SOE Board Talk

Iakweaolep

This week we discuss the important issues of transparency and accountability of SOEs and the need for full disclosure by directors.

Please feel free to comment and provide feedback on SOE Board Talk and to share your director experiences. Remember, the SOEMU team [Assistant Secretary Ywao, Anari and Augustine] are here to help on all matters SOE!

Materials provided this week can be found in sections 3.2, 3.3and 5.8 of the RMI SOE Governance manual.

Please contact SOEMU if there are any concerns or clarifications needed.

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The SOE Act, 2015, provides that SOE operations should proceed on ethical grounds and with accountability to the public. Key accountability documents are the Statement of Corporate Intent (section 611) and the Annual Report (section 634). The Minister may call upon the SOE to disclose other matters (section 636 - The Board can object to certain requested disclosures on the grounds of the information being commercially sensitive. The Board should then justify why such information is sensitive) but broadly, the SOE is expected to conduct its business, based on transparency and accountability. SOEs are in the public eye and thus a high level of ethics and a robust code of conduct (*this will be the subject of Board Talk soon*) are expected and are an integral part of good governance for SOEs.

Requirements for SOE disclosure to the public in the SCI and the Annual Report are detailed in complementary manuals to this document.

Board members during the term of his or her membership on the Board shall;

- Not disclose any confidential information to any person other than another Director or to Government when requested to do so;
- Use his or her best endeavors to prevent the disclosure or publication of any confidential information;
- Not use or attempt to use any confidential information in any manner that may injure or cause loss whether directly or indirectly to the SOE.

Members shall not, during and after his or her term of membership on the Board, use any confidential information for personal benefit, as distinct from the benefit of the SOE.

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At an individual level, senior employees and directors should make disclosures if they are involved with, or have close relations with, persons or enterprises with which the SOE is trading, negotiating or generally engaged with in the course of business. Such disclosures are stipulated under section 624 of the Act and are common to all codes of good governance.

Directors should disclose in writing to each other director all interests that could conflict with the director's proper performance of his or her duties. The disclosure must be given as soon as practical after the interest arises. Disclosure is usually achieved through informing the board of the interest in writing.

If a director has an interest – that director cannot perform their functions as a director unless

- There has been full disclosure, and
- Each of other directors have consented to the director continuing to perform those functions.

It is the obligation of each director to know the legal process and or the agreed policies in regard to disclosure and stipulated under section 624 SOE Act 2015. All interests should be recorded by the board in an interest register. The register should be available for review and update at each board meeting. Directors should update the register immediately an interest arises. Best practice is that review/update of the register is a meeting agenda item.

An interest may be direct/indirect/pecuniary or non-pecuniary and it doesn't matter when it was acquired.

A related party could include:

- Spouse, child or parent,
- A company – other than the SOE on which the director sits – where the director is a director or executive officer,
- A company where a spouse, child, parent is a director or executive,
- Any company where the director, child, spouse or parent owns a controlling interest,
- Where a director is a party to a contract – formal or informal – to hold shares or exercise voting rights.

All directors are expected to be familiar with their duties and obligations. It is often said that "ignorance is no excuse in the eyes of the law". For directors, this is substantially correct, and it is not acceptable for a director to attempt to escape liability due to that director's lack of knowledge and understanding of his or her duties.

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While many sees being appointed a director is a privilege and honor, it is actually a duty that carries significant obligations and potential liabilities. Section 621 of the SOE Act, 2015 (as amended) prohibits an SOE from indemnifying directors unless it meets the requirements of subsection (3).

Normally, board members are not personally liable for their actions if they act in good faith on behalf of the enterprise. Also, it is international best practice for board members to obtain, either personally or through the enterprise, liability or "errors and omissions" insurance for their service. However, in some jurisdictions, directors will still be liable if they are judged to have not taken sufficient "duty of care" in inquiry and analysis of their decisions. This is clearly identified in sections 620 and 621 of the SOE Act.

Overall board accountability rather than issues of liability is the more normal consideration for agencies monitoring board effectiveness. Hence the need for robust recruitment and selection methods, fair remuneration, regular and objective evaluation and transparent reporting.

It is useful to remember that directors can delegate authority – but they cannot delegate their accountability/responsibility.

Specific concerns for SOE directors relate to the issue of 'technical' solvency of the SOE. While there is sometimes a perception that Government, as owners, will not allow an SOE to default, this is not an acceptable rationale for careless decisions or allowing the SOE to continue (to trade and operate) when technically insolvent.

There is due process for Government support and guarantees (section 630) and in the absence of the same, the board is liable for any SOE that 'cannot pay their debts as and when they fall due'. Sometimes, the determination of this is subjective or at the discretion of the Auditor General, but, in the normal course of business, directors have a fiduciary duty to ensure that financial arrangements are sufficient to enable the payment of debts when due.

Allowing the SOE to incur debts/obligations that it cannot repay may result in the director(s) being personally liable for any loss suffered by a third-party creditor[1]. Each director is responsible to know their obligations and duties. Every director should undertake due diligence on the SOE and board prior to accepting appointment. Appointment to a board is an obligation as well as a personal privilege.

Good luck, this week in the boardroom - SOEMU