
Briefing

Resigning from a Board: Issues to Consider



INSTITUTE OF DIRECTORS
IN IRELAND

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There are potentially several reasons why a director might resign from a Board. Regardless of the reason, there are important matters for the director, minded to resign, to think about. Additional considerations will apply if the company is regulated or has shares listed on an exchange and these are also considered in this factsheet.

Prior to Resigning

Consider and Discuss

A hasty resignation by a director should be avoided because of its potential adverse implications for the director, the company and its stakeholders. If possible, the director should take time to think about whether the resignation is inevitable or whether the concerns that he or she may have can be addressed in an alternative manner. Resignations by one or more directors frequently involve publicity and may attract unwelcome attention to the company, so timing of a resignation is important in attempting to minimise adverse implications.

Matters of concern to a director ought, if possible, to be shared with the chairperson (in confidence). Directors should have access to independent professional advice at the company's expense, where it is required to discharge the director's responsibilities as director (and this right is frequently included in the appointment letter).

Contractual and Statutory Obligations

Where a company is in financial difficulty a director may believe that the personal risk to him or her is reduced by resigning. Whilst it is true that an ex-director does not have any responsibility for actions of a company after his or her resignation, he or she continues to have potential liability for what

occurred prior to resignation. If the company is wound up on an insolvent basis, any then director or person who was a director in the previous year may be subject to a restriction order under the Companies Act.

The director may have contractual relationships with the company that need to be considered (at the most basic, the terms of an appointment letter but also perhaps an employment contract). The circumstances giving rise to a resignation may also involve a protected disclosure made by the departing director under 'whistleblowing' legislation.

Once a director resigns he or she does not have any right to access company records, including Board minutes. Whilst a director has no absolute right to have his or her dissent on a matter (or reasons for resignation) recorded in minutes it may be possible to achieve this and that may be useful evidence in future investigations. If the chairperson/secretary declines to record the director's reasons in the minutes, the director should write to the company setting these out.

Effecting the Resignation

The appointment letter or the company's constitution will set out circumstances in which a director is deemed to vacate office as well as the process by which a director can resign. Resignations need not be accepted by a Board to be effective.

Oral resignation at a meeting, if unambiguous, can be effective if accepted by others at the meeting although it is recommended that such hasty actions be avoided. If a director is resigning at a Board meeting there will be an opportunity to explain the reasons. The director may well seek to notify all other directors of the reasons although there is no obligation on a company to circulate these.

A director who resigns should request the company secretary to promptly file notice of resignation in the Companies Registration Office ("CRO"). There is a mechanism under the Companies Act for a director to effect filing where the company does not do so. An additional notification to the CRO may be required if the director's resignation will leave the Board with no EEA resident director.

Post Resignation

Departing directors still owe certain fiduciary duties to the company (sometimes reflected in contractual terms) such as a duty of confidentiality and duty not to make inaccurate statements which are damaging to the company. Accurate and factual statements to the reasons for resignation ought not present any difficulty for a director. A director who resigns ought to be extremely careful as to what he or she says to any person who approaches them, having been asked by the company to replace them.

The former director should check the CRO records to ensure that his /her resignation has been notified to the CRO as of the correct date.

Additional Considerations

Additional considerations will apply to a director resigning from a Board if the company:

- is regulated by the Central Bank of Ireland (“CBI”). There may be an obligation to report matters (which lead to a resignation) to the CBI; the conduct of the director, including resignation, may have a bearing on subsequent fitness and probity examinations by the CBI where the person is joining the Board of another regulated entity. Additional processes will apply if the director holds a Pre-Approval Controlled Function;
- has shares listed on an exchange as the rules of the exchange need to be borne in mind. The likely impact of the resignation on share values ought to be considered and (subject to compliance with the rules of the exchange as to timing of announcements), where possible, managed. Also, a proposed resignation may be price-sensitive information and so subject to the market abuse regime.

Conclusions

A resignation may be required in particular cases but in many it might be avoided by a director having conducted proper due diligence before accepting a directorship (so there is clarity that the expected contribution can be effective). Potential issues that might cause a director’s resignation can be avoided by effective conduct of Board meetings (lead by the chairperson) and by all directors respecting contributions of other directors even where a particular view is not shared.

Effecting a resignation will usually involve more than simply resigning and, as with any decision a director makes, it ought to be done on an objective but informed basis.

Further information is available from



Garreth O'Brien
Partner
+353 1 607 1489
garreth.obrien
@mccannfitzgerald.com



Peter Osborne
Consultant
+353 1 611 9159
peter.osborne
@mccannfitzgerald.com



Frances Bleahene
Senior Associate
+353 1 607 1466
frances.bleahene
@mccannfitzgerald.com

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Institute of Directors in Ireland, Europa House, Harcourt Street, Dublin 2
01 411 0010 | info@iodireland.ie | www.iodireland.ie

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