directors will not act, resignation is often the only alternative. A director who finds himself or herself in that position should consult independent counsel immediately; the danger of being perceived by regulators, the SEC, or a jury as one who has been drawn into wrongdoing can escalate very quickly.⁷

The many members of boards of other organisations, such as government departments and agencies and non-departmental bodies, should not be concerned about personal risk of continuing on such a board – except from the perspective of personal reputation. Directors of these public bodies are not covered by directors' liability insurance, as they do not need to be. The UK Code provides that this insurance cover should be in place for directors of listed companies.⁸

⁷ Freidman, Stephen J. (1996), 'Resigning from the board', in *Directors & Boards*, 20/2: 30.

⁸ *The Combined Code on Corporate Governance* (FRC 2008), Provision A.1.5: 'The company should arrange appropriate insurance cover in respect of legal action against its directors.'

Records

The records of board meetings may later turn out to be important evidence as to why a director resigned. A director who is considering resignation should be careful to check that board minutes accurately record the matter which may lead to his or her resignation, as subsequently they are likely to be held to be the true record.

The UK Code provides that where directors have concerns that cannot be resolved about the running of the company or a proposed action, they should ensure that their concerns are recorded in the board minutes.⁹ It is important that dissenting views be recorded, particularly regarding matters where there are statutory offences for non-compliance or inaction. This is because frequently the statutory rules on liability apply to every director who was at fault, or otherwise base liability on whether a director took all reasonable steps to ensure compliance with the matter in question. The director may be able to avoid or limit personal culpability by ensuring that his or her dissent is recorded within the board minutes. Ideally this should be done every time the subject is discussed at the board, to avoid the risk that the cumulative record might imply that while at one stage the director had dissented, nevertheless at later meetings the director appeared to go along with the matter. If the minute cross-refers to a supporting paper that contains detail about the dissent, that would be sufficient so long as the supporting paper were accessible and retained – which of course would not be something that the dissenting director could ensure, except with respect to his or her own copy of the minutes and agenda papers.

There are no legal rules that address the not unknown scenario whereby the company declines to agree to record in the board minutes a director's dissent; but best practice requires minutes to be clear, concise and unambiguous, which would invariably require dissent to be recorded when a director insisted. Failure to record an objection at a director's insistence would probably cause a loss of confidence in the way that the board was being run. The minutes are the legal responsibility of the directors, with the company secretary being the servant of the board in this respect.

In practice it is quite likely that a director may fail to ask for his or her concerns to be minuted. Initially the eventual significance of the matter may not have been appreciated, and it is divisively confrontational to demand that one's dissent be always recorded. The subsequent effect may be that the director feels obliged to stay on the board to play a part in extricating the company from the difficulties it finds itself in.

Under the UK's 2006 Companies Act, the law now requires records of board and shareholder resolutions and of meetings of directors to be kept and to be retained for ten years.¹⁰ Prior to this Act the retention period was not specified. The Act does not make any distinction between board meetings and board committee meetings. The courts are likely to interpret this new section as extending to committee meetings as well as board meetings: if a committee comprises members of the main board, then its meetings will be meetings of (some of) the company's directors. Given that a board committee almost certainly will have delegated powers from the main board to act, and may have the power to commit the main board, it would in any case make sense for the committee's deliberations and decisions to be recorded in the same way as those of the main board and to be reported to the board. While there is no express requirement within the Act to retain agendas or agenda papers, keeping these in some recorded form will be highly advisable whenever a minute cross-refers to a paper on the agenda of the meeting concerned.

⁹ *The Combined Code on Corporate Governance*, (FRC 2008), Provision A.1.4: 'Where directors have concerns which cannot be resolved about the running of the company or a proposed action, they should ensure that their concerns are recorded in the board minutes. On resignation, a non-executive director should provide a written statement to the chairman, for circulation to the board, if they have any such concerns.'

¹⁰ The 2006 Companies Act, Section 248.

Having the skills and time required

While ‘a director is a director is a director’, the long-standing principles of skill and care mean that more is expected from a director with particular skills and experience than from one without those skills and experience. Under the UK’s 2006 Companies Act this will develop significantly: in future the law will expect a certain standard of skill and care from all directors and will additionally take into account the particular functions that an individual director is carrying out. This will raise the bar of conduct generally, almost certainly leading to an elaboration of the standards expected of non-executive directors vis-à-vis executive directors and of directors serving on specialised board committees, including the audit committee. This will certainly be taken into account in determining responsibility for damages purposes.

It is clear that if a director does not have the skills needed to discharge his or her particular roles on the board, then the director should resign, unless the roles can be revised or the skills learned. Similarly, if the director is unable to put in the time needed, then resignation usually becomes appropriate. Annual evaluation by the chairman of the performance of each director may be a means of addressing these issues in a timely way so that resignation is not necessary. If the time requirements have proved significantly greater than expected when the appointment was accepted and the board is unable to rectify the problem, nor is the director able to devote the requisite amount of time that circumstances are proving to be necessary, then it is hard to avoid the logic that the appropriate course of action is likely to be to resign the board appointment. It would be unsatisfactory to soldier on as a director, with all the obligations that directors have, if one were unable to devote sufficient time to the responsibility.

The *Combined Code* deals with time commitment at the level of both *Code* principles and *Code* provisions. The first Supporting Principle at A.4 of the *Code* states:

Appointments to the board should be made on merit and against objective criteria. Care should be taken to ensure that appointees have enough time available to devote to the job. This is particularly important in the case of chairmanships.

The *Code* sets out that the letter of appointment of a non-executive director should indicate the expected time commitment and that the non-executive director should undertake that he or she will have sufficient time to meet what is expected.¹¹ The issue of time availability is also pertinent for chairmen of boards and for executive directors. For instance, the *Code* sets out that a chairman’s availability and significant commitments should be disclosed to the board before appointment, that any changes to those commitments be reported to the board as they arise and their impact explained in the next annual report,¹² and that an executive director of a FTSE 100 company should not accept more than one non-executive appointment.¹³

11 *The Combined Code on Corporate Governance* (FRC 2008), Provision A.4.4: ‘The terms and conditions of appointment of non-executive directors should be made available for inspection. The letter of appointment should set out the expected time commitment. Non-executive directors should undertake that they will have sufficient time to meet what is expected of them. Their other significant commitments should be disclosed to the board before appointment, with a broad indication of the time involved and the board should be informed of subsequent changes.’

12 *The Combined Code on Corporate Governance* (FRC 2008), Provision A.4.3: ‘For the appointment of a chairman, the nomination committee should prepare a job specification, including an assessment of the time commitment expected, recognising the need for availability in the event of crises. A chairman’s other significant commitments should be disclosed to the board before appointment and included in the annual report. Changes to such commitments should be reported to the board as they arise, and their impact explained in the next annual report.’

13 *The Combined Code on Corporate Governance* (FRC 2008), Provision A.4.5: ‘The board should not agree to a full-time executive director taking on more than one non-executive directorship in a FTSE 100 company nor the chairmanship of such a company.’

Considering resignation

All the relevant factors have to be weighed carefully before a director makes this decision. It will be damaging to the company if the board is seriously and continuously divided on fundamental issues – such as the strategy of the company. If a board is seriously and continuously divided on fundamental issues then there is little point in a dissenting director remaining, and resignation should probably be ‘amicable’ and ‘quiet’. The much more difficult issue, and hopefully less common one, is where there is suspected or known breaking of law, regulations, accounting standards or similar: then the resignation should most likely be much higher-profile and ‘noisy’.

A resignation on a point of principle draws attention to a divided board, diverts management and board attention to handling the resignation and its aftermath, and can damage the company commercially. So resignation may be the ‘Exocet’ option, to be used very reluctantly. Not entirely unreasonably, directors who have resigned may, like whistle blowers, be viewed with some suspicion by other boards as being potentially too difficult as colleagues to welcome on board.

Of course, not every board disagreement is a resignation issue. A hallmark of a successful board is open, lively, dialogue between board members. This in itself makes it less likely that board factions will develop and assume polarised positions. Board members need to be good team workers.

UK company law does not distinguish between different types of director and they all have collective responsibility for the board’s actions. In practice, however, while many board responsibilities are held in common by all the

members of the board, executive directors will often have specific responsibilities for particular areas of the company’s activities, eg finance, and non-executive directors, particularly if they are regarded as independent, fulfil certain roles that are different from those of executive directors. Whether a resignation should be judged appropriate may vary according to the role of the director on the board, and this paper should be interpreted accordingly. For instance, independent non-executive directors should consider the implications if their resignation would be likely to result in a weakened independent element on the board.

Many family businesses across the world are in the process of going public. In these cases the chairman of the board may, for instance, be the family member who ran the business before a proportion of its equity was floated. If the business has independent non-executive directors, they might have been chosen by the company’s chairman. If the chairman departs, there remains the question as to whether the independent directors should also resign. One commentator has recently observed that:

*The departure of a non-independent chairman should not be a good reason for an independent director to exit as he or she is not expected to be aligned to the previous or current majority shareholder and chairman.*¹⁴

It has been said that:

*It would be appropriate for independent directors to resign when their views are consistently and fundamentally different from the board’s.*¹⁵

14 Tan Lye Huat, CEO of HIM Governance, quoted in ‘When is it OK for directors to quit?’, quoted in *The Business Times*, Singapore (28 November 2006).

15 Penelope Phoon, head of ACCA Singapore, quoted in ‘When is it OK for directors to quit?’, quoted in *The Business Times*, Singapore (28 November 2006).

Deciding objectively

A Principle of the UK Code is that all directors must take decisions objectively in the interests of the company.¹⁶ Similar requirements apply across the world. For instance, s157 of the Singapore Companies Act states that:

a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

There could be circumstances where a director's culpability/liability is the greater because of his or her resignation; that is, the court might take the view that the director should have stayed on the board to try to sort out the mess for which he or she was partly responsible. Where the company faces probable insolvency, a director is required to take every step to minimise losses to creditors, otherwise he or she will face personal liability for the company's ongoing debts. So a director who jumps ship rather than staying to sort out the mess in the interests of creditors is likely to be in a worse personal position than one who stays and tries to do the right thing. Stephen Friedman has said:

Directors are elected by shareholders to, among other things, protect the company from the potential damage that management misjudgement...can create. There is little doubt that the right thing to do is to talk to other directors, bring the company's counsel and auditors to board meetings, and stop the improper conduct.¹⁷

Directors may need to be firm with themselves not to allow their pecuniary interests in the company to interfere with making the correct decision whether to resign. In the UK, both Higgs (2003) and Tyson (2003) indirectly address the risk that a non-executive director's fee might influence a director's resignation decision:

...it is important that a non-executive director is not so dependent on the income from their role or shareholding as to prejudice independence of judgement, and I would expect boards to take this into account in determining independence.¹⁸

and:

The perception of a possible conflict between NED compensation and NED independence may be a possible constraint on the selection of NED candidates from non-traditional talent pools.... These are relatively small amounts compared to the annual compensation levels of chief executives, top-level management and other business professionals. But NED compensation levels may be quite large compared to the annual incomes of NED candidates drawn from non-traditional sources such as the non-commercial sector and academia. Institutional

investors and other company stakeholders might wonder whether a NED can be truly independent if NED compensation represents a substantial fraction of his or her total annual income.¹⁹

So best practice is suggested as being that the board, when making an appointment, should consider whether the director's fee will make such a significant impact on the director's standard of living as potentially to colour his or her judgement and make it impractical for the director to contemplate resignation objectively. This has been a contentious recommendation, as there are many not very prosperous people who would like to be non-executive directors and for whom the fee would make a significant difference and is a large part of the attraction. Many of them would argue that they would be quite capable of acting objectively on points of principle.

The special role of independent directors on the board is safeguarded when their pecuniary interest in the company is not at a level which interferes, or might be seen as potentially interfering, with their exercise of independent judgement. Being in receipt of a loan from the company, where permitted by law and regulation, should be regarded as a potential impediment to a director's independence.

An executive director is in a rather different position. His or her livelihood and that of his or her dependants may depend on the job. Unfortunately executive directors are just as likely to face issues of principle. As executive directors may be more caught up in the company's culture, and have fewer points of external reference, an emerging point of principle may be less obvious to them initially. By the time the problem becomes obvious, it may be more difficult to take action, particularly if the director has become complicit in what was going on.

It is well known that whistle blowing can severely limit prospects for career advancement. Regrettably there are no easy answers. In practice, a director faced with concerns about a matter of principle is probably best advised to discuss those concerns with the chairman, other directors or the company secretary. If it is clear that others on the board feel differently about those concerns, the director may have little option but to resign. ACCA members can contact ACCA's advisory service, which can provide objective support in such situations. Many other professional bodies offer a similar service. Members of professional bodies such as ACCA obviously have a professional duty to face up to dealing with a point of principle; ignoring it is not an option.

There is little or no risk that members of councils of charities who provide their services without financial reward, as well as members of the boards of many public bodies whose fees are very modest, would be influenced by pecuniary considerations when they decide whether or not to resign from the board.

¹⁶ The Combined Code on Corporate Governance (FRC 2008), Supporting Principle A.1.

¹⁷ Friedman, Stephen J. (1996), 'Resigning from the board', in *Directors & Boards*, 20 (2): 30.

¹⁸ Department of Trade and Industry (2003), *Higgs Review of the Role and Effectiveness of Non-Executive Directors*.

¹⁹ Department of Trade and Industry (2003), *Tyson Report on the Recruitment and Development of Non-Executive Directors*.

Possible resignation issues

As an aid to deciding whether to resign, we invite use of the questions in Table 3 (which is not an exhaustive list of possible issues).

Table 3

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1. Are you sure that the board has taken a fundamental decision with long-term impact, perhaps on long-term strategy, that you are convinced is wrong and that you will not be able to support going forward?

 2. Can you see clearly that the company is embarked upon a policy that will lead to a future crisis and from which you have been unsuccessful in persuading the company to pull back?

 3. Is the board acting dishonourably by supporting, or conniving in, a significant course of action in breach of:
 - covenants entered into with a third party (without sufficient restitution)?
 - the duties of directors?
 - the law?

 4. Is there a breakdown of trust and confidence between members of the board which has proved impossible to resolve, but which your resignation is the best way to resolve?

 5. Has the board rejected the advice of a committee of the board on a significant matter that the committee considers it cannot compromise over; and have all means to resolve the disagreement been exhausted?

 6. Is it apparent that you are unable to make an effective contribution as a director?

 7. Do you have irresolvable concerns about disclosure and financial reporting to the extent that you consider published results to be misleading?

 8. Have you failed to obtain action to align the financial interests of top management with the interests of the company's members?

 9. Have you failed to persuade the board to address your significant concerns about the quality of the company's corporate governance?

 10. Have you lost confidence in the integrity of colleagues on the board, with no real potential of being able to address this successfully?

 11. Have you lost confidence in the competence or integrity of non-board management, for actions that you as a director will be held responsible, but which you as a director have been unable to resolve?
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Making the resignation

Most directors ultimately leave the board through resignation. The other exit route is when shareholders decline to re-elect a director or when they vote to remove a director from the board. That exit route may have been instigated by a shareholder vote at a general meeting of the company, perhaps on a resolution of the board to remove the director. Even in these cases it is usual for the departing director to submit his resignation formally following the vote.

Directors need to be aware of what, if anything, the articles of the company say with regard to how a resignation should be made. The case where a company's articles require the board to approve any resignation before it is effective can be problematic; this emphasises the importance of a prospective director undertaking a thorough due diligence, which takes in the articles of the company, before accepting an invitation to join the board.

'Table A', the default model articles of association made under the UK Companies Act 1985, will normally be applied by companies unless they provide for alternative arrangements of their own.²⁰ Table A says that a director may resign by giving notice to the company: in practice notice given to the company secretary will be appropriate. Table A says that notice may be given either in writing or in electronic form, using an e-communications address specified by the company. Where the notice is submitted in writing, Table A says that proof of an envelope having been properly addressed, pre-paid and posted will be conclusive evidence that the notice of resignation was given, and it will be deemed to be given 48 hours after it was posted. So if the resignation is not personally presented, it would be sensible for the director to send the notice by recorded delivery and to retain the proof of posting. If personally presented, it may be prudent to obtain a receipt if the resignation is being effected in contentious circumstances.

Where the notice is submitted in e-form, proof that the notice was sent in accordance with guidance issued by the institute of Chartered Secretaries and Administrators shall be conclusive evidence that it was given.

Undated resignations should be avoided. Where a notice is not dated, then if a company follows Table A (1985), which says that a notice is deemed to have been received 48 hours after it was posted, the company would be entitled to record the resignation as of the date of receipt or, if earlier, 48 hours from any verifiable time of dispatch. There will be very few circumstances where undated resignations might be appropriate – deliberate omission of a time and date of resignation would arguably suggest uncertainty as to the director's intentions.

Conceivably an undated resignation might be something to consider in situations where a board needs to ratify a resignation for it to be effective – in that sort of situation an undated resignation might be presented as a threat designed to force an issue and reach a compromise – but it would still be a risky move since the board could accept it anyway. The chairman would not have authority to depart from the rules of procedure as set out in the articles on this matter.

Companies may have policies that require directors to resign if particular circumstances arise. For instance, a chief executive may be required to resign from the board if he or she loses the position of chief executive. Or a director may be required to resign if a significant shareholder sells their stake in the company. It would no longer be legal, under UK law, for the policy of the company to require a director to resign upon reaching a certain age.²¹ Setting out in advance what some of the resignation circumstances are, and thus when a resignation letter is expected, will help to avoid the acrimony that may result if a director has to be removed in another way.

Oral resignation at a board meeting will be effective if that resignation and its effective timing are clear and unambiguous and the resignation is accepted by the other directors present; but it is wise to follow up an oral resignation with written confirmation to the company chairman or to the company secretary or as required by the articles.

If a director resigns at a board meeting, it is as well for that director to make it clear whether the resignation is with immediate effect or takes effect from the end of the meeting. A board member is a party to the decisions of the board up until the moment that he or she resigns.

Acceptance of a resignation, usually by the chairman on behalf of the board, is usual but is not a prerequisite for the resignation to be effective – unless the articles stipulate otherwise.

Companies House Form 288b is used to notify Companies House about a person ceasing to be a director. The significance of this form is only that it fulfils the company's obligation to place the amended details of the board's membership on the public record – it has no direct implications for the validity of the resignation. The resigning director cannot personally submit Form 288b to Companies House as it requires the signature of a current director. If the company fails to submit Form 288b this does not mean that the director who has submitted his or her resignation is still a member of the board. A director who has resigned may, however, wish to check with Companies House that the form has been submitted.

²⁰ The new default articles of association will be published in 2009.

²¹ The age limit of 70 has been taken out of UK company law by the 2006 Companies Act. The age discrimination rules brought in in 2005 extend to company directors as well as the employment situation.

After resignation

In practice, the exclusion of the departed director from the future business of the board can lead to concern as to whether his or her resignation is being explained and interpreted appropriately. The UK *Code* states that, on resignation, a non-executive director should provide a written statement to the chairman of the board, for circulation to the board, if the director resigned over any concerns.²² We would say that the same should also apply to an executive director who resigns on a matter of principle. It may be prudent for the resigning director to copy this statement personally to each member of the board if there is any question as to whether the chairman of the board will do so. As a practical matter it is therefore important, for this and other reasons, that each member of the board has at all times up-to-date contact details of each of the other directors on the board. If the resignation were discussed at a board meeting attended by the resigning director, then he or she could make an appropriate statement to the board and require that this be minuted.

A director who has resigned at a board meeting should ask to receive a copy of the minutes of the board meeting at which he or she resigned. This ensures that the departed director can make representations if the board minute referring to the resignation is, in his or her view, inaccurate or incomplete. There is a risk that those minutes will not be received, since that director is no longer a member of the board. While a director has no legal entitlement to receive a copy of board minutes which apply to board business after his or her resignation, we suggest it would be good practice for boards to ensure that they are so supplied.

A director will still have legal rights up to the time that his or her cessation of office takes effect. Under case law precedent, if the director resigns at a meeting 'herewith' and all directors present accept the resignation, it is effective immediately. Therefore the director will no longer have legal rights to inspect the minutes or do anything else as a director. If the director announces an intention to resign as per the formal procedure in the articles, he or she will technically still be a director until the procedure is complied with, and so will be able to see the minutes of the meeting up until that time. If the minutes are not available until some time after the meeting and after the formal date of resignation, the ex-director would not have a right of access to them. There is no express right for an ex-director to see the minutes of the meeting at which he or she (definitively) resigned. He or she can, of course, always check with Companies House that Form 288b has been filed and can ask the company for formal assurance that the resignation has been recorded and notified to

Companies House. While it would seem good practice for a company to give this assurance it is not a legal requirement.

When directors resign on a point of principle, it will be prudent for them to retain their personal copies of board and board committee papers relating to the resignation issue so that they have their own independent evidence of what those papers contained. Other board papers may be disposed of by them. An effective way of doing this may be to return them personally to the company secretary for secure disposal. Alternatively, the ex-director has the responsibility to ensure that they are disposed of securely.

After resignation, some care may need to be taken so as to avoid the appearance of still being a director. Once a director has resigned, his or her responsibilities will cease as at the date and time of his resignation – so long as he or she does not continue to act as a director. The UK definition of 'director' is based on activity rather than title, so it is conceivable that a person who formally resigns as director may continue to act as such or as a shadow director. A person will only be a shadow director if he or she issues directions or instructions that the other directors routinely follow. In respect of their statutory functions, shadow directors can find themselves with the same liability as directors.

Where a director has resigned, he or she will still be subject to certain fiduciary responsibilities towards the company, so he or she should be careful to conduct himself or herself carefully. He or she should not act in any way which could be construed as damaging the company and, in particular, it is advisable to exercise care not to make any statements which might all too easily be interpreted as impugning the integrity of past colleagues within the company. While bearing these considerations in mind, it is reasonable to make a statement, perhaps a letter to shareholders or a press release, announcing the resignation and the reason(s) for it. While directors do not have to publicise a reason for resigning, it should be possible to do so without adverse legal ramification. The reason should be as accurate as possible. The use of phrases such as 'for personal reasons' or 'to spend more time with the family' should be used only if they are correct. One authority has suggested:

It is acceptable if someone is resigning due to reasons of illness, bereavement or other genuine personal difficulties, but we propose that anyone who uses the 'personal reasons' excuse should, if they have other listed directorships, be required to explain in the same announcement why these 'personal reasons' do not make it necessary to resign from those positions, too.²³

The director who has resigned has no general right to insist that the company release an announcement of the

²² *The Combined Code on Corporate Governance* (FRC 2008), Provision A.1.4: 'Where directors have concerns which cannot be resolved about the running of the company or a proposed action, they should ensure that their concerns are recorded in the board minutes. On resignation, a non-executive director should provide a written statement to the chairman, for circulation to the board, if they have any such concerns.'

²³ David Webb, editor of governance website Webb-site.com, quoted in: 'What other countries say', *The Business Times*, Singapore (28 November 2006).

resignation: the company may prefer to delay the announcement perhaps until the time it reports to the members in the form of the next annual report. Form 288b will of course be on the public record and, for a listed company, there are requirements to inform the market of various issues, though there is no specific requirement to do so in respect of changes in directors.

However, a chief executive's resignation from a listed company is an 'announceable' event. For market reasons it is probably unwise to announce the departure of a chief executive until the company is also able to announce his or her replacement. So it is usual for a chief executive to advise the board of his or her intention to resign, so that the later announcement of the resignation can be contemporaneous with the announcement of who the successor will be. This approach may also be applied so as to limit the damage to a company when one or more directors, perhaps non-executive directors, resign.

It is reasonable for a director who has resigned to press the company to ensure that Form 288b notice is placed on the public record promptly and to inform him or her that this has been done. There are currently limited powers for Companies House (on approach by an interested party or otherwise) to amend information on the public record if it is incorrect or no longer correct, though this will change under the 2006 Companies Act. The director who has resigned may also require the company to desist from referring to him as a director in any official company publication. If it came to it he or she could consider taking out an injunction against the company to compel it to stop referring to him publicly as a director.

It is unlikely to be in the best interests of the company for the members of the company not to be informed promptly of the resignation of a director. While 'the company' has its own corporate personality, its members are, after all, a hugely important part of the company. While the

fundamental reason for the resignation may have been a disagreement on a point of principle, much of the impact of the resignation will be lost if the members of the company remain unaware of it. It would be regrettable if the company were to decline to ensure that members became aware promptly of a director's resignation on a point of principle. The ex-director should find a way of ensuring that the members are informed promptly.

Prior to resignation, it is advisable that the director who is considering resignation avoids making commitments of any sort about his or her intentions following resignation. It is preferable to keep all options open, as the director concerned cannot possibly know how affairs will unfold following the resignation. For instance, an undertaking not to issue a press release or not to speak to journalists may inhibit the resigned director from correcting misinformation after he or she has left the board.

In tense high-profile situations it may be helpful for the leaving director to retain a firm of communications consultants and to refer all enquiries about his or her resignation through that firm.

It is quite likely that a director who has resigned will be approached by someone who is being invited to replace him or her on the board, to enquire about the circumstances surrounding the resignation and whether there are any reasons why this candidate should not accept the role. Again, this requires circumspection. If the enquirer is unknown to the ex-director, care must be taken to guard against the risk of discussing company affairs with an impostor who has a private agenda. It is safer ground to stick to factual material, especially that which is in the public domain, leaving the candidate to draw his or her own conclusions. An ex-director may also safely correct misinterpretations of material that is within the public domain.

Scenarios and dilemmas

Readers may wish to consider the following scenarios and dilemmas to improve their understanding of the issues. This may help directors to consider how they might respond to a situation before a problem becomes acute.

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1. The articles require the approval of the board before you can resign as a director. If you noted this before you joined the board, how would you react? How would it affect your approach to resigning?

 2. You are resigning on a matter of principle. The board refuses to notify the members of the company about your resignation until the next annual report reaches the members in several months' time. What would you do?

 3. Can you anticipate a situation in which it would be in the best interests of the company for the board not to inform the shareholders promptly of the resignation of a director on a matter of principle?

 4. If the majority shareholders oust the chairman of the board, does that justify the subsequent resignation of the independent directors?

 5. A company nears collapse under a mountain of debt after former management had defrauded clients and shareholders. What should determine whether or not the independent directors stay on the board to try to save the company?

 6. If a director resigns from a board and blows the whistle to the Serious Fraud Office or to the Financial Services Authority on the accounts, might it be reasonable for that person to seek immediate reinstatement under the legal protection afforded to those who come with information to the authorities, or to seek compensation for loss of office?

 7. If a non-executive director resigns because the time commitment has proved significantly greater than that set out in his or her letter of appointment, and it has not been possible to resolve the matter, might it be appropriate for the director to sue the company for loss of office?

 8. Do you consider that the board's policy that authorises a director to seek outside advice at the company's expense on matters to do with his or her role as a director, should extend to advice relating to resignation from the board – both prior to resignation and subsequent to it?

 9. The board has declined to accept the advice of the audit committee, which you chair, on improving the clarity of disclosure on executive remuneration within the annual report and accounts. In the audit committee's view this means that the annual report and accounts are misleading. However, they have been prepared in accordance with the law and with applicable accounting standards and the external auditors accept how they have been prepared. Would you resign over this matter?

 10. Is there any content you have read in this paper that you disagree with, or anything that you consider should be added?
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