

DEPARTMENTAL REPRESENTATIVES ON THE BOARDS OF NDPBS AND OTHER SPONSORED BODIES

Introduction

1. Many public services are provided through public bodies which are overseen by departments. Where this happens, there should be robust governance arrangements with the board of each body, setting out respective duties in order to promote good performance and value for money and safeguard propriety and regularity.
2. As part of these arrangements, departments often have officials in attendance at the board meetings of public bodies, either in a representative capacity or sometimes as full board members. This paper sets out some principles which departments should consider.

Relationship between sponsor departments and their bodies

3. Departmental Accounting Officers are not accountable for the day to day operations of NDPBs or other public bodies, nor the way they conduct their business and achieve their objectives. Their responsibilities are limited to ensuring that:
 - the financial and management controls applied by the department are appropriate and sufficient to safeguard public funds and, more generally, that those being applied by the body conform with the requirements of both propriety and good financial management;
 - there is an adequate statement of financial relationship between the department and the body (in a management statement and financial memorandum (MSFM) or similar document) and that this is regularly reviewed; and

- the conditions attached to grants and other funding conform with the terms of Estimates and that the department monitors compliance with such conditions.
4. DAO(DFP) 23/04, issued in December 2004, draws attention to the model MSFM as part of the control framework for bodies. The Public Accounts Committee has issued several reports governing the relationship between departments and their sponsored bodies. Attached at Annex 1 are some of the general recommendations arising from the PAC's report on the Teeside Development Corporation.
 5. Noted below are three key principles which generally caution against officials attending board meetings. However it is accepted that there may be circumstances where it is appropriate and desirable for this to happen. Paragraph 9 onwards discusses exceptions to these principles.

Representatives from sponsor departments on boards

Key principle

If possible, departments should avoid appointing departmental staff as representatives to sit on boards.

6. In general, if there is a properly constituted MSFM in place, it should not be necessary for sponsor departments to have to appoint their staff to formal membership of the boards of their bodies in order to maintain effective control and discharge their departmental accountability obligations.
7. Departmental representation on boards can raise difficulties for the following reasons:-
 - it could create conflicts of interests between the role and responsibilities of the sponsor department and those of its body;

- it could involve the official in decision-making and, by association, call into question the proper arm's length relationship between the Minister, sponsor department and the body;
- even if the departmental official was appointed in a non-executive capacity, he/she could be *perceived* to be sharing corporate responsibility for decisions taken by the board as a whole, leading to potential difficulties for the Minister or the sponsor department.

Officials from sponsor departments attending board meetings on a regular basis

Key principle

If possible, regular or routine attendance by a departmental representative at board meetings should be avoided.

8. Departments often wish to have officials attend board meetings so that they can contribute to discussions, without necessarily taking decisions. Although this can be useful on occasions, regular attendance should be avoided for the following reasons:-
- it could reduce the perceived independence of the board and make it potentially more difficult for a Minister/sponsor department to disassociate themselves from decisions taken by the board, particularly if the representative has taken part in the discussion and/or given views;
 - it can undermine the proper arm's length relationship between the Minister/sponsor department and the body; and
 - it can be time-consuming and, arguably, an inefficient use of departmental resources.

Officials on a board where the body is a company

Key principle

If possible, sponsor departments should avoid appointing its officials as directors of sponsored bodies which are limited companies.

9. Board membership in limited companies provides particular difficulties, as the director has a fiduciary duty to act in a corporate manner for the benefit of the company. This situation should generally be avoided because
 - the responsibilities of being a director could create a potential conflict with the official's departmental role; and
 - it could result in the sponsor department's taking on inadvertent obligations in respect of a body's financial liabilities.

Exceptions to the General Principles

10. While the general advice therefore is for departments to avoid direct involvement in board activities, there may be particular cases which merit an official either being appointed as a nominee director or as a representative of a sponsor department at board meetings. This section discusses such exceptions, and applies to both ordinary bodies and bodies which are companies alike.

Sitting on the Board AND/OR Regular Attendance at Board Meetings

11. Where sponsor departments consider that there are special circumstances, which would justify regular representation/attendance at board meetings, they may, with the approval of the relevant Minister, implement such an arrangement. In such a situation, the sponsor department should ensure that the capacity in which the representative attend, and their duties and responsibilities, are clearly documented, and are understood by all the parties.

Ad Hoc Attendance at Board Meetings

12. There may be occasions when attendance may be desirable on an ad hoc basis (as opposed to formal membership or routine attendance). For example:-
- to assess the performance of board members so that Ministers can be advised on re-appointments;
 - for discussion of a particular issue, or where the sponsor department wants to ensure that a particular issue or concern is brought to the attention of the full board;
 - to bring specialist knowledge to a particular issue and where it is clear to all the parties that they are attending for that reason only;
 - to provide guidance, during the setting up of a new body, or during periods of major organisational or strategic change.
13. Such involvement does not require Ministerial approval, but it is good practice to keep the relevant Minister informed. Again, sponsor departments should ensure that the attendance of the representative is justified and well-documented, and that their role and responsibility is understood by all parties.

Role of departmental representative at board meetings

14. Where it is agreed that a representative from a sponsor department should attend a board meeting of a body, their role at the meeting should be clear. The founding legislation of the body should be checked for reference to the attendance of the sponsor department at board meetings and, if so, in what capacity this may be.

15. It is essential that, in all bodies including companies, representatives establish from the outset the capacity in which they are attending, and they should not participate in any other capacity during board meetings. Their role should be clearly understood by the sponsor department, the individual concerned, the body's Chief Executive and board, and be formally recorded in board minutes. It would be beneficial to include provision for a situation in which the board's actions might conflict with departmental policy/guidance. Consideration should also be given to including an appropriate provision in the MSFM.
16. Regardless of the capacity in which the official is attending, they should always bring to the attention of the board any issue which suggests that the board may be unaware of departmental policy or guidance, or is not complying with such policy or guidance.
17. Where a board decides to proceed with a course of action contrary to departmental guidance or where the departmental representative considers the board is not acting in accord with the body's agreed objectives, they should have their views recorded in writing and should report it to the sponsor department. He/she should also act in conjunction with the provision made for such instances of conflict when the representation was agreed.

Acting as a representative in bodies which are limited companies

18. There are particular issues related to companies and if appointed to the board in the capacity of director (executive or non-executive), their primary responsibility is to the company. Companies and their directors must act in harmony with the various duties and responsibilities under relevant company and insolvency legislation.
19. It is important that departmental officials who attend board meetings should not act as shadow directors. Such a situation may arise even where the official is not formally appointed as a director. Therefore, departmental representatives should avoid giving directions or instructions to the board in case they inadvertently act as a shadow director during a period where there

may be the prospect of the body being in a wrongful trading or insolvent situation. In some circumstances, such a situation could result in the departmental representative taking on potential personal liabilities in respect of decisions taken by the board leading up to, or during, a period of wrongful trading.

Support and training requirements for board members

20. If a sponsor department determines that officials attend or represent their department on the boards of their sponsored bodies, it must ensure that they have the right mix of personal and commercial skills for the role. They should also be given appropriate induction and ongoing training and support in order to fulfil their agreed role.
21. As well as having a sound grasp of the business area in which the body operates, they should also be aware of departmental policy and understand the principles of corporate governance and accountability and related guidance issued by their department to the body, so that they can bring them to the attention of the board if necessary.
22. In the case of attendance at board meetings of companies, appropriate training should be provided to ensure that the official is aware of the relevant company and insolvency legislation, understands the role and responsibilities of directors and the operation of company board meetings. It is not a sufficient defence to claim that they were unaware of a particular problem, which might give rise to a wrongful trading situation, or did not have the knowledge or expertise to identify the problem. The onus is on the director to understand the position.

DFP

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PAC Report on Teeside Development Corporation

Key recommendations covering the relationship between a department and its sponsored body.

- i. Departments should take a close interest in the governance framework of their sponsored bodies, and satisfy themselves that Boards represent an effective check on Chief Executives, with an appropriate balance between executive and non-executive representatives on the Board. In establishing public bodies Departments should consider whether the financial and regulatory framework is appropriate to the bodies' aims, objectives and activities, and adapt it if necessary, but they should not allow the framework to be ignored once in place.
- ii. Departments should satisfy themselves that the Boards of sponsored bodies receive and review regular financial information, and take appropriate action to manage key risks including the establishment of an independent audit committee.
- iii. Departments should provide Board members with sufficient knowledge and understanding of the financial management and reporting requirements of public sector bodies, and draw their attention to any differences which may exist between private and public sector practice.
- iv. Departments should bring concerns about the activities of a sponsored body to the attention of the whole Board, and require explanations and assurances from the Board that appropriate action has been taken.
- v. Departments should not be reluctant to intervene in the affairs of a sponsored body if that body fails to respond to other requests to bring its activities under proper control.

- vi. The effectiveness of the Department's oversight of the Corporation was weakened by the diffuse allocation of oversight responsibility across the Department and the Government Office for the North East. Departments should consider designating a senior officer with primary responsibility for overseeing the activities of a sponsored body, with that person seeking advice from other specialists as required.