

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY ON INDIVIDUAL DUTIES

Section 177: Duty to declare interest in proposed transaction or arrangement

347. The equitable rule that directors may not have interests in transactions with the company unless the interest has been authorised by the members is replaced by this duty. This section requires a director to disclose any interest, direct or indirect, that he has in relation to a proposed transaction or arrangement with the company. The director does not need to be a party to the transaction for the duty to apply. An interest of another person in a contract with the company may require the director to make a disclosure under this duty, if that other person's interest amounts to a direct or indirect interest on the part of the director.
348. Under the current equitable rule, shareholder approval is required for transactions between a company and a director. Company articles often modify the equitable rule, requiring disclosure of the conflict instead. As proposed by the CLR, shareholder approval for the transaction is not a requirement of the statutory duty. The members of the company may however still impose requirements for shareholder approval in the articles.
349. The duty requires directors to disclose their interest in any transaction before the company enters into the transaction (*subsection (4)*). The duty does not impose any rules on how the disclosure of interest must be made, but *subsection (2)* allows the disclosure to be made by written notice, general notice or disclosure at a meeting of the directors.
350. Disclosure to the members is not sufficient. The director must declare the nature and extent of his interest to the other directors. It is not enough for the director to merely state that he has an interest.
351. If after he has disclosed his interest, he becomes aware that the facts have changed, or for some other reason the earlier disclosure is no longer accurate or complete, the director must make a further declaration, correcting the earlier one (*subsection (3)*). However, this is only necessary if the company has not yet entered into the transaction or arrangement at the time the director becomes aware of the inaccuracy or incompleteness of the earlier declaration (or ought reasonably to have become so aware).
352. As the duty requires disclosure to be made to the other directors, no disclosure is required where the company has only one director. There is no need to disclose anything the other directors already know about or ought reasonably to have known (*subsection (6)(b)*). A director will breach the duty if he fails to declare something he ought reasonably to have known, but the duty does not otherwise require a director to declare anything he does not know. *Subsection (6)(c)* makes special provision for service contracts that are considered by a meeting of the directors or a committee appointed for the purpose (such as a remuneration committee).

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

353. No declaration of interest is required if the director's interest in the transaction cannot reasonably be regarded as likely to give rise to a conflict of interest (*subsection (6)(a)*). Currently regulation 85 of Table A imposes a materiality test.
354. Conflicted directors may, subject to the company's articles of association, participate in decision-taking relating to such transactions with the company.