Speech of Miguel L. Alexander held on June 19th, 2015 at the Governor's Symposium 2015 in Sint Maarten.

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Ladies and Gentlemen,

When dealing with the issue of corporate governance I will for the sake of ease focus on a business being carried out in the form of a legal entity. A legal entity can act like a natural person and has rights and obligations like a natural person.

In the 30 minutes that have been given to me I will try to give as much information as possible.
I will try not to be too theoretical, but deal with the subject at hand from a practical viewpoint. Since I will not be able to discuss all relevant matters in 30 minutes, I welcome your questions and comments during the panel session.
Since corporate governance is a powerful tool to achieve checks and balances in the corporate sector I will focus on the corporate law and the corporate governance rules and regulations that are in place at the moment in Sint Maarten.
I will furthermore discuss with you:

1. What corporate governance entails.
2. Corporate governance with respect to different kinds of companies:
   - state-owned companies and state-run foundations;
   - banks, other financial institutions and insurance companies;
   - companies from the business sector.
3. Where we can find the rules and regulations regarding corporate governance, checks and balances and some of the matters regulated in these documents.
4. The importance of the Board of Supervisory Directors of legal entities.
5. And finally I will close with some conclusions and recommendations.

Taking into consideration the limited time that I have, I had to make a choice and I decided to deal with corporate governance in the state-owned company and state-run foundation.
These state-owned companies and state-run foundations play an important role in the economy and therefore in the community of Sint Maarten.

Most services which are now being rendered by the state-owned companies and state-run foundations were formally rendered by Government.
Think e.g. of the Harbour, Airport, Telecommunication, Public Housing and Tourist Bureau.
At a given moment Government decided to incorporate legal entities and have the abovementioned services carried out by these legal entities.
And this is important from a legal point of view. From the moment Government decided to have these services carried out by legal entities, they are governed by private law and not anymore by public law.
By doing so Government relinquishes certain rights it had pertaining these services.
One of the big advantages, on the other hand, was that these companies/foundations were free to borrow money on the financial market in order to carry out needed investments. At the time the Government of Sint Maarten was not allowed to borrow money.
However having the aforementioned services carried out by these legal entities has as a consequence that Government had to keep an at arms length distance between Government and these companies and foundations, which proved in practice difficult for Government.
Government sometimes has the tendency to treat these legal entities (companies and foundations) as if they still are governmental services and this can cause friction.
By the way, being at arms length does not mean that Government has nothing to say in these companies. If for instance there is a serious conflict between the supervisory board or management on one hand and the shareholder/Council of Ministers on the other hand regarding the way management or supervision is carried out, then the shareholder/Council of Ministers will eventually have the last word.
But always in accordance with the procedures established in the laws of the land. We can discuss this issue further in the panel session later on.
Fact is that the checks and balances between Government and its civil servants are of a completely different nature than the checks and balances between Government and its state-owned companies and state-run foundations.

Corporate Governance in general

There are many definitions of corporate governance and it is definitely not my intention to burden you with comparisons of the many definitions as far as corporate governance is concerned. However it is important to

know what corporate governance is all about. Simply put corporate governance has to do with the functioning of a legal entity in a correct and transparent manner. It moreover has to do with responsibility and accountability. Responsibility of management, supervisory board and shareholders towards the company. Accountability of the management towards the supervisory board and ultimately accountability of management and supervisory board towards the shareholders.
Corporate governance moreover also has to do with the interaction between management, supervisory board and shareholders.
Each of these so-called corporate bodies should respect the rights of the other. Of course, each corporate body has not only rights but also obligations.
On our islands we have the tendency to focus on the rights and not so much on the obligations.
In general the management of a legal entity has the right but also the obligation to run the company in accordance with the articles of incorporation of such company and the business plan established by management and approved by the supervisory board, but also in accordance with the law and the relevant rules and regulations, and all this in a business like manner.
State-owned entities must also comply with the Corporate Governance Ordinance as well as the Corporate Governance Code. Banks, other financial institutions and insurance companies must comply with special laws and guidelines and are supervised by the Central Bank of Curaçao and Sint Maarten.

It is important that management should always be in the Driver's Seat of the company and the supervisory board and the shareholders should respect this right.
On the other hand, the supervisory board has the right but also the obligation to supervise and advise management in an adequate manner.
The shareholder on the other hand has the right to hold management accountable for the way the company is being run or has been run and to hold the supervisory board accountable for the way in which the supervision of management of the company is being carried out or has been carried out.

Where do we stand in Sint Maarten as far as corporate governance/ checks and balances of state-owned companies and state-run foundations are concerned?

Financial institutions, being banks, finance companies and insurance companies are supervised by the Central Bank of Curaçao and Sint Maarten as mentioned before (e.g. the Windward Islands Bank, RBC Bank and Nagico). The companies belonging to the last mentioned group need a special license from the Central Bank in order to operate as such.
Moreover the managing directors and supervisory directors of such companies need to pass an integrity and suitability test in order to act as such. There are several ordinances regulating these companies. Moreover special corporate governance rules established by the Central Bank are laid down in a "Summary of Best Practice Guidelines" and in other Guidelines.

The other group in Sint Maarten for which corporate governance rules have been established is the group of state-owned companies and state-run foundations (the so-called "Overheids N.V.'s en Overheidsstichtingen)".
My focus today will be on this last-mentioned group (the state-owned companies and the state-run foundations). As stated before the state-owned companies and state-run foundations play an important role within the Sint Maarten community and economy. Just think of the Airport Group of Companies, the Harbour Group of Companies, the Telem/ Telecommunication Group of Companies, Gebe, the Sint Maarten Housing Foundation and the Sint Maarten Tourist Authority. Each of these companies and aforementioned foundations play an important role and has an impact on the inhabitants of this island in one way or the other. It is therefore important that checks and balances with respect to these legal entities are not only in place but are also adhered to by the relevant players. The players in the state-owned companies are the management, the supervisory board and the shareholder (council of ministers), while the players in the state-run foundations are also the management, supervisory board and council of ministers, with this exception that the foundation does not have any shareholders. It is very important that the rights of the council of ministers vis-à-vis management and supervisory board are well worded in the articles of incorporation and if needed in By-laws of the state-run foundations, since a foundation does not have any shareholders and very little is regulated in the law. (E.g. accountability of management and supervisory board, manner of appointment of management and supervisory board, etc.).

I will now give an explanation as to how the corporate governance concept is supposed to work for the state-owned companies and the state-run foundations, and I say suppose to work, because as we say in Dutch "papier is geduldig", meaning in practice, that we can create all kind of wonderful structures on paper, but if at the end of the day we do not put the right people in the right place, such structures will not function properly.

Corporate governance with respect to aforementioned companies and foundations is applied via a law/an ordinance and a code.
I am referring to the Eilandsverordening Corporate Governance (the Ordinance Corporate Governance) and het Eilandsbesluit Corporate Governance Code (the Corporate Governance Code).
The Code is to be compared with guidelines, while the Eilandsverordening (the Ordinance) is a law.
There is a significant difference between the two.
The rules in the Corporate Governance Ordinance are mandatory, while the Corporate Governance Code starts from the premise that the guidelines laid down in the Code should be followed/adhered to and if they are not followed, you should explain, why they have not been followed. (Comply or explain rule).

Let me begin with the Code.
According to the Code, it is applicable to all corporations, which have their statutory seat in Sint Maarten and of which shares or depositary receipts in evidence of shareholding (in Dutch "certificaten van aandelen"), are held in whole or in part directly or indirectly by country Sint Maarten.
The scope of this definition is in my view too broad. The way the definition is worded, implies that if the country Sint Maarten holds let's say one percent (1%) of the issued shares in a company, which is established in Sint Maarten, this fact alone will label the company as a company to which the Code and the Ordinance will apply. This does not make sense. A more logical definition would have been that e.g. the majority of the issued shares with voting rights should be held by country Sint Maarten.
The Corporate Governance Code is also applicable to foundations of which the Government of Sint Maarten has the right to appoint or dismiss one or more managing directors or supervisory directors or of which the Government of Sint Maarten has the right to amend the articles of incorporation.

Also this definition is in my opinion too broad. This definition entails e.g. that if the board of a foundation consists of 7 members of which one is appointed by the Government of Sint Maarten, the Code and the Corporate Governance Ordinance will apply to such foundation.

The following can also be said of the contents of the Code as is stated in the Code itself.
The Corporate Governance Code embodies principles as well as substantial provisions, which the persons and parties involved with the corporation, have to observe towards one another. These principles may be interpreted as the general views regarding good corporate governance. The principles have been further elaborated in substantial provisions, which create certain standards for the conduct of managing directors, supervisory directors, shareholders and the external certified public accountant. These provisions may be considered as a further formalization of the general principles of good corporate governance. The corporations and foundations may deviate from the provisions of the Code. Deviations from the provisions are possible all after they can be justified. Being able to apply all of the provisions of the Corporate Governance Code, depends namely on the actual circumstances of each corporation or foundation. (Comply or explain rule).

The Corporate Governance Code furthermore takes as its point of departure that the state-owned company and the state-run foundation entail a long term co-operative relationship of various parties involved with these legal entities. These parties are the groups and the individual interested parties, who either directly or indirectly have an impact on the achievement of the objectives of such legal entities. The managing board and the supervisory board have an integral responsibility for balancing these interests, usually oriented to the continuity of the legal entity. In so doing, the legal entity strives to create an added value for all stakeholders in the long run. The managing board and the supervisory board must take into account the interests of all the parties involved with the legal entity. Confidence of the stakeholders that their interests will be looked after will in the long run benefit the legal entity.

The Code also expands on proper entrepreneurship and state that proper entrepreneurship, including the conduct of business with integrity and transparency by the managing board, as well as adequate supervision thereon, are essential conditions for creating trust in the management of the managing board and trust in the supervision by the

supervisory board. Application of the Corporate Governance Code and observance of same guarantees these points of departure for good corporate governance.

In the Corporate Governance Code the structure of a separate supervisory board, apart from a managing board for state-owned companies and state-owned foundations, is taken as point of departure (no one tier board). The managing board and the supervisory board are responsible for the corporate governance structure of the legal entity, as well as the observance of the provisions of the Corporate Governance Code. The managing board and the supervisory board of the state-owned companies are answerable to the General Shareholders' Meeting (Council of Ministers). The managing board of state-owned companies and state-run foundations is accountable for the policy conducted and the execution of the principles and provisions embodied in the Corporate Governance Code. The supervisory board must render a report from the viewpoint of its supervision whether and to what extent the principles and provisions laid down by the Corporate Governance Code have been observed. The shareholders/Council of Ministers should carefully take note of these findings and should profoundly assess the reasoning given by the corporation for deviations from the principles and provisions laid down in the Corporate Governance Code.

And finally the Corporate Governance Code states that the principal rules of the corporate governance structure of the corporation should be annually dealt with in the annual report in a separate chapter, also based on the principles and provisions of the Corporate Governance Code. In such a chapter the corporation or foundation explicitly points out to what extent it adhered to the principles and provisions of the Corporate Governance Code, and if not, why and to what extent it deviated from same (comply or explain). Each substantial change in the corporate governance structure of the corporation and of the observance of the principles and provisions of the Corporate Governance Code shall be submitted to the General Shareholders' Meeting as a separate point on the agenda.

The Code furthermore extensively spells out what is expected of the managing directors, the supervisory directors and the shareholders, the so-called corporate bodies.
Some of the issues dealt with in the Code are:
- The tasks and responsibilities of the corporate bodies;

- The importance of supervisory directors being independent and critical;
- Rules in case of a conflict of interest of supervisory directors and managing directors vis-à-vis the company/foundation;
- The fact that persons holding official positions within Government ("politieke gezagsdragers") may not act as supervisory director or managing director;
- The agenda points that must be dealt with at the annual general meeting of shareholders;
- The fact that each year the report of management and supervisory board regarding observance of the provisions of the Code must be audited by an independent accounting firm.

And now some remarks about the Corporate Governance Ordinance:
On January 22nd, 2008, Holland, Curaçao and Sint Maarten entered into an agreement at the Belair Community Center that Curaçao and Sint Maarten would develop rules (the agreement spoke of "regelgeving") pertaining to corporate governance and that in any case rules must be put in place by Curaçao and Sint Maarten regarding:

a. the procedure pertaining to the alienation (sale) of shares and of the acquisition of shares;
b. guidelines for a dividend policy;
c. procedures pertaining to the appointment and dismissal of managing directors and supervisory directors of state-owned companies and state-run foundations.

Sint Maarten already had a draft of its Corporate Governance Code at the time and decided to:

1. leave the draft Code intact as much as possible;
2. regulate the points with respect to which consensus was reached in a separate document.
   This last-mentioned document became the Corporate Governance Ordinance.

The point of departure in the Ordinance is that before the Government of Sint Maarten can take decisions with respect to the actions mentioned above (such as appointing and dismissing of managing directors and supervisory directors), advice of an independent body/adviser must be requested and obtained.
That independent adviser is the Corporate Governance Council.

Let's take a closer look at the way the Ordinance is intended to work by using an example.
Let's say country Sint Maarten acting as shareholder of one of its companies would like to appoint a managing director or dismiss a supervisory director.
The procedure would be as follows:
The shareholder (the Council of Ministers or the shareholder representative appointed by the Council of Ministers) must inform the Corporate Governance Council, the independent adviser, of its intention.
The Corporate Governance Council must send a written advice within one month to the shareholder and must indicate if - in the opinion of the Corporate Governance Council - the intention of the shareholder is in accordance with the articles of incorporation of the company and the other applicable rules, such as the procedure rules and the profile of the managing director in the case of the appointment.
In the case of the dismissal of the supervisory director, the Corporate Governance Council must assess and motivate if in its opinion the dismissal grounds given by the shareholder could lead to a dismissal in all reasonableness.
In its advice, the Corporate Governance Council must also motivate if it has substantial objection against the appointment or dismissal or not.
If the shareholder deviates from the advice of the Corporate Governance Council, and the shareholder may deviate, then the shareholder must immediately inform the Corporate Governance Council
of its decision in writing, while said decision of the shareholder must be motivated.
In accordance with the Corporate Governance Ordinance the advice of the Corporate Governance Council should be sent to Parliament within one week after the advice has been rendered to the Council of Ministers.

This is theory and is beautiful on paper but does it work in practice?

The Corporate Governance Council was set up in such a way that it would be a trusted adviser of the shareholder (Council of Ministers).
In practice the first Corporate Governance Council of country Sint Maarten was in my opinion not taken seriously by Government, and that is a pity.
One gets the impression that Government – instead of seeing the Corporate Governance Council as a trusted adviser – viewed this council as an adversary meddling with its (governments) business.

The Corporate Governance Council is an advisory body, nothing less and nothing more. It advises Government but at the end of the day Government decides. What is expected of Government however by virtue of the Corporate Governance Ordinance is that if Government deviates from the advice of the Council, then Government must substantiate its decision. Nothing less and nothing more. Is this asking too much of Government? In all fairness I do not think so.
The intention – when setting up the Corporate Governance Council – was that it would play an important role regarding the checks and balances with respect to the functioning of state-owned companies and state-run foundations. My conclusion is that the first Corporate Governance Council never got a fair chance from past Governments to function properly.

The importance of the Supervisory Board
The supervisory board plays a vital role with respect to the functioning of legal entities.
Here is what our Central Bank says about the importance of the supervisory board, in its "Guidance Notes for the Supervisory Board of supervised Financial Institutions".
*Quote*
*An institution's Supervisory Board is ultimately responsible for the conduct of the institution's affairs. The Supervisory Board controls the institution's direction and, hence, its overall policy. By doing this, the Supervisory Board determines how the institution will conduct its business on the long term. In general, the Supervisory Board establishes or approves and monitors the policies by which Management will operate.*
*The financial stability and continuity of an institution is very much dependent on the strength and quality of the Supervisory Board, its independence from management and its degree of involvement in the institution's affairs. In favorable times the Supervisory Board contributes by setting the tone and direction, its overseas and supports Management's efforts by testing and probing their recommendations before approving them. The Supervisory Board also makes sure that adequate systems and controls are in place to identify and address problems before they become a threat. In adverse times an active and involved Supervisory Board can help an institution survive by taking the necessary corrective actions and, when needed, keep the institution on track until effective management can be re-established.*
*Unquote.*

So the supervisory board not only advises management but also supervises management and moreover it also plays an intermediary role between the management and the shareholder.
It is important that the right persons, being persons with the right qualifications and who are willing to and can act independently are appointed as members of the supervisory board.
The members of the supervisory board should be appointed based on pre-established objective criteria, established by the Meeting of Shareholders, after the advice of the Corporate Governance Council has been sought and received.
When carrying out his/her task as supervisory director it is important that the interest of the company must first and foremost be taken into account. It goes without saying that the interest of the other stakeholders must also be taken into account as much as possible.
Moreover when carrying out their task supervisory directors should always keep in mind that the managing director is in the Drivers Seat and that they are there to advise and supervise.
It is recommended to use a "performance target agreement" as a tool with respect to the supervision of the managing director. Based on the business plan management and supervisory board agree in writing at the beginning of the year what part of the business plan (including investments) should be completed that year and by which date.
By doing so, the supervisory board can supervise management in an objective and structural manner and not in an ad hoc and subjective manner. By doing so the supervisory board also has a tool to evaluate management.
The supervisory board should function without mandate or instruction of the shareholder (Council of Ministers).
However as I said before, at the end of the day the supervisory directors are accountable to the shareholder. The way accountability should work is that the shareholder should have written general policies pertaining to the different fields in which its companies and foundations are active. Based on these general policies management of the companies and foundations should draw up business plans and multi annual plans. The supervisory board should advise with respect to these plans and they should also be approved by the supervisory board. And of course the supervisory board should then monitor the execution of these plans by management.
Personally I am in favor – as far as it pertains to state-owned

companies – to insert a clause in the articles of incorporation of said companies to the effect that the supervisory board should discuss the multi annual plan with the shareholder before approving same. By doing so, the shareholder will be kept abreast of future (major) investments, which the relevant company of foundation intends to carry out.

Another important policy which should be established by the shareholder (Council of Ministers) is the dividend policy for the relevant (group) of companies.
Once such an objective dividend policy has been established, then the shareholder has an objective tool by which it can control and hold management and the supervisory board accountable with respect to dividends.
Both the shareholder, the supervisory board and management then know where they stand.

In connection with the above I am also in favor of inserting a clause in the Articles of Incorporation of state-owned companies to the effect that management, with the approval of the supervisory board, may not without prior approval of the shareholder enter into finance agreements stating that dividends may not be declared and or paid out to the shareholder without the approval of the Lender.

Conclusions and recommendations

In concluding I would like to leave you with the following thoughts:

1. The checks and balances are generally speaking in place with respect to state-owned companies and state-run foundations in Sint Maarten.
   The problem in practice is that the rules are not always (properly) applied and that not always the right persons are appointed in the right positions.
2. Taking into account the important position and responsibility of managing directors and supervisory directors of state-owned companies and state-run foundations, it is important that persons to be appointed to these posts not only undergo a suitability but also an integrity test.
3. It should be considered to have newly appointed supervisory directors follow a crash course regarding, among others, the legal aspects of the function and the functioning of a supervisory director. During such a crash course supervisory directors should also be enlightened of

financial aspects of the legal entities as laid down in the financial statements.

4. Government should establish as soon as possible general policies (including a general dividend policy) for all of its (groups of) companies.
5. Government should make better use of the Corporate Governance Council by soliciting its advice also with respect to other matters than those mentioned in the Corporate Governance Ordinance, said Council being the trusted adviser of Government with respect to its legal entities.
6. Individual ministers (members of the Council of Ministers) should not be given too much power with respect to state-owned companies and state-run foundations. Important decisions of the shareholder with respect to matters of the state-owned companies should be taken by the Council of Ministers and not by an individual minister.
   Neither should the Council of Ministers delegate important decisions regarding state-run foundations to individual ministers.

Sint Maarten, June 19th, 2015