

DUTIES OF A COMPANY SECRETARY

THE COMPANY SECRETARY'S ROLE

It is easy to underestimate the role of the company secretary. Whilst not having the range of responsibilities and duties of directors, a company secretary, as chief administrative officer, has important tasks delegated to him or her and may be liable if he or she fails to carry them out properly. This briefing note highlights the key aspects of the company secretary's role.

THE REQUIREMENT TO HAVE A COMPANY SECRETARY

Private companies are no longer required to have a company secretary. This requirement was abolished pursuant to the Companies Act 2006, as from 6 April 2008. The rationale for removing this requirement was that, without underestimating the highly valuable function which the company secretary can fulfil in certain companies, for small private companies, particularly those with only one director, it often became a regulatory burden, with the result that the role had to be contracted out to external advisors.

Whilst not having the range of responsibilities and duties of directors, a company secretary, as chief administrative officer, has important tasks delegated to him or her and may be liable if he or she fails to carry them out properly.

A private company therefore has a choice as to whether to have a secretary. Note, however, that where a private company decides to dispense with the requirement for a company secretary, it will need to ensure that the functions of the role are carried out by another individual or individuals, typically the directors.

Public companies are required to have a company secretary. A secretary of a public company must fulfil certain criteria and it is the responsibility of the directors to ensure that the candidate is suitable.

The criteria which the secretary of a public company must meet include:

- being a barrister, advocate or solicitor called or admitted in any part of the UK;
- being a member of one of a number of recognised accountancy or secretarial bodies;
- for at least three of the five years preceding his or her appointment, having held the office of secretary of a public company; or
- otherwise, by virtue of any position held by him or her or his or her membership of any other body, appears to the directors as being capable of discharging the functions of secretary.

Generally, a corporate entity or firm, as well as an individual, may be appointed to the post of company secretary although in the case of public companies, due to the qualification requirements, this may not be possible.

Additionally, a person may not hold the post of secretary of the company if he or she is also its auditor.

APPOINTMENT AND REMOVAL OF THE COMPANY SECRETARY

The secretary's appointment is generally governed by the company's articles of association. These will commonly state that appointment and removal of a secretary will be a matter for the board of directors. However, if the secretary is also an employee of the company, his or her contract of employment may also be relevant to his or her appointment and removal.

Notice of the secretary's appointment and removal and any change of details must be filed at Companies House within 14 days of the relevant event.

DUTIES OF THE COMPANY SECRETARY AND THE CONSEQUENCES OF BREACH

There is no comprehensive code defining the scope of the duties of a company secretary. Their responsibilities are governed partly by statute and partly by general law. If the company secretary is also an employee, he or she may have additional duties and responsibilities arising from his or her employment contract. In general, a company secretary's obligations under the Companies Act 2006 are administrative rather than managerial (which tasks would fall to the responsibility of the directors). Specific functions include:

Maintaining the company's statutory registers

A company is required to maintain certain books and records including the following:

- register of members
- register of people with significant control
- register of directors and secretaries
- register of directors' residential addresses
- register of charges
- records of director and shareholder meetings and resolutions
- register of interests in shares (public companies only)

With the exception of the minute books of directors' meetings (which may be kept where the directors determine), these registers must generally be kept at the company's registered office address. However, they may be kept at a single alternative location (for example, this is sometimes done where the company uses professional registrars). If this is the case, notice of the alternative address must be filed at Companies House.

The company secretary should be familiar with the precise information required in each register and ensure that it is kept completely up to date. Failure to do so risks the secretary being liable to a fine. However, this may not be the only consequence. In particular, failure to keep the register of members up to date can have disastrous consequences, as a shareholder's voting and other share rights generally arise only once that shareholder's name is written in the register as a member.

Although not a statutory requirement, companies also tend to keep separate registers of transfers and allotments of shares, the maintenance of which will also be the responsibility of the company secretary.

Dealing with the administration of share transfers

Company secretaries are often asked to assist in the administration of share transfers unless, as tends to be the case with larger and listed public companies, professional registrars are retained.

Where the secretary is required to perform this function, this generally involves the receiving and processing of stock transfer forms and the cancellation of old and issuing of new share certificates.

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The secretary is generally responsible for ensuring that all this information is filed in the correct form and with any relevant fees within the prescribed time limits.

In particular, the secretary should ensure that any provisions in the articles of association in relation to share transfers have been complied with. For example, if a share transfer requires the approval of the directors, this should be obtained by a resolution of the board. It is also unlawful for a company to register a transfer of shares unless the stock transfer form is duly stamped with the correct amount of duty and so the secretary should also make sure that this has been done.

Co-ordinating inspection of the company's statutory registers

Members of the company as well as other members of the public are entitled to ask for copies of or to inspect some of the statutory registers listed above. Where a request is made, it must be complied with within certain time limits.

The secretary is generally responsible for co-ordinating any such requests and should be familiar with the procedural requirements, as well as to which registers are open to public inspection and when the company is entitled to charge a fee (which is generally when the request is made by a non-member of the company).

Failure to comply with any request within the required time limits may expose the secretary to a fine.

Assistance in relation to board and shareholder meetings and related paperwork

The secretary is generally responsible for circulating agendas and other documentation to directors, shareholders and auditors within the required time limits, as well as producing accurate minutes of shareholder and directors' meetings and resolutions.

In particular, the procedures and document requirements for calling general meetings/passing written resolutions of shareholders are fairly rigid and the secretary should be fully up to speed with the requirements so as to be able to ensure that the company complies with all the legal procedures. In a worst case scenario, failure to comply could invalidate the business of the meeting.

Filing of information at Companies House

The Companies Act 2006 sets down a wealth of information that has to be filed at Companies House including:

- details of directors and secretaries
- alterations to the articles of association
- the annual accounts
- the confirmation statement
- details of people with significant control
- details of share issues
- certain resolutions passed by the members
- registration of charges

The secretary is generally responsible for ensuring that all this information is filed in the correct form and with any relevant fees within the prescribed time limits.

Failure to file information on time may result in the secretary (if applicable), as well as the directors and/or the company itself being liable to a fine. Even if not fined personally, it is potentially very embarrassing for a secretary if, due to his or her personal default, the directors and/or company are fined. Further, for example, if the company grants a charge to a third party and details are not registered within 21 days, the charge will become void against a creditor, administrator and liquidator of the company, with potentially adverse consequences.

Custody and use of the company seal

A company is no longer required to have a company seal but if it does, the secretary is usually responsible for its custody and use and, in particular, must ensure that any provisions in the articles of association regarding its use are observed.

Other obligations

Fiduciary duties: as a matter of general law a secretary, as an officer of the company, owes duties to act in good faith in the best interests of the company. This imports duties not to act where there is a conflict of interests or to make secret profits. Breach of these duties may result in the secretary becoming liable to the company for damages.

In particular, in the event of a company's winding up, the court may award damages against any officer (including the company secretary) in respect of any misfeasance or breach of trust by him.

Employment obligations: if the company secretary is also an employee, any breach of duty may result in a breach of his or her employment contract, leaving the secretary exposed to all the consequences of such breach, including dismissal.

Secretaries of listed and larger public companies: for public listed companies, the secretary will also have to ensure compliance with the various disclosure and other obligations under the Listing Rules, Disclosure Rules and Transparency Rules.

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There are also various codes of practice drawn up at various times, in particular the UK Corporate Governance Code setting out best practice guidelines. These are generally aimed at listed public companies and focus largely on directors' duties but they do contain various recommendations regarding the duties of the company secretary, of which secretaries of larger and listed public companies should be aware.

These codes of practice do not have the force of law but are generally widely observed under the practical threat of censure from the marketplace.

Signing contracts and other documents: a secretary may be called upon from time to time to sign contracts, deeds and other documents on behalf of the company. Where this is the case, the secretary should check that the company has in fact agreed to enter into the document by a duly passed resolution of the board of directors (or, as sometimes may be required, the shareholders).

Generally, execution of a document by a company requires the signature of two officers (either two directors or a director or the secretary) or, as an alternative, the signature of one director in the presence of an attesting witness. However, this is subject to any restrictions that a particular company wishes to impose, either in its articles or by virtue of any internal signing authorities. Additionally, the secretary may be authorised to act on his or her own to conclude contracts and other commitments on behalf of the company. Further consideration as to when a secretary may have such authority and the consequences of acting without that authority is set out below.

AUTHORITY OF SECRETARIES TO ENTER INTO COMPANY CONTRACTS

The authority of a company secretary to act alone in entering into contracts and commitments on behalf of the company will depend upon several factors but, as a general rule, the secretary must have been given authority to do so by the directors.

By virtue of their post as administrative officer, company secretaries will generally have “ostensible authority” from the directors to enter into contracts on behalf of the company in pursuance of their administrative functions, for example ordering stationery. Where this is the case, the secretary would not need to obtain the express consent of the directors on each occasion. However, such authority would not generally extend to more managerial matters which are outside the scope of the secretary’s administrative role.

However, even if the company secretary’s ostensible authority does not extend to a particular act, he or she will nonetheless be able to undertake it if either the express or implied authority of the board has been given. Express authority could be given either as a specific instruction by the board or, for example, through an express obligation set out in the secretary’s employment contract (if he has one). Implied authority may be given, for example, by the conduct of the directors or as established through a previous course of dealing in relation to instructions given to the secretary in carrying out his duties.

So long as the secretary acts within the scope of his or her authority (whether actual, implied or ostensible), his or her actions will bind the company. However, if company secretaries act outside the scope of their authority, not only may they be liable to the company for breach of authority but worse still, they could potentially be personally liable to a third party for any contract entered into, unless the directors choose subsequently to ratify the secretary’s action (see below). It is therefore important for a company secretary in any given situation to check whether he or she has authority to undertake a particular act and, if in any doubt, to seek the consent of the board of directors.

DELEGATION OF THE SECRETARY’S DUTIES

Similar rules apply to the delegation of functions by a company secretary as apply to a delegation of duties by directors. In particular, a company secretary may not be able to abrogate responsibility by delegating a particular function to another person, if that other person then fails to perform the function.

Furthermore, it may not always be appropriate to delegate a function, especially where a secretary has been appointed for his or her particular expertise in relation to a matter. Where, however, a function which would otherwise fall within the scope of the secretary’s duties is delegated, the secretary should ensure that such delegate is competent and trustworthy and should keep him or herself informed as to the activities the delegate is carrying out.

ASSISTANT, DEPUTY AND JOINT SECRETARIES

It is possible for two or more persons to be appointed as joint secretaries. As a general rule, the assumption is that, in the absence of any decision to the contrary, joint secretaries will have to carry out their duties jointly ie: both their signatures must be included on all notices, documents and forms. If the intention is that they each be able to act alone, this should be clearly set out either in a resolution of the directors or in the company’s articles of association. Details of all joint secretaries must be filed at Companies House.

The position of joint secretaries is different to that of assistant or deputy secretaries. An assistant or deputy secretary, who is generally appointed to help the company secretary, can act only if the office of secretary is vacant or the secretary is otherwise unable to act for any reason.

SECRETARY WHO IS ALSO A DIRECTOR OF THE COMPANY

Company secretaries who are also directors of the same company, should note that, due to the differing nature and scope of duties of the respective posts, it is important that they are aware, in relation to each task, whether they are carrying this out as director or secretary and in particular, in which capacity they are signing notices and other documents.

Importantly, where an act is required to be done by a director and the secretary (for example, signing a document), it is not possible for one person to sign in his or her respective capacities as director and secretary.

POSSIBLE RELIEF FROM LIABILITY FOR BREACH OF A SECRETARY'S DUTIES

Court's power to relieve a director from liability

The Court has the power to relieve a secretary either wholly or partly (and on such terms as it thinks fit) from liability in any proceedings against him or her for negligence, default, breach of duty or breach of trust if it appears to the Court that the secretary has acted honestly and reasonably and that having regard to all the circumstances of the case he or she ought fairly to be excused.

Ability of the directors/shareholders to ratify an unlawful action by a company secretary

In certain cases a company may, either by a directors' or shareholders' resolution (depending upon the nature of the transaction), ratify an unlawful transaction previously undertaken by a company secretary. However, even if ratification is possible, whilst this might relieve the secretary of liability to a third party, it may not relieve him or her from liability to the company for his prior breach.

Officers' liability insurance and indemnity by the company

A company is able to indemnify its secretary as it sees fit, in the same way as it may do so for directors. A company is also able to purchase insurance to cover the secretary's liability for negligence, default or breach of duty. In practice the articles of association of a company tend to contain provisions providing for this right of indemnity and enabling the company to take out relevant officers' liability insurance to cover this liability.



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