



**ONBOARDING AND INDUCTION OF DIRECTORS
OF STATE BOARDS**

DAY 3 of Governance Week (30th June 2021)

SPEAKING NOTE

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1. Directors of State Boards in Trinidad and Tobago are governed principally by sections 60(b) and 99(1) and (2) of the Companies Act Chapter 81:01 and by the Code of Conduct in the Integrity in Public Life Act Chapter 22:01.
2. The Code and these provisions in the Companies Act requires directors, as persons in *public life*, to act honestly, prudently and in good faith in the best interest of the state owned enterprise (“SOE”) that they serve. These duties are not owed to the Cabinet, Corporation Sole (the Minister of Finance), the line Minister or even their fellow directors. They are owed to the SOE.

The best interests of the SOE

3. In determining what is in the best interest of the SOE, a director is required by sections 99(1) and (2) of the Companies Act to take into account, principally, the interests of its shareholders and employees, but these interests are not exhaustive and a prudent director has a fiduciary obligation to consider *inter alia* the public interest, environmental conditions and compliance and regulatory requirements; moreover, decision-making is not grounded in the short term (1-2 years) or even the political cycle (5 years) but the medium and long term.
4. The courts in the Commonwealth Caribbean, however, have underscored that the employees’ and the shareholders’ interests are divergent. This is because an employee is primarily interested in job security and enhanced employment benefits while the shareholder’s principal concern is to increase the capital value of his share.
5. How then does a prudent SOE director reconcile these competing interests in determining what is in the best interest of the SOE? A good example is CAL which, while not a typical

SOE, is now completely reliant on government financial support. This means that its board of directors (principally appointed by Corporation Sole), in deciding to retrench a large swathe of its workforce, would, properly, have balanced the financial benefits to CAL of a leaner, less expensive workforce against the costs of the retrenchment exercise and the commensurate loss of many highly competent and loyal employees in a specialized industry who they may have to re-employ when aviation prospects improve.

6. Happily, for state board directors, they often do not need to make hard choices because both the SOE and Corporation Sole, as shareholder, are generally interested in the same thing – the profit motive and an enhanced bottom line.
7. The recent WASA debacle where the company reversed its decision to disconnect thousands of heavily indebted consumers because of the optics (the hardships in a Covid-19 pandemic) and political considerations, demonstrates how little autonomy many state boards actually enjoy as the reversal instruction came from the line Minister no doubt on the authority of Cabinet.
8. The problem, however, is that while Corporation Sole is the shareholder, after it appoints its board of commissioners as it did in WASA, the board is now supposed to be in control not the shareholder.
9. In addition to the shareholders' interest and the employees' welfare, a prudent SOE director is also statutorily required to consider all material factors and, in my respectful view, this means that in making business decisions, prudence requires a consideration of corporate risk.
10. Risk assessment is underscored in the Ministry of Finance's State Enterprises Performance Monitoring Manual 2011. The Manual, however, unlike the legislation, is merely a Guide and SOE directors, on their appointment, are often provided with a copy.

Legal exposure

11. It is a matter of public record, however, that High Court claims have been brought against SOE directors by the very state agencies they served. These claims generally allege serious breaches of fiduciary duties and it is speculated that many of these claims are politically motivated when there is a change in administration.
12. It is principally because of the risks of litigation exposure that many civic minded and responsible citizens do not offer themselves for public service. They are also afraid of being politically associated with the government that appoints them or of the possibility of grave and irreparable damage to hard-earned professional and personal reputations because of board failings which they are not in control of.

Principle or Rule Based Corporate Governance

13. Indeed, as it relates to SOE accountability, the whole notion of principle or rule based corporate governance is very much alive and in Trinidad and Tobago, we have now completely abandoned principle-based for rule-based corporate governance.
14. In the US, corporate governance is increasingly enforced by the Rule of Law through federal and regulatory laws. These laws have been reinforced by SEC requirements.
15. The US rule-based model must be compared with the principle based models still operating in the UK, Australia, Canada, Hong Kong, India, Malaysia, New Zealand, Singapore and South Africa where corporate governance is often discretionary based on Codes and Best Practices. Both competing systems have not converged despite the view that the American model will prevail because the world needs access to American finance.
16. In fact, however, there has been only a few prosecutions and, so far, even fewer convictions for breaches of the integrity legislations and, in many respects, the latter has become a box ticking exercise so that the SOE director satisfies the reporting requirements by his annual integrity filings and is generally not at grave risk of investigation and prosecution for insider trading or dealing, obtaining secret profits, bribery, corruption or nepotism.

17. It is likely, however, that future SOE directors, having regard to the new procurement and whistleblowing legislation, may become more publicly accountable.

Induction Training

18. My experience is that most SOE directors do not read the Manual and, even if they do, there is very little by way of induction training to answer questions or address concerns, particularly as it relates to fiduciary duties and corporate risks.
19. At p. 10 of the 2011 iteration of the Manual, directors are reminded to:-
- (i) familiarise themselves with the Bye-Laws of the company;
 - (ii) refrain from conflict of interest situations;
 - (iii) support the management of the company while maintaining operational oversight;
 - (iv) approve the Strategic Plan for the business; and
 - (v) develop a risk analysis and mitigation strategy for the company.
20. Part 2.4 of the Trinidad and Tobago Corporate Governance Code devised by the CCGI in 2017 in conjunction with the Stock Exchange and the Chamber of Commerce states that all directors should receive induction training upon joining the board and should regularly update and refresh their skills and knowledge. The aim is to offer new directors with the tools, resources and information to help them appreciate the SOE, the environment in which it functions and their role in making it a success.
21. While the Code is referable to public companies, there is no reason why Part 2.4 should not apply to SOE directors.
22. Indeed, there is now an increasing trend for SOE's to work with governance professionals to provide dedicated training for directors. In many cases, however, the training is generic,

usually based on the UK model which fails to take into account that our companies legislation is Canadian driven.

23. Moreover, the training often does not take into account the idiosyncrasies of our state sector where the Cabinet and the line Minister, rather than the board of directors, determine the strategic direction and some business decisions to satisfy political aspirations rather than the SOE's mandate.
24. This means that state boards should avoid *off the shelf* induction training which, too often, is a cut and paste of what is offered for directors in private enterprise.
25. The onboarding process for state board directors should, therefore, define responsibilities from a Cabinet and line Minister context rather than the customary shareholder perspective where the latter appoints the board of directors; further, the training should reflect, for most SOE's, that its source of revenues is the public purse and the usual economic theories of demand and supply do not apply; it should also speak to monolithic service industries where there is an absence of competition and regulatory oversight.
26. Evaluations are another powerful tool for sensitizing state boards to the link between corporate governance and performance; these evaluations should be board driven and need not require external oversight but be a key indicator to the government as to competencies of its directors which should drive the recruitment and renewal process.
27. Having said that, there is no SOE in my experience which has a functioning nominations or governance committee making recommendations for the appointment of future directors and its absence is a plain demonstration that governments are less concerned with competence than it is with rewarding party loyalty.
28. It is also essential that newly inducted state board directors are encouraged to take action and report any undue pressure from politicians so as to insulate the board from overt political interference in commercial decision-making. Thus, more complaint mechanisms

ought to be established to safeguard the independence of the SOE and to reduce the scope of discretionary influence, bringing greater clarity to the role of the directors.

29. The Chair therefore has a major role in protecting his board from overt executive influence while, at the same time, taking policy directives from the line Minister who speaks for the Cabinet.
30. The Select Committee process where state enterprises are required to defend their performance in Parliament, while encouraging sensationalist headlines, does little to ensure sustainable transparency and accountability and the periodic reports of the Auditor General are issued so long after the financial impropriety occurs, that nothing is generally done to improve financial systems.
31. It must be noted that by virtue of the Exchequer and Audit Act Chapter 69:01, the Minister of Finance or Corporate Sole is responsible for investigating the financial performance of all SOE's; this has been very sporadically used and, when activated, is generally directed to the governance of the previous administration.
32. The OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) aims to improve corporate governance in public companies and invites boards to assess and review their corporate strategy, develop and oversee the effectiveness of risk management policies and procedures with respect to financial and operational risks, labour, environmental and tax-related issues and ensure that the financial statements fairly represent the performance of the company. They should also provide periodic board reviews which are laid in Parliament.
33. Summarily, the onboarding and induction process should encourage the board to be more vigilant by crafting a system of checks and balances to guarantee that there is an ethical environment where there is no abuse of power and that all decisions are made in the SOE's and the nation's best interests.

34. There must also be a sustainable evaluation of board performance as well as an active internal audit engagement and functioning Audit and Finance Committees with regular external auditing. The intent is to encourage the board to improve its appetite for openness and transparency, to remove persons who are corrupt and to strengthen the procedures and systems to increase public accountability.
35. SOE's should also, with board support, attract qualified and talented employees who are rewarded with performance-based bonuses and who are removed for chronic under-performance or where they are unable to establish a professionally competitive work culture to improve the company's efficiency and profitability.
36. Finally, it is essential that the government appoint competent, professional and independent members to the SOE's board of directors. This can be implemented by establishing a national, non-partisan Board Selection Committee which comprises of members of the Government, the Opposition, the Private Sector and the Independent Senate.
37. Having said that, we are all alive to the system which rewards trusted and loyal political operatives with plum chairmanship and director positions. This political culture is not likely to change unless the appointment system is re-calibrated to improve diversity including a greater appreciation for politically neutral directors, very much like our system of independent Senators.
38. I wish to thank Ms. Ilisha Manerikar and Ms. Ariana Praboocharan for assisting me with this presentation.

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