

Government, Law and Policy Journal



A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School

Public Authority Reform



- Re-evaluating the Use of Public Authorities During Recessionary Times
- Public Authorities Reform Act of 2009
- Public Authority Controversies
- Public Authorities Accountability Act of 2005
- Reality v. Legality of Conduit Financing
- Oversight of Public Authority Contracts by the State Comptroller
- Reforms to Improve New York's Industrial Development Agencies
- Compliance With the PAAA
- Ethics Laws and the Public Authorities of New York State

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in Public Service**

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**Government, Law
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Tappan Zee Bridge at Night, by John Hudson © 2009

The *Government, Law and Policy Journal* welcomes submissions and suggestions on subjects of interest to attorneys employed or otherwise engaged in public service. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *GLP Journal*, its editors, the Government Law Center, or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief for submission guidelines. Material accepted for publication becomes the property of the Association.

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CORRECTION

Mark Schachner authored the article Open Meetings Law "Puzzlers" for Local Municipalities which appeared in the Spring 2009 Issue of the *Government, Law and Policy Journal* on Freedom of Information Law. Mark's biographical information was inadvertently left out of the issue and appears below:

Mark Schachner is a principal in the law firm of Miller, Mannix, Schachner & Hafner, LLC in Glens Falls, where his efforts are concentrated in the areas of municipal, environmental, land use and planning/zoning law. Mr. Schachner and his colleagues represent numerous municipalities in northern New York. He is a graduate of Brown University and Boston University School of Law.

Message from the Chair

By Peter S. Loomis

This past June I was greatly honored to be asked by State Bar President Mike Getnick to serve as the sixth Chair of the Committee on Attorneys in Public Service (CAPS). Having been a member of CAPS for three years prior to my appointment, and a member of its Subcommittee on the Administrative Law Judiciary for even longer, I was well aware not only of the responsibilities the job entails, but of the substantial accomplishments of all those who have served before me. Our most recent past Chair, Professor Patty Salkin of Albany Law School, has set the bar very high, and her service to the Committee was extraordinary. We are fortunate that while she now chairs the Municipal Law Section, Patty will continue to be a CAPS member, and I look forward to her wise counsel.



In my first message to CAPS members, I stated that my priorities as Chair "...will be not only to continue the good work we have done in the past that has brought us attention and respect from the greater membership, including our *Journal*, the wonderful Annual Meeting program, and our awards, but to also focus on membership and bettering our involvement and relationship with Sections within the Association." Since its inception in 1998, CAPS has evolved to a point where we are now recognized as an increasingly important voice within the Association, representing public sector perspectives that require attention and consideration.

The inaugural issue of the *Government, Law and Policy Journal* was published in 1999, and it has become a valued Association publication over the last decade, with each edition now awaited with great anticipation. The *Journals* have always dealt with relevant and timely issues of interest, and this issue, devoted to a broad discussion of public authorities, is no exception. I want to thank Rose Mary Bailly of Albany Law School for her continued work as the *Journal's* Editor-in-Chief. Rose Mary agreed to take on this responsibility in 2005, and she and the student editors at Albany Law have played a pivotal role in the publication's success. Thanks go, as well, to Scott Fein, the Guest Editor for this issue. Scott, a partner at Whiteman Osterman & Hanna LLP, has devoted much of his distinguished career to issues involving public agency governance and regulatory compliance, and he brings his broad experience and background to this issue.

The CAPS Annual Meeting Subcommittee, this year co-chaired by Natasha Philip and Spencer Fisher, has

already been hard at work planning the program for this coming January. The traditional morning Supreme Court review will continue, with Professors Mazzone and Araiza of Brooklyn Law School, and the afternoon will focus on timely issues involving the process and prospects for structural constitutional change in New York, with some discussion within that context of the events of the past year such as the Lieutenant Governor dispute and the leadership crisis in the Senate. It is sure to be a winning program!

The CAPS Awards for Excellence in Public Service, and their presentation at an Annual Meeting reception following our CLE program, have also become a tradition over the past ten years, and the Committee has been honored to publicly recognize the extraordinary dedication to public service demonstrated by this diverse group of past winners. This year, the Committee awarded its first Citations for Special Achievement in Public Service in conjunction with a program on the career of Charles Evans Hughes held at the Bar Center in June. The Citations are intended to complement our longstanding Excellence in Public Service award and recognize a unique or special achievement by a public service attorney in relation to a particular event that affects the public. This year's inaugural winners were Erin N. Guven, Esq., an attorney with Legal Services of the Hudson Valley, and Amy Pitcairn Barasch, Esq., with the New York State Office for the Prevention of Domestic Violence. The Awards and Citations Subcommittee, chaired by Donna Hintz and Anthony Cartusciello, is currently awaiting nominees for our January Excellence in Public Service awards.

CAPS has been successful in meeting the goals set forth in our Mission Statement of 1999 only because of the hard work of dedicated public servants who have served on our Committee and on its subcommittees over the years. In addition to our Annual Meeting and Awards Subcommittees, four other CAPS subcommittees this year are pursuing their own endeavors. The Subcommittee on the Administrative Law Judiciary, this year co-chaired by Elizabeth Liebschutz and James Horan, had a particularly noteworthy 2008, as it produced a Model Code of Judicial Conduct for State Administrative Law Judges, a unique document that will provide useful and unprecedented guidance to ALJs on ethical issues. The Code was shepherded through the Executive Committee and the House of Delegates by last year's co-chairs, Catherine Bennett and James McClymonds, and the House gave its approval on April 4, 2009. This year's subcommittee efforts will focus on informing state agencies of the Code's existence and to urge its adoption, and to consider appropriate training for ALJs on its content.

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Editor's Foreword

By Rose Mary Bailly

The Government Law Center at Albany Law School is pleased to host the Public Authority Project. The project was established in 2004 "to provide information and analysis concerning the practices and proposed reforms relating to New York State and local public authorities and to assist public authorities in achieving compliance with applicable law."



We were delighted when Scott Fein, Esq., Chair of the Public Authority Project and a partner at Whiteman Osterman and Hanna, accepted our invitation to be the guest editor of this issue of the *Government, Law and Policy Journal* which is dedicated to an examination of the role of public authorities in state and local government

I want to extend my thanks to the authors and all those behind the scenes whose hard work and diligence

have made this a successful issue. Our Board of Editors was as always supportive and helpful. Special thanks are in order to our Executive Editor for 2009-2010, Ali Chaudry, Albany Law School, Class of 2010. He and his colleagues from Albany Law School, Robert Axisa, Anass Chakir, Jeremy Cooney, Stephen Dushko, Marwa Elbially, Lynn Evans, Jillian Kasow, Joi Kush, Daniel Schlesinger, Robin Wheeler, and Andrew Wilson, undertook their editing responsibilities with great enthusiasm for which we are most grateful. As always we are indebted to the staff of the New York State Bar Association, Pat Wood, Lyn Curtis and Wendy Harbour, for their expertise and enduring patience. And last, and always, my thanks to Patty Salkin for her unstinting support.

Finally, any flaws, mistakes, oversights or shortcomings in these pages fall on my shoulders. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Message from the Chair *(continued from page 3)*

The CAPS Subcommittee on Ethics, co-chaired by Lisa Grumet and John Mancini, plans to look at ethical issues facing attorneys in the public sector and potentially develop a guidance document similar to the ALJ Model Code, but with broader applicability. The Subcommittee on Technology, co-chaired by Christina Roberts-Ryba and Jackie Gross, will investigate what types of password protected internet postings and activities on the Association's CAPS Web site, such as list serves and blogs, might be useful to current NYSBA members in the public sector, as well as attract more public service attorneys to membership in the State Bar.

As I indicated, my goals as Chair are not only to build on CAPS' past good work, but to also focus on membership and bettering our involvement and relationships with Sections in the Association. Our newly created Subcommittee on Membership and Association Outreach, co-chaired by Justina Cintron Perino and Donna Giliberto, will endeavor to brainstorm ways of bringing more public sector attorneys into the Association and to identify specific ways that CAPS can work with Sections within the Association that also attract public sector attorneys, such as Municipal Law, Health, Criminal and Environmental Law.

During her tenure, Patty Salkin developed a new organizational model for the Committee, naming three coordinators, each working directly with various subcom-

mittees, and I have decided to continue that successful idea. Assisting me this year as coordinators will be Catherine Bennett, James McClymonds and Michael Barrett, to whom, together with our subcommittee co-chairs, I express my ongoing thanks and appreciation.

Finally, in my first message in the *Journal*, I want to especially thank Pat Wood and Maria Kroth at the Bar Center, who have both been an enormous help to me during my first few months as Chair. Pat has been the Staff Liaison to CAPS since its inception and her institutional knowledge is invaluable, as is her constant willingness to lend an ear and participate in our many conference calls despite all her other responsibilities. Maria, too, has demonstrated enormous dedication to our Committee, and is largely responsible for our effective communications.

I have worked in the public sector as an attorney and as an Administrative Law Judge for more than 30 years, and I can truly say that my affiliation with CAPS, first as a member of the ALJ Subcommittee and then as a CAPS member, has been extraordinarily rewarding. Too often, public sector attorneys do not have the opportunities to interact with others in similar situations and facing similar challenges. CAPS and the Association provide wonderful opportunities for collegiality and learning, and my hope is that our Committee can inspire other public sector lawyers to join our ranks.

Introduction: Public Authority Reform

Public authorities are little understood. When high school students study the operation of State government, little, if any, attention is paid to the role of public authorities. This is despite the fact that State public authorities are currently responsible for approximately 93 percent of the State's indebtedness and the ownership and operation of 85 percent of the State's infrastructure. Some have described State public authorities as the "Fourth Branch of Government" and the more cynical as the "Shadow Government." Stewarded by 409 unelected board members, they are insulated, in differing degrees, from electoral control and direct public accountability. Their indebtedness is incurred outside of the State's traditional budgeting and approval process. In addition to State authorities, there exist more than 500 local authorities in New York and tens of thousands of authorities that have been incorporated by others states, the Federal government and other nations.



Though authorities do not fit neatly into the framework of government, most commentators believe that they play an important role ensuring that key governmental functions operate outside of political influence and electoral cycles, and allow difficult and unpopular decisions to be made, in some measure insulated from the arena of elected politics.

Although public authorities are as old as the nation itself (the Hudson's Bay Company and East India Company were variants of current day authorities), there was not sustained attention paid to authority operation and reform until the early part of this decade. With the enactment of the Public Authority Reform Act of 2005 (PAAA), a mechanism was created to illuminate the "shadow" by enhancing transparency of authorities and fostering significant improvements to policies pertaining to governance, auditing, and property transactions. Over the

past four years the PAAA has opened a window into the operation of public authorities.

With greater understanding of the operation of public authorities, the legislature and Governor concluded that a second phase of authority reform was warranted. This past December the Public Authorities Reform Act of 2009 was signed into law. The Act in many respects is unprecedented and appears to go well beyond what other states have adopted. It should, when fully implemented, enhance compliance, board independence, programmatic and fiscal operations, and provide a new standard of contract review. Commentators suggest that in due course a third phase of reform should be considered to address several of the bedrock fiscal issues including limitations on conduit financing and State supported debt.

The authors of the articles for this *Journal* are among those who have thought long and hard about authority reform. Some are skeptical of public authorities; others perceive them as the best hope for progressive government. On balance, the authors understand the authorities are here to stay, and turn their focus on how best to enhance the authority operation and public accountability.

The Public Authority Project of the Government Law Center has sought to facilitate the debate on authority reform by making available analysis and programs. Its most significant contribution is the development of a first in the nation website (publicauthority.org) which seeks to collect and catalog all available information on public authorities, nation-wide as well as internationally, to assist those who wish to understand the role of authorities and those, including legislators, who may consider the benefit of reform.

I would like to express my appreciation to each of the authors who have taken time from their day jobs to contribute to this volume.

Scott Fein
Director, Public Authorities Project
Government Law Center
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(Partner, Whiteman Osterman & Hanna LLP)

Is the Private Sector Really a Model of Efficiency and Independence? Re-evaluating the Use of Public Authorities During Recessionary Times

By Jonathan D. Rosenbloom

Introduction

Over the past ninety years, cities and states have increasingly shifted control and oversight over government services from elected officials to quasi-private entities, called “public authorities.”¹ Today, public authorities perform thousands of services previously provided by state and local governments, such as mass transit, economic development and housing. In executing these services, public authorities borrow more money than all of the cities and states combined,² and in some states, such as New York, they issue over 90% of the public debt.³



While public authorities are authorized to perform public services, they are specifically organized around a private sector model that includes a board of directors and a hierarchy of officers. The most common justification for structuring public authorities around the private sector model is that the model inherently achieves an increase in efficiency and independence in the provision of government services.⁴ Mimicking the private sector model, it was thought, would make the provision of public services more “independent,” “outside and above politics,” “the very epitome of prudence, efficiency, economy” and “free...from political interference, bureaucracy and red tape.”⁵

Today, in the midst of a recession and the unfolding of a massive *public sector* bailout of the *private sector*, can organizing public services around the private sector model be justified on the grounds that it inherently increases efficiency and independence? This article sets out to examine this question and begins in Part I by briefly summarizing the origins of public authorities. It reviews the corruption and financial strain experienced by cities and states during the early 1900s that compelled local governments to look at contemporary operational and managerial advancements in the private sector. In response, cities and states structured public authorities around a private sector model that had assumed a mythical status of efficiency and independence.

Part II reviews the same private sector model in light of the current recession and bailout. It raises the question of whether the private sector model, particularly as used in public authorities, still paints a picture of independence

and efficiency. It considers the private sector model in light of its contribution to or participation in allowing the current financial crisis to transpire and the necessity of public funds to support private sector entities through the recession.

Finally, Part III discusses recent ideological and conceptual changes in the private sector that have challenged the organization of the private sector model, as used in public authorities. It presents a new and emerging model that is responding to the recession. This model is no longer narrowly and solely focused on efficiency, as defined by the financial bottom line, to the exclusion of other concerns. Rather, it finds profitability and marketability in accommodating environmentally friendly and socially responsible initiatives.⁶ Part III questions whether this new model or the ideological approach behind the model is the new icon of efficiency and independence. Further, it explores whether this model, or the principles behind this model, should replace the private sector structure as used for organizing public authorities and should be the basis for providing public services. Just as financial difficulties, corruption and changes in the private sector during the turn of the twentieth century provoked the creation of public authorities, should the recession, mismanagement and changes in the private sector today provoke a re-evaluation of the use of private sector models in providing public sector services?

I. The Private Sector Model and the Creation of Public Authorities

This Part briefly summarizes the economic difficulties and corruption in the public sector around 1900, as well as contemporary changes of governance in the private sector. It considers the mythical status the private sector model assumed, as the apex of efficiency and independence. Because local governments believed the private sector model would help address deficits and corruption by increasing efficiency and independence, they organized public authorities around this private sector model.

A. Local Governments Face Fiscal and Ethical Challenges During the Turn of the Century

In the early part of the nineteenth century, cities and states, particularly in the North and Midwest, sought to grow and implement large capital projects.⁷ With the advent of the steam locomotive and the coming of the Industrial Revolution, local governments borrowed money for a variety of projects, including the construction

of railroads and canals.⁸ Most cities and states were given great leeway in borrowing, as regulations to check spending and borrowing were rare. As a result, cities and states borrowed more money than ever, accumulating record debts.⁹ Shortly after the Civil War, the southern states also found themselves with record debts following a drop in property values, residual costs from the Civil War and damaged infrastructure, including prisons, bridges and railroads.¹⁰

In addition to record debts, cities and states were struggling with government mismanagement and corruption.¹¹ For example, government officials often borrowed money to finance construction of railroads and canals. The railroad construction contracts were often granted to political allies or were issued hastily, as competition for the railroads was fierce.¹² When railroad barons abandoned projects, cities and states were left with massive debt and no railroad. There was a general outcry to amend state constitutions to require voter approval before cities and states could borrow money.¹³ “By 1870 the popular referendum [to approve local borrowing] had become a major part of fiscal policy-making” in America,¹⁴ stabilizing many state and municipal deficits.¹⁵ For example, New York State’s debt in 1893 was almost gone.¹⁶

With the arrival of the Progressive Era in the late nineteenth and early twentieth centuries came a call for increased public services and economic development. Cities and states were compelled to improve and expand the distribution and number of services, straining the economic stability of local governments.¹⁷ Putting further stress on local budgets was a wave of municipal annexations, enlarging major metropolitan areas and increasing their population four to sixty-five times.¹⁸

Along with an increase in services and serviced areas came an increase in costs.¹⁹ With the constitutional referendum requirement in place, cities and states found it difficult to raise capital by borrowing, as the public referendum requirement was often slow, expensive and unsuccessful. With few alternatives, politicians looked to the private sector for new and innovative managerial and operational techniques.

B. A New Private Sector Model Develops During the Turn of the Century

Prior to the end of the nineteenth century, the typical private sector model was characterized by an entrepreneur that served as the owner *and* the manager.²⁰ It was “the era of entrepreneurial or family capitalism” in which the owner managed the business and was intricately involved with the day-to-day operations.²¹

By the early twentieth century, the private sector model characterized by joint ownership and management had changed. As described in *The Visible Hand: The Managerial Revolution in American Business* by Alfred D. Chandler, Jr., a new private sector model emerged that was

characterized by a separation of ownership and management.²² Leading the charge, railroad companies devised new management methodologies to respond to their geographically vast and operationally complex functions. They implemented the first widespread use of a complex management system that operated independently from ownership. The system consisted of a board of directors, top-level managers (for example, chief executive officer and chief financial officer) and a large number of salaried and middle managers.²³ The railroad companies also developed modern business accounting with sophisticated financial, capital and cost accounting procedures.²⁴

By the 1880s, the railroad innovations were standard operating procedures and spread throughout the private sector.²⁵ As businesses continued to expand, ownership became increasingly dispersed among shareholders.²⁶ Often those holding an ownership interest had little or no authority over management, while those in charge of management were professional operators with no ownership in the business.²⁷ The separation between management and ownership was designed, among other things, to form an independent managerial body and to make the private sector model more efficient in the delivery of services or products.²⁸

C. Local Governments Adopt the Private Sector Model to Address Public Sector Fiscal and Ethical Challenges

Believing the managerial and operational changes occurring in the private sector could make government more efficient and independent, as they had done in the private sector, state and city governments organized public authorities around the private sector model.²⁹ Because they were structured around the private sector model, public authorities were thought to be “simply too businesslike and efficient to fall prey to the corruption and managerial disarray that infect[ed] less businesslike, less efficient, more ‘political’ units of traditional government.”³⁰

Just as the private sector model separated ownership from management in the private sector, newly formed public authorities were designed to separate the public’s “ownership” over government services from management of those services.³¹ It was believed that separating public services from the public and the political arena would solve fiscal and ethical issues by making the provision of public services more efficient and independent.³² This belief relied heavily on two related principles: one, that public authorities were more efficient because their independence allowed them to avoid elected politics and oversight by an elected body; and two, that they were more efficient because they were not subjected to regulations applicable to state and city governments.

Lending support to the claim that they were more efficient and independent was the ability of public authorities to morph into a public or private entity depending on

the circumstance.³³ For example, on the one hand, public authorities were able to issue tax-exempt bonds, which only public entities were permitted to issue. On the other hand, they were able to avoid many regulations applicable to state and city governments, such as civil service and procurement laws, because they were considered private entities.

Most importantly, public authorities were considered private (i.e. independent from government) for purposes of debt restrictions and limitations applicable to state and city governments.³⁴ The private sector structure allowed them to avoid the voter referendum requirement and borrow for capital projects without asking the voters.³⁵ Thus, faced with rising costs and increased demand for expanded services, state and city governments turned to public authorities to borrow money.

By the 1960s public authorities were “financing, constructing, and managing public housing, bridges, tunnels, roads, mass transit systems, university dormitories, sewer systems, sport stadiums, parks, convention centers, bus stations, landfills, and power plants” all over the country.³⁶ Public authorities were being used for and becoming “known as ‘borrowing machines’ whose uses were seemingly unlimited.”³⁷

Because of the ease with which public authorities could issue debt, they have grown faster than any other public or quasi-public entity. They are second only to the federal government in the amount of debt they have issued and issue per year.³⁸ The widespread use of public authorities has led critics to refer to them as the “fourth branch of government,”³⁹ “phantom governments”⁴⁰ and “underground government[s].”⁴¹

II. Efficiency, Independence and the Private Sector Model in Recessionary Times

This Part reviews the economic difficulties experienced in the private sector today and whether those difficulties contradict the notion that the private sector model is inherently more efficient and independent. It notes the public’s changing perception of the private sector and an increased skepticism that it is an example of efficiency and independence. This Part concludes by questioning whether using the private sector model to constitute public authorities can still be justified on the grounds that it is more efficient and independent.

The enormous financial repercussions following mismanagement and malfeasance in the private sector are well documented.⁴² Whether attributable to subprime loans, poor oversight, deregulation, greed, Ponzi schemes or a host of other ailments,⁴³ the private sector today paints a very different picture from the model of efficiency and independence idealized during the early twentieth century and used to create public authorities.

As noted above, the private sector model, as constituted in public authorities, was designed to separate “owner-

ship” of public services from management of public services just as it had done in the private sector. For purposes of borrowing, this separation made public authorities independent from state and city governments because a wide body of interested people (i.e., shareholders, elected officials and voters) were not involved in the day-to-day operations. By separating the voters and elected officials from daily operations, public authorities were considered *independent* and their bonds, therefore, were not backed by state or city governments.

A closer look at the private sector model, as constituted in the private sector, reveals a structure quite *dependent*, rather than independent, upon the public sector. In 2008 and 2009, many entities in the private sector and the financial system itself relied upon public funds to continue to operate at great cost to the public.⁴⁴ Early 2009 reports indicated that the government was prepared to provide more than \$7.76 trillion in public funds to “rescue” a portion of the private sector.⁴⁵ Part of that rescue plan included the public sector’s acquisition of an ownership interest in numerous private entities and spending billions of public funds to prop up entities, such as AIG and GM.⁴⁶ Further, the public sector, in conjunction with dedicating public funds, has taken an active role in management. The President has appointed officers and board members to private corporations,⁴⁷ and Congress and the Administration are regularly overseeing and criticizing the day-to-day operations of private corporations.⁴⁸

The government’s acquisition of an ownership interest and its active involvement in management in the private sector is a move toward a rejoining of ownership and management. The result of this concentration and other actions to assist the private sector exhibit *dependence* upon public funding and resources and a joining of management and ownership. The government’s actions represent a reversion to the pre-twentieth century private sector model where management and ownership were not independent from one another.⁴⁹ Combining management and ownership is a move away from the mythical and idealized independence of the early twentieth century private sector model. If the private sector model is unable to exhibit independence in the private sector, on what grounds do public authorities rely to show that they are achieving a justifiable independence in the public sector?

Similarly, the perception that the private sector model is an operational and managerial icon of “efficiency” has suffered during the current recession. Many of the claimed “efficiencies” achieved in the private sector have been revealed as shortcuts and run-arounds that have contributed to the crisis. Richard Bitner, in *Confessions of A Subprime Lender: An Insider’s Tale of Greed, Fraud and Ignorance*, paints a bleak picture of mortgage lending, only one part of the private sector.⁵⁰ He discusses how “efficiencies” were driven by greed, lack of financial control and willful ignorance. In order to procure quick profits, lenders turned unqualified borrowers into new homeowners

with reckless disregard for the results by abolishing many oversight and accountability measures.

Actions by entities in other areas of the private sector further erode the perception that structuring around a private sector model is inherently efficient. Rating agencies, which served as an important level of oversight, relied on other rating agencies' analyses and did not perform their own analyses.⁵¹ This "was one of a series of shortcuts that undermined credit grades issued by S&P and rival Moody's Corp.... Flawed AAA ratings on mortgage-backed securities that turned to junk now lie at the root of the world financial system's biggest crisis since the Great Depression."⁵²

While there are disputes and extensive discussions concerning the definition of "efficiency" for purposes of determining the health of the private sector, by any of those definitions, the \$523.3 billion in bank writedowns and losses stemming from the above shortcuts and leading to the "collapse or disappearance of Bear Stearns Co. Inc., Lehman Brothers Holdings Inc. and Merrill Lynch & Co," cannot be considered efficient.⁵³

Shortcuts, malfeasance and mismanagement were not limited to mortgage lending. Ponzi schemes orchestrated by Stanford Financial Group, Bernie Madoff, and Gordon Brownoff also resulted in billions of losses for people across the globe. Since the recession officially began in December 2007,⁵⁴ actions by Wall Street executives continue to hurt the private sector's image as JPMorgan Chase, AIG, and others continue to move forward with lavish plans, even after taking billions in public funds.⁵⁵

The list of companies and individuals involved with the financial crisis appears to grow every day. As that list grows, the public's early twentieth century perception of the private sector as an icon of efficiency and independence diminishes.⁵⁶ One recent poll indicated that only 30% of Americans believed Wall Street executives could make the right decisions to end the recession, while 75% believed the President could.⁵⁷ Further, investor confidence in the private sector continues to suffer as the recession unfolds.⁵⁸ In the past year, billions of dollars have shifted out of private sector entities and funds to public sector bonds.⁵⁹ Where the private sector was once held in high esteem, it is now distrusted and often scorned.

With millions of people having lost jobs, homes and retirement savings in the wake of actions in the private sector, it is hard to blindly accept the claim that the private sector model is efficient, independent and one that would serve the public good through public authorities. In light of the loss of confidence in the private sector, the *public sector* bailout of the *private sector*, the recession and corresponding job losses, foreclosures and retirement losses—can structuring public authorities around a private sector model still be justified on the grounds that the model inherently increases efficiency and independence in the provision of government services?

III. Restructuring the Private Sector Model and Its Use as a Basis to Provide Public Services

This Part examines a new and emerging private sector business model that has flourished in the wake of the recession and bailout. The new model adopts a more public service-oriented strategy, focusing equally on profitability, environmental friendliness and social responsibility. This Part questions whether the new model is now the icon of efficiency and independence, and whether it should replace the antiquated private sector model that has been used to create public authorities for the past ninety years. If the private sector model is gravitating toward a new organization and finding efficiency and independence in an environmentally and socially conscious business structure, should the provision of government services follow?⁶⁰

During the early twentieth century, the mythical private sector model epitomized as the height of efficiency and independence was in sharp contrast to a government that was considered listless and rife with corruption. Today, the public's perception of government and the private sector have inverted. Where once the private sector was held in high esteem, the perception of the private sector today fades with every new allegation of mismanagement, graft and corruption. Recent polls indicate not only an increased faith in the public sector and its ability to handle the economic recovery, but also a decreased faith in the private sector to do so.⁶¹

Even before the recent economic turmoil, although quick in response to it, a new private sector model re-conceptualizing "efficiency" and the purpose of a for-profit business began to emerge.⁶² The focus of the new and growing private sector model is no longer narrowly and solely focused on "efficiency," as defined by the financial bottom line to the exclusion of other concerns and impacts. The new model finds efficiency, profitability and marketability in accommodating environmentally friendly and socially responsible initiatives.

Innovative entrepreneurs are shifting objectives and adopting the new model, understanding that an expanding and powerful market is seeking socially responsible and environmentally friendly products and processes.⁶³ These entrepreneurs are not merely making their businesses or products "green," but rather they are fundamentally changing the way they operate their businesses. Every decision is made with the long-term social, environmental and financial impacts in mind. They create long-term stakeholder value by embracing opportunities and managing risks derived from economic, environmental and social developments. They argue that the new model derives economic efficiency by, or at least achieves economic efficiency in conjunction with, promoting social and environmental initiatives.⁶⁴ One recent study highlighted the efficiency benefits of the new model, finding that "in 16 of the 18 industries examined, companies recognized as [implementing the new model]...

outperformed their industry peers over both a three- and six-month period, and were well protected from value erosion.”⁶⁵

The new private sector model has assumed and continues to assume a variety of identities and forms, including “Triple Bottom Line,”⁶⁶ “Corporate Social Responsibility,”⁶⁷ “B Corporations,”⁶⁸ “Hybrids”⁶⁹ and others. For each new identity and form, there are corresponding criteria to guide private sector entities in achieving the new model. Although distinct, the criteria cover common ground that includes: environmental performance and monitoring; employee ownership and compensation; community involvement; production of beneficial product or service and in a legal and beneficial manner; charitable work; and transparency and accountability in governance.⁷⁰

In light of these changes in the private sector, can government services once performed by public authorities also find efficiency and value in focusing on environmental, social and economic concerns?⁷¹ Criteria similar to those set forth above are helping to redefine the private sector model in the midst of, and partially in response to, the economic downturn. It seems it would be prudent for cities and states to consider following a related path and re-evaluate the use of the old private sector model used to organize public authorities. Cities and states could consider what, if any, benefits can be gleaned from the ideological approach used to develop the new private sector model. Cities and states have an opportunity to delve deeper into understanding the current changing of consciousness in the private sector and how this change may be a positive force for the provision of public services.

The current private sector model structuring public authorities was primarily justified on an economic basis, particularly as it related to public authorities’ borrowing practices. In addition to economic benefits, the new private sector model and the ideological approach adopted by it find value in environmental and societal benefits. Cities and states are in a position to question whether using the old model is efficient and independent, and whether the new model is now the icon of efficiency and should serve as the basis for providing public services.

The new and emerging private sector model offers cities and states with a new method for providing public services. The ideological concepts behind the new model provide governments with a set of criteria and benchmarks for providing public services in an efficient manner, as defined by the new model. Instead of providing public services through an entity formed by copying structural elements in the private sector such as a board of directors and hierarchy of officers, cities and states could provide public services based on ideals and concepts in the new model that we, as a society, value.

Where the provision of public services and the organization of public authorities were built around a myth

of efficiency and independence rooted in an antiquated private sector model, state and city governments can shift focus to concentrate on the environmental, social and financial impacts of the services. For example, instead of designing public authorities to avoid regulations that are often promoting the environment (for example, local zoning laws) or the community (for example, local procurement or living wage laws), a new public model would incorporate environmental and community initiatives into its overall strategy. Similarly, instead of designing public authorities to separate voters and elected officials from the provision of public services, the new private sector model would focus on inclusion, community building and social responsibility in providing those services. Rather than having thousands of public authorities operating clandestinely with thousands of distinct geographical jurisdictions, input from voters and elected officials would be encouraged. At the very least, voter participation would educate people on which public services are provided and by which entity. It would also incorporate a level of oversight and accountability directly into the new public model. That oversight, as required in the private sector model, would focus not only on the financial impact, but also on the social and environmental impacts.

The ideals embraced by the new private sector model are consistent with our ideals for a public entity. In light of the changes in the private sector, cities and states should explore whether the provision of public services that considers the ideological changes in the new private sector model will be beneficial and will achieve the goals of efficiency and independence.

Conclusion

Public authorities were born out of financial crisis and corruption. Governments witnessed advancements in the private sector and sought to capitalize on them. We are experiencing an analogous situation today. In the midst of a recession, a new private sector model is emerging. By combining public sector services with revised private sector motives, cities and states can seek to maximize on both, resulting in positive economic, environmental and social benefits to cities, business and citizens. Local governments stand to benefit from efficiencies, as defined by the new model, and from environmental and health benefits, stressed by the new model.

The changing of consciousness in the private sector questions the continued use of public authorities, as currently constituted, and whether they achieve their stated purpose of efficiency and independence. In light of the current fiscal crisis, do we require more than past precedents to justify the continued use of public authorities? It would truly be a reversal of fortunes if the private sector gravitated toward an environmentally and socially conscious model, while the public sector and government services held steadfast to an antiquated, separated private sector model.

Endnotes

1. Public authorities are generally created to provide one public service or undertake one public project. Some well-known examples include the Port Authority of New York & New Jersey, the Tennessee Valley Authority, and the Housing Authority of the City of Los Angeles.
2. See Bernard F. Hillenbrand, Foreword to ROBERT G. SMITH, PUBLIC AUTHORITIES, SPECIAL DISTRICTS, AND LOCAL GOVERNMENT ix (1964); see also Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 925 (2003) (citing WILLIAM D. VALENTE ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 647 (William D. Valente ed., 5th ed. 2001)).
3. ALAN G. HEVESI, OFFICE OF THE STATE COMPTROLLER, 2004-05 BUDGET ANALYSIS, REVIEW OF THE EXECUTIVE BUDGET 55 (Feb. 2004), available at <http://www.osc.state.ny.us/reports/budget/2004/execbudget04.pdf>.
4. See SMITH, *supra* note 2, at 53-87, 125-50 ("The two most frequently repeated arguments proffered in favor of the creation of public authorities are:...they [are] 'business-like'...and... 'out of politics'"); see also KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 18 (1997); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1781--82 (2002) (stating that the use of public authorities is mostly based on "efficiency," "expertise" and independence and not on "equality"); see generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2300 (2003) ("[U]rban reformers...deployed the corporate analogy that had once pointed back to an image of the incorruptible segmented private city...to promote an urban future in which expertise and efficiency would shape municipal governance. If the great cities of the day were like private businesses, it was only because they, like modern corporations, should be run by principles of expertise and efficiency....").
5. Diana B. Henriques, *The Machinery of Greed: Public Authority Abuse and What to Do About It* 2 (1986) (quoting Robert Moses in Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* (1974) and Austin J. Tobin, former director of the Port Authority of New York and New Jersey); see also Foster, *supra* note 4, at 18; Smith, *supra* note 2, at 53-87, 125-50; Alan G. Hevesi, Office of the State Comptroller, Public Authority Reform, Reining in New York's Secret Government 3 (2004), available at <http://osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf> [hereinafter Public Authority Reform] ("The benefits of public authorities include their ability to finance public improvements without increasing taxes...to avoid the use of broad-based dedicated revenue streams, to finance the public takeover of private enterprises, to remove entities and associated operations from the direct control of elected officials, and to provide a more flexible management environment than is typical of government." (citing Office of the State Comptroller, Study No. 4, Public Authorities in New York State: A Financial Study, Comptroller's Studies for the 1967 Constitutional Convention (June 1967) (citing the Report of the Temp. State Comm'n on Coordination of State Activities (1956)))).
6. The combination of generating profits, enhancing the environment and being socially responsible is often referred to as the "triple bottom line." The triple bottom line concept is thought to be originated by John Elkington in *Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development*. John Elkington, *Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development*, CAL. MGMT. REV. 36, no. 2: 90-100 (1994); see also JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS ix, 2 (1998) (stating, "The triple bottom line approach to sustainable business views corporate performance and success in three separate dimensions: economic prosperity, environmental quality, and social justice."); CYNTHIA A. McEWEN & JOHN D. SCHMIDT, LEADERSHIP AND THE CORPORATE SUSTAINABILITY CHALLENGE 10 (2007); CANADIAN BUS. FOR SOC. RESPONSIBILITY, GOOD COMPANY GUIDELINES FOR CORPORATE SOCIAL PERFORMANCE 11 (2002) (defining triple bottom line as "a business philosophy that focuses on economic prosperity, environmental quality, and social justice").
7. See CHARLES R. ADRIAN & ERNEST S. GRIFFITH, AMERICAN CITY GOVERNMENT: 1775-1870, 213-15 (1976).
8. See DENNIS ZIMMERMAN, THE PRIVATE USE OF TAX-EXEMPT BONDS 20 (1991).
9. See ADRIAN & GRIFFITH, *supra* note 7, at 213-15; see also Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911-12, 915, 917 (2003) (stating that debt rose so quickly that nine states defaulted on their bonds and four repudiated at least part of their debt) (citations omitted); JAMES A. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS 179 (1965) (noting the increase in borrowing to fund canals, highways, and railways).
10. See also BENJAMIN U. RATCHFORD, AMERICAN STATE DEBTS 162-67, 173-74 (1941).
11. See ADRIAN & GRIFFITH, *supra* note 7, at 214 (stating that many cities and states provided upfront capital to private railroad companies to build railroads to their city or state; when the railroad companies let the projects die, the cities, states and taxpayers were left with massive debt obligations and no railroads); N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO TAXATION AND FINANCE (1938) (stating that every state, except eight, had issued debt for railroads or canals by 1836); see also Briffault, *supra* note 2, at 911, 917 (attributing massive debt and losses to state supported turnpikes, canals, and railroads during the early nineteenth century in the hopes of increasing economic development); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1308 (1991) (finding that the 1837 depression led to a decrease in railroad value, causing major losses in state-supported debt); see generally MAXWELL, *supra* note 9, at 179 (stating that nine states and one territory defaulted on their debt during this period).
12. See generally RATCHFORD, *supra* note 10, at 79-81.
13. See ADRIAN & GRIFFITH, *supra* note 7, at 198, 215 ("In early nineteenth century, it became commonplace to require a referendum on proposed bond issues and tax levies beyond a certain level."); Briffault, *supra* note 2, at 911-12, 915, 917 (stating "the vast majority of state constitutions impose some limitation on the ability of their state and local governments to incur debt" in response to massive debt) (citations omitted). A typical constitutional referendum requirement can be found in Article VII, section 11 of the New York State Constitution, and states in relevant part: "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law.... No law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election." N.Y. CONST. art.VII, § 11; see also MICH. CONST. art. IX, § 15; S.C. CONST. art. X, § 13; UTAH CONST. art. XIV, § 3.
14. ADRIAN & GRIFFITH, *supra* note 7, at 215.
15. See also MAXWELL, *supra* note 9, at 180.
16. See PROBLEMS RELATING TO TAXATION AND FINANCE, *supra* note 11, at 67.
17. See ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT, THE PROGRESSIVE YEARS AND THEIR AFTERMATH 1900-1920, 32, 106 (1974); JAMESON W. DOIG & JERRY MITCHELL, EXPERTISE, DEMOCRACY, AND THE PUBLIC AUTHORITY MODEL: GROPING TOWARD ACCOMMODATION, IN PUBLIC AUTHORITIES AND PUBLIC POLICY: THE BUSINESS OF GOVERNMENT 25-26 (Jerry Mitchell ed., 1992); Barron, *supra* note 4, at 2286-87, 2302-03 (noting the concern for corruption and favoritism).
18. See Frug, *supra* note 4, at 1766-67 (citing a description of nineteenth century city expansion in VICTOR JONES, METROPOLITAN

- GOVERNMENT 122-35 (1942); R.D. MCKENZIE, *THE METROPOLITAN COMMUNITY* 191-98, 336 tbl. ix (1933); PAUL STUDENSKI, *NAT'L MUN. LEAGUE, THE GOVERNMENT OF METROPOLITAN AREAS IN THE UNITED STATES* 65-85 (1930); JON C. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850-1970*, 32-63 (1979); KENNETH T. JACKSON, *Metropolitan Government Versus Suburban Autonomy: Politics on the Crabgrass Frontier*, in *CITIES IN AMERICAN HISTORY* 442, 444-48 (Kenneth T. Jackson & Stanley Schultz eds., 1972); Chester C. Maxey, *The Political Integration of Metropolitan Communities*, 11 *NAT'L MUN. REV.* 229, 229-30 (1922)).
19. See ADRIAN & GRIFFITH, *supra* note 7, at 225; GRIFFITH, *supra* note 17, at 32, 171.
 20. Michael Robertson, *Property and Ideology*, 8 *CAN. J.L. & JURIS.* 275, 285 (1995); ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* Intro., Ch.1 (Cambridge, MA: Belknap Press, 1977); ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY 69-71 (1985); see generally LESLIE HANNAH, *THE RISE OF THE CORPORATE ECONOMY* 18 (1983) (finding that Adam Smith in the *Wealth of Nations* believed that owners should always be working and managing, if productivity and efficiency were to be maximized).
 21. Robertson, *supra* note 20, at 285 (citing HANNAH, *supra* note 20, at Ch.1-2; CHANDLER, *supra* note 20, at Ch.1; R. DAHL, *supra* note 20, at 69-71; R. H. TAWNEY, *THE SICKNESS OF AN ACQUISITIVE SOCIETY* (1920), reprinted in part as *Property and Creative Work* in C.B. Macpherson, ed., *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 137-38 (1978).
 22. CHANDLER, *supra* note 20; HANNAH, *supra* note 20; Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 *BERK. B. L. J.* 263, 273-74 (2008) (citing ADOLF A. BERLE JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 84-89, passim (1932); PHILIP SCRANTON, *ENDLESS NOVELTY: SPECIALTY PRODUCTION AND AMERICAN INDUSTRIALIZATION, 1865-1925* (1999); Naomi R. Lamoreaux et al., *Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History*, 108 *AM. HIST. REV.* 404 (2003)).
 23. See CHANDLER, *supra* note 20, at Ch.3; see also *THE RAILROADS: PIONEERS IN MODERN MANAGEMENT* (Alfred D. Chandler ed. 1979) [hereinafter *THE RAILROADS*] (reprinting five nineteenth century documents detailing the business organizational changes in the railroads).
 24. See CHANDLER, *supra* note 20, at Ch.3; see also *THE RAILROADS, supra* note 23.
 25. See CHANDLER, *supra* note 20, at Ch.3.
 26. See Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 *BERK. B. L. J.* 263, 273-74 (2008).
 27. See *id.* at 274.
 28. CHANDLER, *supra* note 20, at 339 (stating, "Modern business enterprise became a viable institution only after the visible hand of management proved to be more efficient than the invisible hand of market forces in coordinating the flow of materials through the economy....").
 29. GRIFFITH, *supra* note 17, at 32, 106 ("The emphasis [of the reforms in the early twentieth century] was clearly on a businesslike handling of municipal affairs, reflecting its usual strong business-tinged origins."). Interestingly, the federal government also took a keen interest in the railroads at this time, leading to what is "widely recognized as the first modern administrative agency," the Interstate Commerce Commission. KEITH M. WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 14, 15 (2007).
 30. HENRIQUES, *supra* note 5, at 1; see also FOSTER, *supra* note 4, at 18; SMITH, *supra* note 2, at 53-87, 125-50; FRUG, *supra* note 4, at 1781-82; see generally BARRON, *supra* note 4, at 2300.
 31. Written directly into state enabling statutes, most public authorities are created with a board of directors and hierarchy of managers that establish the basic corporate structure, separating management from ownership. See, e.g., CAL. PUB. UTIL. CODE §§ 130050.2, 130051 (West 2006) (establishing the Los Angeles County Metropolitan Transportation Authority with a fourteen-member board); MICH. COMP. LAWS SERV. § 830.412(2) (LexisNexis 2006) (establishing the Michigan State Building Authority with a five-member board appointed by the governor with the advice and consent of the senate); 24 P.S. §§ 791.2 (establishing the Pennsylvania Public School Building Authority with nine members of a "body politic and corporate"); V.T.C.A., GOV. CODE §§ 1232, 1232.052 (establishing the TFA with a seven-member board of directors appointed by the governor with the advice and consent of the senate). The board of directors and managers are generally not elected by the public (i.e., "owners") and are difficult to be removed by elected officials. See, e.g., Andrea Estes, *Romney Takes Steps to Remove Amorello*, THE BOSTON GLOBE, July 16, 2006, http://www.boston.com/news/traffic/bigdig/articles/2006/07/19/romney_takes_steps_to_remove_amorello/ (detailing moves by governor to remove public authority management); Anthony Flint, *Romney Taps Aide for Pike Board Grabauskas Will Succeed Mihos*, THE BOSTON GLOBE, Aug. 19, 2004, at B1.
 32. See GRIFFITH, *supra* note 17, at 32, 106; HENRIQUES, *supra* note 5, at 1; see also FOSTER, *supra* note 4, at 18; SMITH, *supra* note 2, at 53-87, 125-50; FRUG, *supra* note 4, at 1781-82; see generally BARRON, *supra* note 4, at 2300.
 33. *Compare Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994) (holding that public authority was a private entity not entitled to state immunity); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (finding Port Authority of New York & New Jersey to be a private entity operating an airport); *Ball v. James*, 451 U.S. 355, 371 (1981) (upholding unequal voting power for the board of directors of a special district because it provided electricity, a function typically provided by private companies), with *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (holding that Amtrak was a public agency because it was created by Congress and members appointed by the President); *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 53 (1970) (requiring one person one vote for election to community college district because it "exercised general governmental powers").
 34. See *Schulz*, 84 N.Y.2d 244, 247 (holding the purpose of public authorities is to "protect the State from liability and enable public projects to be carried on free from restrictions otherwise applicable") (citations omitted); NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS, PRIVATE VALUES IN PUBLIC INSTITUTIONS* 16 (1994) ("technical financing maneuver[s]... has become accepted wisdom about why we have [public authorities]") (citation omitted); HENRIQUES, *supra* note 5, at 4 ("the public authority provided the legal smokescreen behind which essential government work could be done and paid for").
 35. See, e.g., *Carr-Gottstein Props. v. State*, 899 P.2d 136 (Alaska 1995); *Strand v. Escambia Cty.*, 992 So.2d 150 (Florida 2008); *Campbell v. State Road & Tollway Auth.*, 276 Ga. 714 (2003); *In re Anzai*, 936 P.2d 637 (Haw. 1997); *Train Unlimited Corp. v. Iowa Ry. Fin. Auth.*, 362 N.W. 2d 489 (Iowa 1985); *Wilson v. Ky. Transp. Cabinet*, 884 S.W.2d 641 (Ky. 1994); *Employers Ins. Co. of Nev. v. State Bd. of Exam'rs*, 21 P.3d 628 (Nev. 2001); *Bulman v. McCrane*, 312 A.2d 857 (N.J. 1973); *Schulz v. New York*, 84 N.Y.2d 231 (1994); *Fent v. Okla. Capitol Improvement Auth.*, 984 P.2d 200 (Okla. 1999); *Mun. Bldg. Auth. v. Lewder*, 711 P.2d 273 (Utah 1985); *Dykes v. N. Va. Trans. Dist. Comm'n*, 411 S.E. 2d 1 (Va. 1991); *Dep't of Ecology v. State Fin. Comm.*, 804 P.2d 1241 (Wash. 1991).
 36. MITCHELL, *supra* note 17, at 37.
 37. *Id.*; see Briffault, *supra* note 2, at 922 (finding public authority bonds are used "solely to evade the debt limits. These bonds do not involve using the state to provide extra security for public authority bonds; instead, their only purpose is to enable the state to use a public authority to circumvent the state constitution"); PUBLIC AUTHORITY REFORM, *supra* note 5, at 4 ("[I]n the 1960s public authorities were established to finance housing and urban development initiatives without the need for a statewide

referendum. From the 1970s to the present, a number of public authorities have been established with the sole purpose of issuing debt on behalf of the State or local governments.”).

38. U.S. Census Bureau, *State and Local Government Finances by Level of Government and by State: 2001-02* (Dec. 9, 2005), http://www.census.gov/govs/estimate/0200ussl_1.html.
39. OFFICE OF THE STATE COMPTROLLER, NEW YORK STATE COMPTROLLER'S STUDIES ON ISSUES ON PUBLIC FINANCE, STATEWIDE PUBLIC AUTHORITIES: A FOURTH BRANCH OF GOVERNMENT? (1972) [hereinafter A FOURTH BRANCH OF GOVERNMENT].
40. See JOHN C. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 30 (Univ. of Cal. Press 1957).
41. PUBLIC AUTHORITY REFORM, *supra* note 5, at 3; A FOURTH BRANCH OF GOVERNMENT, *supra* note 39.
42. See, e.g., Jack Healy, *Housing Construction Fell in March, Dashing Hopes*, N.Y. TIMES, Apr. 16, 2009, available at http://www.nytimes.com/2009/04/17/business/economy/17econ.html?_r=1&hp; Special Report, *When Fortune Frowned*, THE ECONOMIST, Oct. 9, 2008, available at http://www.economist.com/specialreports/displayStory.cfm?story_id=12373696 (stating that in February 2009, the rate of unemployment increased to 8.1 percent, hitting a 25-year high. The median home price dropped 26 percent over the past year and a half, and about 12 percent of homeowners were in foreclosure or behind on mortgage payments at the end of 2008. Similarly, the Dow Jones industrial average and the Standard & Poor's 500 index lost “more than half their value since the stock market peaked in October 2007. It's the worst bear market since the aftermath of the crash of 1929, when the Dow plunged 89 percent and the S&P 500 index tumbled 86 percent”); Alan Zibel, Christopher Leonard & Tim Paradis, Op-Ed., *When Economy Bottoms Out, How Will We Know?*, AP BUSINESS WRITERS, Mar. 7, 2009, available at http://www.usatoday.com/money/topstories/2009-03-07-3942277786_x.htm. See generally Paul Krugman, *Banks Gone Wild*, N.Y. TIMES, Nov. 23, 2007, at A37 (“The point is that the subprime crisis and the credit crunch are, in an important sense, the result of our failure to effectively reform corporate governance after the last set of scandals.”).
43. See, e.g., Zibel, Leonard & Paradis, *supra* note 42; Then-candidate Barack Obama, *Renewing the American Economy*, N.Y. TIMES, Mar. 27, 2008, available at <http://www.nytimes.com/2008/03/27/us/politics/27text-obama.html> (noting mismanagement in lending and failures in regulating); Alan M. Christenfeld, *Proliferating Fraud Challenges Lenders to Step Up Diligence*, N.Y.L.J., Apr. 2, 2009, at Col.1 (detailing Ponzi and other fraud schemes and proposals to combat).
44. Readers may point out that prior to the current financial crisis many in the private sector were reliant upon the public sector for funding through a variety of incentives, including tax credits and insurance to boost confidence. Although this point is critical to a larger analysis highlighting the private sector's reliance upon public funds, this section is only examining direct public funding of private entities, as an extension of the current financial crisis.
45. See Mark Pittman & Bob Ivry, U.S. Pledges \$7.7 Trillion to Ease Frozen Credit, Bloomberg.com, Nov. 25, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&sid=an3k2rZMNgDw&refer=home> (last visited Sept. 10, 2009); see also David Goldman, Bailout Tracker, CNNMoney.com, <http://money.cnn.com/news/storysupplement/economy/bailouttracker/index.html> (last visited Sept. 10, 2009) [hereinafter Bailout Tracker] (noting \$10.5 trillion in public funds has been committed and \$2.5 trillion has been invested).
46. See, e.g., Chris Isidore, *Feds Step Deeper into Citi Bailout*, CNNMoney.com, <http://money.cnn.com/2009/02/27/news/companies/citigroup/index.htm?postversion=2009022707> (noting an approximate 36% ownership of Citigroup) (last visited Sept. 10, 2009). See also, Bailout Tracker, *supra* note 45 (listing entities receiving funds, programs under which the funds were allocated and number of public funds invested).
47. See Neil King, Jr. & John D. Stoll, *Government Forces Out Wagoner at GM*, WALL ST. J., Mar. 30, 2009, at A1 (detailing removal of GM's CEO and other actions taken by government).
48. See, e.g., Daniel Wagner, *Fed Pushes Citi, BofA to Increase Capital*, WALL ST. J., Apr. 28, 2009, at A1, available at http://online.wsj.com/article/SB124088901025362487.html#mod=todays_us_nonsub_page_one; Edmund L. Andrews & Peter Baker, *Bonus Money at Troubled A.I.G. Draws Heavy Criticism*, N.Y. TIMES, Mar. 15, 2009, available at <http://www.nytimes.com/2009/03/16/business/16aig.html?emc=rss&partner=rss>.
49. This, of course, raises other issues that are beyond the purview of this article, such as conflict-of-interest issues among the public sector as regulator, owner and manager.
50. Richard Bitner, *Confessions of a Subprime Lender: An Insider's Tale of Greed, Fraud, and Ignorance* (2008).
51. Elliot Blair Smith, *Bringing Down Wall Street as Ratings Let Loose Subprime Scourge*, Bloomberg.com, <http://www.bloomberg.com/apps/news?pid=20601109&sid=ah839IWTLP9s> (last visited Sept. 10, 2009).
52. *Id.*
53. *Id.* Sadly, one may argue that the rating agencies did in fact profit greatly from these “efficiencies,” thus justifying their actions. (“Moody's operating margins exceeded 50 percent for the past six years, three to four times those of Exxon Mobil Corp” and structured finance was its “leading source of revenue”). *Id.*
54. See The Bus. Cycle Dating Comm., National Bureau of Economic Research, *Determination of the December 2007 Peak in Economic Activity* (2009), available at <http://www.nber.org/cycles/dec2008.html>; Neil Irwin, *It's Official: U.S. in Recession*, Wash. Post, Dec. 1, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/01/AR2008120101365.html>.
55. See Brian Ross, Joseph Rhee & Megan Chuchmach, *JPMorgan Chase to Spend Millions on New Jets and Luxury Airport Hanger*, ABC WORLD NEWS, Mar. 23, 2009, <http://abcnews.go.com/Blotter/story?id=7146474&page=1> (last visited Sept. 10, 2009) (stating that JPMorgan Chase intends to go forward with \$138 million dollar purchase of two jets, despite having taken \$25 billion in TARP funds). Many of the funds were taken as part the Troubled Assets Relief Program under the Emergency Economic Stabilization Act of 2008, signed into law on October 3, 2008, PUB. LAW 110-343.
56. Paul Krugman, *Crisis of Confidence*, N.Y. TIMES, Apr. 14, 2008, at A23 (declaring that the public has, in short, “lost confidence in the integrity of our economic institutions”); Jay Bookman, *In Obama, Hope, Unity Prove True*, ATLANTA J. & CONST., Jan. 19, 2009, at A14 (“roughly \$7 trillion in value has disappeared from Wall Street, destroying not just wealth but confidence”); Paul Steinhauser, Poll: Politicians Trusted More Than Business Leaders on Economy, CNN.com, <http://www.cnn.com/2009/POLITICS/02/23/poll.economy/> (last visited Sept. 10, 2009); see also Larry King Live (CNN television broadcast Feb. 23, 2009), WLNR 3522973 (quoting Dee Dee Myers) (“[O]ne of the things that we've seen is, across the board, people have lost confidence in the private sector. They've lost confidence in business' ability to pull us out of this.”); Rachel Maddow Show, MSNBC television broadcast Feb. 2, 2009, WLNR 1989516:

[RACHEL] MADDOW: I think that, as Americans, we are sort of hard-wired to believe that business-es...could probably run themselves better than any government agency.... That said, I sort of feel like my pet bunny could do a better job running the bank right now....

[SENATOR CLAIRE] MCCASKILL:...the people who got us in this mess, by and large, remain in control of these very large financial institutions.... So that is another problem with confidence....maybe they should say...we've got to move on because people don't have confidence in us anymore.

57. Steinhäuser, *supra* note 56.
58. See THE ASSOCIATED PRESS, *Germany: Investor Confidence Falls to 17-Year Low*, N. Y. TIMES, July 16, 2008, at C7 (stating that “German investor confidence fell to its lowest level since the private research firm that compiles the index began the measurement in 1991.”); Teh Hooi Ling, *Will Investor Confidence in Hedge Funds Return?*, BUS. TIMES (SINGAPORE), Feb. 6, 2009; Andrew Main, *Suddenly, Broking Is Dangerous as Investor Confidence Goes Missing*, THE AUSTRALIAN, Jan. 31, 2009, at 29 (stating that investors are “sitting tight and whimpering quietly rather than stepping up and bargain hunting”).
59. See Walter Brandimarte, *Investors shift to bonds as retail data disappoint*, THE INT’L HERALD TRIB., Apr. 15, 2009, at 17; Fin. Times Limited, *Slovakia moves towards cash and government bonds*, EUR. PENSIONS & INVESTMENT NEWS, Nov. 3, 2008, available at 2008 WLNR 21303690.
60. Although entirely relevant to the discussion of whether public authorities should continue as currently constituted, the failure of public authorities to solve many of the early twentieth century woes, including corruption and mismanagement in the public sector, is beyond the purview of this article. For a discussion of the failure of public authorities to operate efficiently as government bodies, see PUBLIC AUTHORITY REFORM, *supra* note 5, at 29 (stating that with the increase of public authorities “allegations of impropriety...corrupt practices also surface. Investigations...[and] audit[s]...uncover [] cases of bribery, nepotism, bid-rigging, misuse of funds and financial mismanagement—costing the State tens of millions of dollars and resulting in the indictments of dozens of authority employees.”); see HENRIQUES, *supra* note 5, at 42-52; DOIG & MITCHELL, *supra* note 17, at 116-20; Hillenbrand, *supra* note 2, at 33-37; see also BOLLENS, *supra* note 40, at 256 (noting that local governments have become less effective through the use of public authorities by “bypassing them or stripping them of particular functions”).
61. See Steinhäuser, *supra* note 57.
62. See A.T. Kearney, “Green” Winners, <http://www.atkearney.com/index.php/Publications/green-winners.html> (last visited on Sept. 10, 2009); see also Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries*, 83 CHI.-KENT L. REV. 199, 207 (2008); Jeff Civins & Mary Mendoza, *Corporate Sustainability and Social Responsibility: A Legal Perspective*, 71 TEX. B.J. 368 (May, 2008) (“Some commentators suggest we are about to reach the sustainability “tipping point”—the point at which the idea of sustainability becomes a strategic business imperative.”); Jonathan Dee, *A Toy Maker’s Conscience*, N. Y. TIMES, Dec. 23, 2007, § 6 (Mag.), at 34 (“According to...a marketing research firm, [ninety-one] percent of chief executives believe that a good corporate social-responsibility program creates shareholder value.”). See generally DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005).
63. See generally EUROPEAN COMM’N, COMMISSION GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY, available at http://www.eurofound.europa.eu/emcc/content/source/eu02002s.htm?p1=topic&p2=Corporate_Social_Responsibility (urging companies to consider “lifelong learning, work organization, equal opportunities, social inclusion and sustainable development.”). See also A.T. Kearney, *supra* note 62.
64. See A.T. Kearney, *supra* note 62 at 1 (“A recent A.T. Kearney analysis reveals that during the current economic slowdown, companies that show a ‘true’ commitment to sustainability appear to outperform their industry peers in the financial markets.”); see also COMM’N OF THE EUROPEAN COMMUNITIES, REPORT ON THE COMMUNICATION FROM THE COMMISSION CONCERNING CORPORATE SOCIAL RESPONSIBILITY: A BUSINESS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT, available at http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127374.pdf; Stacy Perman, *Making a Profit and a Difference*, BUS. WK., Apr. 3, 2009, available at http://www.businessweek.com/smallbiz/content/mar2009/sb20090330_541747.htm?chan=smallbiz_smallbiz+index+page_top+small+business+stories; see also AUGUSTIN LANDIER & VINAY B. NAIR, INVESTING FOR CHANGE: PROFIT FROM RESPONSIBLE INVESTMENT (2008).
65. A.T. Kearney, *supra* note 62, at 1.
66. See *supra* note 6.
67. JEFFREY HOLLENDER & STEVEN FENICHELL, WHAT MATTERS MOST, 29 (2004) (stating that Corporate Social Responsibility (“CSR”) is “an ongoing commitment by business to behave ethically and to contribute to economic development while demonstrating respect for people, communities, society at large, and the environment”).
68. See B. Corporation, <http://www.bcorporation.net/about> (last visited Sept. 10, 2009) (describing B Corporations).
69. A hybrid is a legally recognized organizational form structured by combining for-profit and non-profit ideals. See, e.g., Minn. Responsible Bus. Corp. Act, ch. 304A, § 2(2), 84th Legis. Sess. (Minn. 2006), available at <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S3786.0.html&session=ls84>; H.B. 3118, § 2, 23d Leg. (Haw. 2006), available at <http://www.capitol.hawaii.gov/site/archives/2006/> (Search for HB 3118); B. 91, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncleg.net/sessions/2007/Bills/Senate/PDF/S91v5.pdf>; H.B. 39, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncleg.net/sessions/2007/bills/house/PDF/H39v1.pdf>.
70. See, e.g., ISO/CD 26000, GUIDANCE ON SOCIAL RESPONSIBILITY (Dec. 12, 2008), available at http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935837/ISO_CD_26000_Guidance_on_Social_Responsibility.pdf?nodeid=7795973&vernum=0; B. Corp., The B Ratings System, <http://www.bcorporation.net/become/BRS> (last visited Sept. 10, 2009); Ceres 20-20: Our 20-20 Vision, <http://www.ceres.org/Page.aspx?pid=1081> (last visited Sept. 10, 2009); U.N. Global Compact, Corporate Citizenship in the World Economy, <http://www.unglobalcompact.org/> (last visited Sept. 10, 2009).
71. Interestingly, in the midst of the recession, some states have attempted to move public authority services entirely to the private sector. The Newspaper.com, *Pennsylvania Tolling Deals Fail*, <http://www.thenewspaper.com/news/25/2556.asp> (last visited Sept. 10, 2009) (detailing Pennsylvania’s failed attempt to lease the Pennsylvania Turnpike for decades).

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New York State Public Authority Reform: Where We Have Come From and Where We Need to Go

By Lynn Wilson and Clayton Eichelberger

Introduction

Governments have engaged entities similar to public authorities for centuries to conduct public business, particularly for financing capital needs. New York is no exception; since 1921, when the first public authority was created in New York State, the use of these entities has been prolific in this State.



However, in addition to the important projects and purposes these authorities were created to advance, public authorities have become known as the State's "shadow government," often operating outside of their original purpose and creating a virtually independent arm of government. These entities develop, operate and maintain some of New York's most critical infrastructure while, at the same time, avoiding the mechanisms that provide oversight and transparency to the operations of traditional government agencies. This has resulted in a call from many, including, in 2007, State Comptroller Thomas P. DiNapoli, who outlined a comprehensive approach for fiscal and public authority reform to restore accountability for authority actions to the taxpayer and eliminate authority abuse of operational flexibility.

The role of many authorities has been expanded over time, extending beyond the authorities' core missions. This has resulted in imprudent practices such as the use of "backdoor borrowing"—debt not approved by voters which the State is expected to provide the funds for repayment subject to annual appropriation—for a variety of uses beyond the initial purpose of an authority. There is no better known example of this type of practice than the 1991 sale of a State prison, Attica, to the Urban Development Corporation, which then leased the prison back to the State. The proceeds of the sale were used simply to balance the State budget that year.

Despite prior reform efforts, which did little to contribute to the transparency and accountability necessary for effective, financially stable State government, many of these practices continued to undermine the State's fiscal position. In the case of backdoor borrowing, by 1985, over 60 percent of the State's outstanding debt was issued by authorities. Between 1985 and 2009, State-funded debt supported with State revenues and issued by authorities increased from \$5.7 billion to \$53.7 billion, representing an average annual increase of nearly 9 percent. In 2009, authority debt made up 94 percent of State debt outstanding.

Furthermore, previous efforts at public authority reform have not adequately reinforced the fiduciary duty of board members or tightened controls over procurement practices.

The 2009 Brodsky/Perkins Public Authority Reform Bill, which was recently passed by both houses of the Legislature, would, if signed into law by the Governor, enhance authority monitoring by restructuring the Authority Budget Office (ABO) and giving the office powers which allow it greater oversight of the operations and finances of authorities.¹ The newly reconstructed ABO would also conduct a thorough review of the number, types and purposes of public authorities and the potential redundancies in services. To further enhance Authority oversight, discretionary authority would be given to Comptroller DiNapoli's Office to review and approve certain authority contracts. While this bill makes great strides toward improving the accountability and transparency of authority operations, as Comptroller DiNapoli indicated in his *Report on the State Fiscal Year 2009–10 Enacted Budget*,² additional measures may be needed to improve long-term capital planning, restore voter control and approval for debt supported with tax dollars, and increase control over the State's debt load by comprehensively defining debt and applying caps to the revised definition. While the 2009 Brodsky/Perkins Public Authority Reform Bill demonstrates a commitment to change, continued diligence is needed to ensure transparency and accountability remain a priority.³



What Are Public Authorities?

Public authorities are corporate instruments of the State created by the Legislature to further public interests. Unlike traditional state agencies, many authorities conduct business outside of the typical oversight and accountability requirements for operations including, but not limited to, employment practices, contracts and procurement procedures, and financial reporting. Each public authority is governed by a separate board of directors appointed by elected officials for varying terms of office.

Public authorities have various levels of autonomy from the State based on the powers, as well as the constraints, built into their legislative mandate. Some public authorities are completely self-supporting and operate entirely outside the budget process, while others rely on

State appropriations to fund operations. In addition, most authorities are authorized to issue bonds—without voter approval—to develop and maintain infrastructure, such as roads and schools, or to fund projects for third parties, including hospitals and nursing homes. The debt service for these bonds is usually supported by revenues of the project, such as tolls that are levied by the authority, fees paid by the third party or appropriated payments from the State to repay outstanding debt. The State has also assigned specific revenue streams to an authority as a way for the authority to pay debt service.

The ability of public authorities to issue bonds without voter approval has been used in New York to support initiatives not necessarily associated with a specific project or authority. This debt is supported by a contractual agreement with the State to pay the authority an amount equal to debt service and is referred to as backdoor borrowing. Approximately 94 percent of the long-term debt outstanding for which the State is responsible has been issued by a variety of public authorities with such a contractual agreement by the State.

New York State currently has over 1,000 State and local public authorities created either in statute or as subsidiaries of other authorities. The Office of the State Comptroller categorizes these authorities into four major classifications:

- **Public authorities with statewide or regional significance**, such as the Urban Development Corporation or the Metropolitan Transportation Authority. There are currently over 250 of these authorities.
- **Entities affiliated with a State agency or created by the State** that have limited jurisdiction but with a majority of board appointments made by the Governor or other State officials or that would not exist but for their relationship with the State, such as the Erie County Medical Center Corporation or the SUNY Auxiliaries. There are 70 of these authorities.
- **Authorities with local jurisdiction**, which include local development corporations and industrial development corporations. At present, New York State has over 750 such authorities.
- **Entities with Interstate or International jurisdiction**, such as the Port Authority of New York and New Jersey. There are eight of these authorities, including subsidiary corporations.

Historical Perspective

Public Authorities in New York State were created primarily as a means to circumvent an 1846 constitutional amendment requiring voter approval of State debt. This amendment came as a result of a series of state financial decisions to build public infrastructure that left New York \$38 million in debt by 1846.⁴ The use of public debt nationwide to support large public infrastructure projects

was inspired by the successful completion of the Erie Canal in 1825, which had been funded by debt issued by New York State. It was the canal's success which led states across the country to begin selling municipal bonds to finance public works projects.⁵ However, just as many of these projects were in progress, the economic panic of 1837 and subsequent depression occurred, resulting in a substantial decline in the rate of return on the states' investments.⁶ New York's largest exposure at the time of the panic was a \$3 million credit line to the Erie Railroad Company. The Erie Railroad Company, like other companies during the period, then defaulted on the line of credit, leaving the financial burden on the State, as well as rail beds that were largely worthless.⁷

While several other states defaulted on their debts, New York was not among them. Instead the State, like numerous others, proposed constitutional amendments in 1846 to curtail the amount and the way the State could issue debt.⁸ These revisions significantly limited what the Legislature and State government could do independently, including restrictions on the purposes for which debt could be issued and the requirement of voter approval of debt. Notably, in 1846 the New York State Constitution, Article VII § 9 was amended and stated, "[t]he credit of the state shall not, in any manner, be given or loaned to or in aid of, any individual, association, or corporation."⁹ In addition, § 12 of the same article of the New York State Constitution affirms, "[n]o such law [which creates debt] shall take effect until it shall at a general election have been submitted to the people and have received a majority of all the votes cast for and against it at such election."¹⁰

With these provisions in place, the State's voters would be responsible for the approval and payment of State debt. Eventually, however, the increasing demand for infrastructure and services to support the State's growing urban centers required an alternate approach to development which could be supported by project revenues. Public authorities were introduced as a vehicle to fill that role.

The first authority in New York State, the Port Authority of New York, now known as the Port Authority of New York and New Jersey, was created in 1921 by congressional compact. The use of public authorities continued to grow in the decades that followed as New York created additional authorities, including eleven in 1933 alone.¹¹

Responding to increasing concern regarding the growing number of public authorities, their operations and, most importantly, the State's potential liability for public authority debt, the 1938 Constitutional Convention sought to provide additional controls. A constitutional amendment provided that public authorities were to be created only by a special act of the Legislature, required the State Comptroller to supervise the accounts of public authorities and stated that public authority debts were not an obligation of the State or local governments.¹²

In response to the restrictions on debt imposed in 1938, the State entered into its first lease-purchase financing agreement with the Dormitory Authority of the State of New York in 1944.¹³ The Dormitory Authority would issue bonds to build dormitories and the State would annually appropriate money to make lease payments, which would be used by the Dormitory Authority to pay debt service on the bonds. Since lease-purchase agreements are contractual obligations, it is the expectation that the State will make the rental payments necessary to support debt service. Once the bonds are paid, the title of the properties reverts to the State. Use of this type of financing arrangement would continue to grow throughout the 1950s and the 1960s.

In 1951, a constitutional amendment provided for the State to guarantee up to \$500 million of authority bonds. Taking advantage of this change, the Thruway Authority (TA) issued \$250 million of State guaranteed bonds in 1953. These bonds did not, however, cover the cost of the numerous projects the TA had begun. This deficit was addressed on April 7, 1954 when Governor Dewey signed legislation allowing the TA to issue additional revenue bonds, above and beyond the amount guaranteed by the State.¹⁴

The legislation avoided the bond cap restrictions by considering these bond issuances as “non-guaranteed.” “Non-guaranteed” bonds, at the time, were not considered to place a debt burden on the State but they also held a prior claim to any revenues of the authority. This provision allowed the TA to issue an additional \$350 million by 1956 in “non-guaranteed” revenue bonds, which, if counted, would have brought the amount of bonds issued over the \$500 million cap.¹⁵

The use of lease-purchase financing and the concept of State-backed debt was a precursor to the shift in the nature of public authorities that occurred in the 1960s. In a 1967 report, the State Comptroller noted, “In the newer financial-type authority, the authority finances the construction of facilities but does not operate the facility, and derives its revenue through lease-purchase payments made by the State out of earmarked revenue.”¹⁶ The Housing Finance Agency (HFA) was created in 1960 for the purpose of building middle income housing. The HFA was authorized to issue bonds to be repaid with revenues of the agency and was required to establish a reserve fund equivalent to one year’s debt service. If the revenues of the agency were not sufficient to cover debt service, HFA would call on the State to replenish the reserve fund. While not a legally enforceable obligation, these bonds were considered a “moral obligation” of the State.¹⁷

The use of public authorities to issue debt backed by State revenues continued to grow in this manner during the 1960s due to a number of proposals for general obligation bonds that were not approved by New York voters. The use of lease-purchase agreements and moral obligation financing proliferated. Following the formation

of HFA, legislation was enacted in 1962 creating the State University Construction Fund and, in 1968, the Urban Development Corporation (UDC) was created.

In several annual reports and studies on public finance issued in the 1960s, the State Comptroller cautioned against the increasing use of these financing methods. In the 1963 *Annual Report of the State Comptroller*, the Comptroller cautioned, “The financial community regards the obligations created through these methods of financing as carrying the moral commitment of the State. The financing costs are higher than if State-issued bonds were used to pay such construction costs.”¹⁸

In a 1972 study on public finance issues, the Comptroller examined the interdependence between the State and its public authorities, and the idea of public authorities as a “fourth branch of government” began to gain momentum.¹⁹ In the letter to the Legislature accompanying this report, State Comptroller Arthur Levitt stated, in regard to public authorities, “Nor are they necessarily self-sustaining—as a group, they have already received heavy assistance from the general taxpayer, and the commitments they are making may result in substantial future calls upon the tax dollar. It is clear that any true picture of public sector activity within the State must include the services performed by authorities. This argues for a closer tie-in with the State budgetary process and with all fiscal planning.”²⁰

In 1975, UDC was in danger of defaulting on \$105 million in short-term debt. The risk of default, as well as the increasing use of short-term borrowing to address cash flow problems at the State and New York City levels, prompted the investment community to push the State to change its debt issuance practices. Bankers and investors refused to market the State’s short-term notes until the State capped the issuance of debt with moral obligation provisions. In addition, the problems at UDC highlighted the need for more accountability in both State and City debt practices. As a result, the Public Authorities Control Board was created to review projects proposed by certain authorities at the State level and the State took actions to control New York City’s financial issues.

Limitations on the use of moral obligation debt, included in legislation enacted in 1976 in response to the UDC crisis, resulted in the creation of an alternative mechanism, the “service contract obligation.” Service contracts represent an agreement by the State to pay an amount equal to debt service to an authority for a project or projects. The payments are subject to annual appropriation and reflect a contractual, not a moral, obligation. Although lease-purchase agreements reflect contractual obligations, service contracts differ in that the asset being financed is not part of the payment guarantee. The asset being financed always belongs to the State, whereas in a lease-purchase arrangement, the asset is held by the authority and reverts to the State when the bonds are satisfied.

Debt Reform Act of 2000

To address the State's growing debt burden, Chapter 59 of the Laws of 2000, known as the Debt Reform Act of 2000, added Article 5-B to the State Finance Law. The provisions of this article established statutory limitations, phased-in, beginning April 1, 2000, on State-supported debt. The legislation included three key provisions:

- Cap new debt issued after April 1, 2000 at 4 percent of personal income. The cap is phased in over 10 years and fully implemented by SFY 2010-2011.
- Cap debt service on new debt issued after April 1, 2000 at 5 percent of all funds receipts. This cap is phased in over 13 years and fully implemented by SFY 2013-2014.
- Provide that debt can only be used for capital works or purposes and that State-supported debt cannot have a maturity longer than 30 years.

Unfortunately, the Debt Reform Act did not provide sufficient fiscal discipline or ensure that future debt is affordable. The definition of State-supported debt counted under the caps does not include all borrowing that is funded with State resources. In 2005, the Office of the State Comptroller created a new definition of debt financed by the State that is more comprehensive than the existing statutory definition. The Comptroller's definition of State-funded debt includes general obligation bonds and other State-Supported debt, as defined by Section 67-a of the State Finance Law, as well as obligations associated with the following: bonds issued by the Tobacco Settlement Financing Corporation (TSFC) to securitize the State's tobacco settlement revenue stream; bonds issued by the Sales Tax Asset Receivable Corporation (STARC) to refinance New York City's Municipal Assistance Corporation (MAC) debt from the 1975 fiscal crisis; bonds issued by the Municipal Bond Bank Agency (MBBA) to amortize prior year school aid claims; and, most recently, Building Aid Revenue Bonds (BARBs) issued by New York City's Transitional Finance Authority (TFA).

Using this definition:

- New York's current State-funded debt outstanding is approximately 6 percent of personal income.
- New York's total current debt service costs for State-funded debt outstanding, including pre-2000 debt, average approximately 4.5 to 5 percent of all governmental fund receipts.

The sale of the State share of tobacco settlement revenue also illustrates the ineffectiveness of the Debt Reform Act of 2000 caps. Over \$500 million in State resources annually supports the debt service on the remaining \$3.6 billion in tobacco bonds, issued by the TSFC. This Corporation was established solely to purchase the State's portion of tobacco settlement revenues through debt backed by the revenues. The debt was issued outside of the param-

eters defined in the Debt Reform Act of 2000 as it did not support a capital purpose, and it is paid with the revenues originally used to fund State health care needs from the 1998 Master Settlement Agreement.²¹ As a result, the State has had to replace tobacco settlement dollars to continue financing health care needs.

Furthermore, the Debt Reform Act of 2000 did not include the roughly \$35 billion in debt outstanding that existed at the time of its enactment under the statutory caps. If these existing obligations had been included, the State's debt caps would have been exceeded at the time the Reform Act was signed into law.

Another inherent weakness of the Debt Reform Act of 2000 is that the imposed caps are statutory and not constitutional. Consequently, provisions are more easily avoided or "notwithstanding" in the face of budgetary or other pressures. While the cap currently stands as originally enacted, there have been several legislative authorizations for debt issuances not included under the Act's cap. In addition, the Debt Reform Act of 2000 preserves backdoor borrowing by public authorities on behalf of the State.²²

In certain instances, debt management changes, such as the authorization for Personal Income Tax (PIT) Revenue bonds, have made authority-issued debt more attractive than General Obligation (G.O.) debt. At present, PIT Revenue bonds have split ratings from the rating agencies with Standard & Poor's giving these bonds the highest rating (AAA), currently higher than G.O. bonds. In addition, public authorities generally have less restrictive issuance and repayment provisions, which may not result in the most prudent debt management practices.

Public authorities continue to play a significant role in the debt structure of New York State. Currently, over 94 percent of all State-funded debt outstanding was issued by public authorities without voter approval. The State Fiscal Year (SFY) 2009-10 Enacted Budget continues to rely heavily on public authorities to issue debt to finance capital projects and to supplement general spending. The rate of issuance for State-supported debt is projected to increase by 50 percent during the five-year period ending SFY 2013-14.²³

Authority Accountability and Oversight

Public authorities are not subject to the same oversight and accountability standards required of State agencies. Over the years, audits and investigations by the Office of the State Comptroller have revealed serious ethical and legal violations, as well as financial mismanagement, by public authorities.

In 1991, a Manhattan District Attorney's office investigation of union corruption involving the Jacob Javits Convention Center Operating Corporation led to twenty-three indictments, including extortion and falsifying names and Social Security numbers. This was uncovered when ex-

hibitors at the Jacob Javits Convention Center complained of high labor costs and the use of “featherbedding”—the practice of requiring an employer to hire more workers than needed.

A 1995 audit of the Olympic Regional Development Authority (ORDA) by the Office of the State Comptroller revealed that the Executive Director of ORDA engaged in nepotism, contracted with firms in which he was a partial stakeholder, and approved raises for himself and others beyond what was allowed in contracts or by board policy.

A 2003 audit of the Metropolitan Transportation Authority’s (MTA’s) finances revealed that the Authority hid more than half a billion dollars in the 2002 budget by maintaining two sets of financial plans—one that was publicly disclosed, the other that was kept internally. The Comptroller’s budget review found that the MTA was shifting surplus between years, thus showing a smaller surplus or creating a deficit in the out-year plans. In addition, the MTA justified the need for a fare increase by referencing these misleading financial plans. More recently, Comptroller DiNapoli has issued a series of reports on the MTA designed to provide information to taxpayers and decision makers regarding the financial condition and outlook of the Authority.

Also in 2003, the President of Roosevelt Island Operating Corporation granted bonuses to himself and fourteen other staff members without board approval.²⁴ More recently, a 2008 audit of the New York State Thruway Authority’s Capital Plan, conducted by the Office of the State Comptroller, found that information on capital plan projects was not provided in its entirety to the Authority’s Board of Directors, State policymakers or the public for review. In addition, the audit concluded that completing its \$2.7 billion capital plan will take the Authority longer and cost substantially more than was originally forecast in 2005.²⁵

More recently, the use of public authorities has been stretched beyond the purposes for which they were originally intended. The SFY 2009-10 Enacted Budget authorizes over \$350 million in transfers from public authorities to provide General Fund support for State programs and purposes. In addition, the level of backdoor borrowing, which is not approved by voters, has continued to rise. As the purposes of authorities have expanded over the years, so have questionable management practices. The result has been rising employee compensation levels, bonus payments, and procurement practices and expenditure controls that are less stringent than those required of State agencies.

In a 2006 audit of internal controls over financial operations, the Office of the State Comptroller found that the Albany Port District Commission (The Port) awarded a number of contracts without competition. The Port did not document the reasons for the non-competitive awards or obtain formal Board approval to conduct a

non-competitive award process. In another instance, the Port continued to pay monthly marketing services bills even after the contract had expired and was not renewed or extended.²⁶

As a result of proposed toll hikes by the New York State Thruway Authority, Comptroller DiNapoli commenced an audit in November 2007 to determine if the proposed increases were necessary. One of the audit findings suggested that rapid increases in the percentage of revenue necessary to cover operating costs should have indicated the need for expense-reduction plans instead of rate hikes.²⁷

In addition, political influence and lobbying have been an ongoing issue with regard to public authorities whose board members are largely appointed by the Governor and other elected officials. In 2002, the HFA approved \$100 million in tax-free bonds to be granted to each of three luxury housing projects. Two of the developers of the projects had made campaign contributions exceeding \$458,000 to candidates on the State level and \$221,000 on the city level.²⁸

Public Authorities Accountability Act of 2005

Largely as a result of decades of allegations ranging from the unethical to the illegal, Governor George Pataki formed the New York State Commission on Public Authority Reform (Commission) in 2004. The Commission was charged with making recommendations to improve the operations, governance practices and accountability of public authorities. Also in 2004, the Governor established the Public Authorities Governance Advisory Committee (Committee) to help public authorities implement “Model Governance Principles” based on corporate governance “best practices” and the requirements of the Federal Sarbanes-Oxley Act of 2002.

As a starting point, in 2005 the State Comptroller introduced an expansion to existing regulations to increase the accountability and improve the transparency of public authority operations. In March 2006, the revised regulations were adopted. The regulations enhanced budget and financial plan reporting requirements, expanded reporting and supervision requirements to include all State and major regional public authorities, required authorities to establish investment guidelines and implemented corresponding oversight measures. In addition, reporting requirements for authorities that issue State-supported debt were added. The new regulations required reports on debt issuance within fifteen days of issuance, as well as quarterly summaries of debt issued pursuant to statutory authorization.

Meanwhile, a reform proposal submitted by the State Comptroller, Attorney General and members of the Assembly was later introduced and signed by Governor Pataki in 2006.²⁹ The Public Authorities Accountability Act of 2005 (Act) contained extensive changes to existing

Public Authorities Law. Many of the provisions of the Act reflected the recommendations of the Commission.

The Act clearly defined public authorities as State, local, interstate or international and also defined what constitutes an affiliate or subsidiary of an authority. More importantly, the Act made comprehensive changes to governance, reporting, auditing standards and property transactions. In addition, the Act established the Authority Budget Office (ABO) and codified the Office of the State Inspector General (State IG), which had previously been established by Executive Order. The Act outlined the conditions under which the State IG would have jurisdiction over public authorities.

The governance provisions of the Act established that board members should be independent, are prohibited from accepting personal loans from the authority and are prohibited from serving as Chief Executive Officer (CEO) or any other senior management position while serving on the board of the same authority.

The roles and responsibilities of board members were more explicitly described as well. Board members are required to oversee the CEO and senior management of the authority, monitor the implementation of financial and management controls, and establish policies regarding salary, time and attendance of the CEO and senior management. In addition, the board must implement a code of ethics for all officers and employees, and establish protections for whistleblowers.

Provisions were also added to require each board to create an audit committee, the members of which should be familiar with corporate financial and accounting practices, and a governance committee. The Act also altered the structure of several specific authority boards by increasing the number of members required.

Compliance reporting was expanded to include a schedule of debt, a compensation schedule, information on projects commenced during the fiscal year, data on real property disposal and internal controls assessments. The Act also required that public authorities make their most recent annual budget and audit reports available on the Internet. These requirements were expanded to include local authorities as well.

Independent audit standards were enhanced to require the rotation of the auditing firm or lead partner every five years and to prohibit the use of the firm for non-audit services unless prior written approval is granted by the audit committee. The new provisions also prohibit any audit firm that employed the CEO, Chief Financial Officer, Controller or Chief Accounting Officer in the year preceding the audit from performing the authority audit. These audit standards were extended to include local authorities.

The Act also addressed the disposition of property by public authorities. Over the years, instances of serious

mismanagement of authority property likely led to the property reforms contained in the Act. In 2003, the Canal Corporation awarded exclusive land use rights to a single bidder, who had contributed \$6,000 to the gubernatorial campaign, without soliciting additional bids. The exclusive development rights were sold for \$30,000. Provisions in the Act require the authority to have property disposition guidelines and to publish those guidelines on the internet. In addition, each authority is required to maintain an inventory of all property, publish an annual report of property to be disposed of and hold public bidding for all sales, except under certain circumstances.

In order to address the lack of oversight and accountability historically associated with public authorities, the Act created the ABO. The ABO was granted the power to review and analyze authority operations, practices and reports to ensure compliance. In addition, the ABO was authorized to make recommendations to the Governor and Legislature regarding opportunities to improve the performance, structure and oversight of authorities, and to maintain a comprehensive inventory of all authorities and subsidiaries and the annual reports of authorities. The Act also empowered the ABO to assist authorities in improving management and disclosure practices.

Even after the Act was signed into law, the Commission continued its work. In May 2006, the Commission released its final report which recommended new legislation, in addition to the 2005 Act, to reform various aspects of public authority governance, operations and oversight. The report highlighted several areas where the Commission believed the Act fell short.

The Commission recommended several enhancements to the Act related to disclosure, board member qualifications and the ABO. The most significant proposals related to strengthening the fiduciary duty of board members, suggesting that the ABO develop an oath to be executed by board members pledging to adhere to the authority's mission.

In response to a need for greater accountability and transparency through more timely data collection and analysis, the Office of the State Comptroller developed the Public Authorities Reporting Information System (PARIS). The system was fully implemented under the leadership of Comptroller Thomas DiNapoli in November 2007 and is jointly managed by the Comptroller's Office and the ABO. Public authorities have reported nearly \$28 billion in budgeted expenditures for fiscal year end 2009. In addition, over \$27 billion in actual expenditures were reported in PARIS for fiscal year end 2007.

2009 Public Authority Reform Legislation

Reform legislation passed in recent years, including the Debt Reform Act of 2000 and the Public Authorities Accountability Act of 2005, represented important steps to control the State's increasing debt and improve oversight,

accountability and transparency for public authorities, but more remained to be done.

During the 2009 legislative session, both houses of the Legislature passed public authority reform legislation (A.2209-C Brodsky/S.1537-C Perkins) with the goal of providing more oversight while also requiring more accountability from the authorities.³⁰ Comptroller DiNapoli has noted that this bill is the first major step toward public authority reform the State has seen in years. This bill, if signed by the Governor, would restructure the existing Authority Budget Office (ABO) and would charge the ABO with several important roles, including:

- Conducting reviews and analyses of the operations, practices and reports of public authorities;
- Maintaining a comprehensive inventory of authorities;
- Verifying the existence of and looking for opportunities to consolidate or clarify names of certain authorities;
- Promulgating regulations to effectuate the provisions of the bill.

The ABO would also be authorized to undertake in-depth investigations, request additional data or reports, make recommendations to State officials on numerous authority practices and suggest additional reform measures. In addition, the ABO would be empowered to issue subpoenas and commence special proceedings in New York State Supreme Court if an authority fails to comply with the ABO's requests for information to perform its duties. Perhaps most importantly, the ABO would be granted the power to publicly warn and censure non-compliant authorities.

This bill would also strengthen and reinforce the importance of independence, loyalty, care, commitment to the authority mission and fiduciary duty of authority board members by requiring each board member to execute an acknowledgement of these duties upon taking their oath of office.

While the ABO is given significant new roles and powers under the Brodsky/Perkins bill, Comptroller DiNapoli's Office would also take on new roles and responsibilities in relation to the authority procurement process. The new bill would give the Office of the State Comptroller the discretion to review certain contracts prior to publication for bid or proposal. The purpose of this process is to ensure that higher dollar amount contracts that may become a fiscal burden on the State are deemed prudent, reasonable and necessary.

While the Brodsky/Perkins Public Authority Reform Bill would close many of the gaps that currently allow some authorities to avoid the accountability and transparency to which taxpayers are entitled, opportunities for improvement may still exist.

The Future of Reform

The 2009 Brodsky/Perkins Public Authority Reform bill should be viewed as a catalyst for continued long-term change in New York's fiscal policy. While many practices of public authorities have largely been addressed in both the 2005 Accountability Act and this 2009 legislation, other complex, interrelated issues still exist. Comptroller DiNapoli has consistently commented that the State's dependence on backdoor borrowing through public authorities remains a hindrance to the State's future fiscal health. In addition, the Comptroller has indicated that the lack of strategic capital expenditure planning processes puts the State's budget at risk each year and, even more importantly, puts critical infrastructure needs at risk as well.

As a first step, Comptroller DiNapoli recommends that a comprehensive definition of debt, as well as a meaningful debt cap, must be established. The existing definition of State debt for purposes of the current debt cap includes some, but not all, categories of debt backed by State resources. As a result, the State's outstanding debt burden is under-represented to citizens and policy-makers. A comprehensive definition of debt—State-funded debt—would provide the basis for a comprehensive evaluation of the State's long-term debt burden. The comprehensive State-funded debt definition would include all instances whereby the State makes payments with State resources directly for General Obligation (G.O.) bonds or indirectly to a public authority, bank trustee or municipal issuer to enable them to make payments on debt issued for State purposes. The Office of the State Comptroller has used such a definition since 2005 to more accurately account for all such debt outstanding. A new cap on total allowable debt outstanding based on an all-inclusive debt definition would improve transparency in decisions and provide a better sense of affordability as it relates to available borrowing capacity.

Comptroller DiNapoli has also called for the elimination of backdoor borrowing to restore control over debt issuances to the taxpayers. Backdoor borrowing should be replaced with voter approved debt issued by the State Comptroller, including a new category of State-issued debt backed by specific revenues. Backdoor borrowing limits accountability and transparency by circumventing public participation and transferring control over the spending of billions of taxpayer dollars to largely autonomous public authority boards. Reform should also include the authorization to propose more than one bond referendum to the voters annually to better allow for long-term capital planning and to ensure all critical needs are addressed.

But debt reform by itself is not sufficient to ensure a more balanced and stable fiscal future. The Comptroller has proposed a comprehensive process to evaluate long-term capital needs to ensure that the highest priorities are addressed first. The process for selecting capital projects, which are often supported by debt, results in pressure

to add spending and/or debt for projects that have not been prioritized based on current and future needs. While agencies prepare multi-year plans for capital spending, these rarely extend more than five years with no independent assessment of competing priorities. A systematic capital needs assessment and long-term strategic capital plan, including the State's infrastructure needs for transportation, energy, higher education facilities or economic development projects, would ensure a more effective prioritization to aid decision-making.

As the State faces unprecedented fiscal challenges, it is imperative to improve the transparency and accountability of its component public authorities which have, for too long, been a shadow government existing outside of customary public oversight and control. It is time to return public authorities to their core mission, restore control over State-funded authority debt to New York's taxpayers and expose authority operations to systematic oversight. While public authorities provide important services and support for New York's critical infrastructure, lasting reform will help the State ensure long-term fiscal stability, affordability and transparency.

Endnotes

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30. See A.2209-C/S.1537-C (2009), sponsored by Assemblyman Richard Brodsky and Senator Bill Perkins, passed the New York State Assembly on June 17, 2009 and passed the New York State Senate on July 16, 2009. At the time this article was written, the bill had not yet been signed by the Governor.

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The Public Authorities Reform Act of 2009

Bringing Transparency, Accountability, and a System of Checks and Balances to New York's Shadow Governments

By Assemblyman Richard L. Brodsky

Let me first note that as of writing this, we are in negotiation about changes in A.2209-C, the Public Authorities Reform Act of 2009 which has passed both houses of the Legislature and will shortly be sent to the Governor for signature. I will be discussing the bill in its current form.



Public Authorities often effectively deliver public services. But they are constitutionally remote from traditional checks and balances. They are not part of the Executive Branch, and there is no effective oversight or control of their actions. They have the ability to issue revenue-backed debt, thereby avoiding the Constitutional requirement for full faith and credit indebtedness. Collectively, public authorities currently have over \$140 billion in outstanding debt, and are deeply involved in the delivery of essential services to the people of the State.

At the same time, the authority system is often characterized by ineffectiveness, secrecy, runaway debt, favoritism, failure, and corruption. It has become a shadow government, existing outside the checks and balances that define democratic governance. Over the years, the hearings we conducted and the reports we issued on the MTA, LIPA, the Erie Canal, Yankee Stadium, the Port Authority, the Olympic Regional Development Authority, the Buffalo Bridge Authority and many others have created a broad public consensus that fundamental reform of the authority system is needed.

The Legislature has addressed that need over the past years, including the enactment of the Public Authorities Accountability Act of 2006. With bipartisan support, the bill was signed by Governor Pataki creating an Authority Budget Office and greatly enhancing the transparency and reporting requirements required of state authorities. At the same time, the Commission on Public Authority Reform, led by corporate governance expert Ira Millstein, published a Report, recommending further reform of public authorities.

A.2209-C, the Public Authorities Reform Act of 2009, includes many of those recommendations, as well as others, and fundamentally transforms public authority operations and oversight. We create an Authorities Budget

Office with real power to police public authorities. We set forth a strong fiduciary duty owed by each authority board member to the public interest and the statutory mission of the authority. We insist on real whistleblower, lobbying and MWBE protections. We bring the State Comptroller into the contract review and approval process. We reform the practice of giveaways of authority property. We began the process of fundamental reform of authority debt issuance.

"It requires that the board members take all opinions into account, and do what is best for the authority and its mission on behalf of the citizens of New York."

There has been vocal opposition, mainly by New York City Mayor Michael Bloomberg. He has asked that the bill be vetoed, citing his desire to direct his appointees how to vote on particular issues, and his desire to direct how authority assets should be sold, especially in below-value transactions, among many other objections. While the Mayor's views need to be considered, we believe them to be mistaken.

The Mayor should no more be able to control the votes of his appointees to authority boards than he should be able to control the votes of the judges he appoints. The bill does not silence a public official such as the Mayor from voicing his opinion in connection with a board's decision. It requires that the board members take all opinions into account, and do what is best for the authority and its mission on behalf of the citizens of New York.

Reforming below-market value transactions is a key aspect of creating transparency in public authority reform. For too long, public authorities have manipulated and disposed of assets for less than fair market value in ways that are rife with abuse and corruption. Examples include the Yankee Stadium deal, the proposed sale of the Erie Canal, and the MTA 2 Broadway deal. The Mayor has objected to our provision barring below market value transactions, believing that it will harm economic development projects.

The Public Authorities Reform Act of 2009 makes a fundamental change in the way these transactions are conducted. The ability to subsidize worthy projects where

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the mission of the authority is maintained, but the public for the first time will know the value of the asset sold, and the value of the subsidy given.

"The Legislature has taken the lead in enacting the most fundamental reform of state government in decades, and our commitment to that effort remains firm."

Objection has also been raised to Comptroller review of contracts. It is asserted that the 90-day review of contracts by the Comptroller may be too long, and will interfere with certain types of contracts. For instance, the New York Power Authority buys energy in markets where contracts are purchased every few minutes. Clearly, this is an area where changes in A.2209-C are appropriate.

We understand that legislation can always be improved. We are willing to consider changes that solve specific problems. But we will insist on legislation that guarantees transparency, accountability, and real checks and balances. The Legislature has taken the lead in enacting the most fundamental reform of state government in decades, and our commitment to that effort remains firm. The Public Authorities Reform Act of 2009 will finally bring these public institutions out of the shadows and we look forward to it becoming law.

Assemblyman Richard L. Brodsky is the Chairman of the New York State Assembly Committee on Corporations, Authorities and Commissions, which oversees the State's public and private corporations, including public authorities. He is the author of A.2209C, The Public Authorities Reform Act of 2009, one of the most comprehensive reforms New York has seen in decades.

What Happened to Authority Reform?

By Charles Brecher

For a period of about two years leading up to the 2006 statewide elections, “authority reform” gained increasing attention as an important policy issue.¹ Among the events creating the drum beat for reform were:

- The Assembly’s Committee on Corporations, Authorities and Commissions held hearings revealing abuse in the awarding of contracts, sale of property and other financial management practices at the Canal Corporation, the Metropolitan Transportation Authority (MTA) and other authorities.²
- The State Comptroller issued outraged reports finding public authorities in New York to be, among other things, a “secret government,”³ and he was joined by the Attorney General and some legislative leaders in proposing reforms.⁴
- The Governor appointed a prestigious commission to examine the topic, and its May 2006 report also recommended substantial changes.⁵
- The non-partisan Citizens Budget Commission issued a report charging the authorities with being poorly governed and misusing their debt issuing powers, and urging reforms in these areas.⁶

The calls for reform were not ignored. The Public Authorities Accountability Act (PAAA), effective beginning in 2006, established new transparency requirements for authorities, set standards of independence for authority board members, authorized training of board members, and created an Authority Budget Office (ABO) to help implement the act. But few reformers thought this legislation went far enough; most reformers looked forward to additional reforms after inauguration day in 2007.

Unfortunately, instead of gaining momentum, the effort waned. Comptroller Alan Hevesi, re-elected in 2006, subsequently resigned due to abuses in his office. His appointed successor has not embraced authority reform with equal vigor. Newly elected Governor Eliot Spitzer deferred action on authority reforms in his first year, and then he resigned due to a prostitution scandal. His successor has been obliged to focus on fiscal issues due to the severe economic downturn. While the Assembly Committee Chair Richard Brodsky continued an active program of oversight hearings for the MTA and other authorities, until the summer of 2009 his legislative proposals remained “one-house bills” that were not passed in the Senate. After much political turmoil over party control of the Senate,



a Brodsky initiated bill with notable reforms passed the Senate in July 2009 and is awaiting delivery to the Governor at the time of this writing.

This article develops three points with respect to authority reform. First, the problems identified by reformers in the 2004-2006 are serious and extensive. Second, the reforms adopted in that period address only a part of the problem, and their implementation has been problematic. Third, the unaddressed problems have worsened in recent years and still warrant major changes in State policy. The 2009 reform legislation, whose fate remains uncertain, is a partial and imperfect measure for solving the remaining problems.

What Is the Problem?

Public authorities play a major role in delivering services to New Yorkers. A recent comprehensive count identified 583 authorities statewide.⁷ The largest group consists of 192 local public housing authorities, followed by 173 authorities with economic development missions including 116 local industrial development authorities. Another 54 are part of the state’s transportation system, ranging from the mammoth Metropolitan Transportation Authority running the New York City regional mass transit facilities to 34 far smaller local entities operating public parking garages. Additional authorities are operating parks and recreation facilities, water and sewer systems, hospitals, and solid waste disposal. A few do not serve the public directly, but provide financing for other government agencies that do.

While it is difficult to generalize about such a diverse set of institutions, the “problem” of public authorities is considered by many critics to have two dimensions. The first relates to their governance and transparency, the second relates to their borrowing powers and practices. Five issues fall under these two headings. The problems of transparency and governance are: (1) insufficient reporting to support accountability, and (2) insufficient independence in governance. The problems with debt are: (3) misuse of the power to incur government-backed debt, (4) insufficient oversight and coordination of debt backed by authority operating revenues, and (5) ineffective use of private conduit debt. While the charges each require a short separate explanation, together they comprise a serious indictment of New York’s network of authorities.

Insufficient Reporting. Authorities are intended to be accountable to the public, and the primary mechanism for achieving accountability is public reporting. Information that is timely, accessible and subject to outside review or audit should be provided on the organization’s financial condition and results, financial plan for future periods, condition of capital assets, and activities and accomplishments.

Prior to the Public Authorities Accountability Act, many New York authorities failed to meet these standards for reporting. Available information was generally limited to financial condition and results, and this information was not readily accessible and suffered from inconsistencies among entities in time horizons and definitions of fiscal years. Information on future financial plans and capital assets was often unavailable. And no one entity provided a “big picture” of the finances of the multiple authorities.

Insufficient Independence. A defining characteristic of public authorities is a degree of insulation from the pressures of electoral politics. Authorities are governed by “independent” boards, rather than by elected officials or commissioners serving at the pleasure of elected officials. This degree of independence is intended to enable boards to make decisions that provide long-term benefits and that are fiscally responsible, even if unpopular. Politicians count on authority boards to do things like site and build power plants or raise tolls and fares for bridges and subways.

Critics charge that the desired independence of boards has been undermined by practices such as appointing only individuals who accept a role as representative of the appointing official rather than as an independent voice, and keeping board members indefinitely in a “hold over” status that makes them subject to dismissal at the will of the appointing official rather than re-appointing them or appointing a new member to a full, fixed term. Patronage-like decisions in procurement and in hiring of senior staff, and an associated decline in professionalism among staff, is associated with this erosion of board independence.

Misuse of Tax-Backed Debt. Debt is both a useful and respected tool of public finance, and it is a dangerous temptation for elected officials. Borrowing long-term to finance capital projects such as sewers, roads and schools makes good sense; multiple generations of taxpayers who enjoy the benefits of these facilities should also share the burden of paying for them. Tax-backed or general obligation bonds of state and local governments are suitable means for financing long-term investments.

At the same time, such borrowing can be misused. It is inappropriate for operating purposes rather than capital investments, and even capital-related borrowing can become excessive. Tax-backed bonds enable elected officials to gain short-run political credit as they cut ribbons for new projects, while passing much of the cost onto future taxpayers who have no say in the current decision to borrow.

A common solution to this dilemma is constitutional limits on state and local borrowing. In New York, the State limit takes the form of a constitutional provision requiring voter approval for the amount and purpose of any general obligation bonds. The limit on local government general

obligation debt in New York is typically set as a percentage of the jurisdictions’ property values.

State leaders have been frustrated by the constitutional debt limit. Since 1946, voters have been asked to approve 34 different bond proposals; 22 passed and 12 failed. Of the six considered since 1990, four have failed.⁸

Authorities have been used to circumvent the limit on state debt with a device called “backdoor borrowing.” Three financing mechanisms enable authorities to borrow on behalf of the State: lease-purchase agreements, dedicated taxes, and securitization. Under lease-purchase agreements, an authority issues the bond with debt service covered by contractual payments from the State. State payments are subject to annual appropriations from the Legislature, but the mechanism has proven suitable for large-scale borrowing at interest rates only slightly above those for general obligation bonds. Similarly, a part of the revenue collected as state taxes can be dedicated to an authority to repay its debt issued for the state’s purposes. For example, New York State has dedicated a part of its sales tax revenues to support the Local Government Assistance Corporation, and it has dedicated a part of its personal income tax revenue to support bonds issued by five authorities.⁹ Securitization is a mechanism to pledge future non-tax revenues for the repayment of bonds. The prime example in New York is the creation in 2003 of the Tobacco Settlement Financing Corporation to issue bonds backed by court-ordered payments to the State from tobacco companies.

The combination of creative financing mechanisms and multiple authorities available to use them means that there is no effective limit on the amount of State-funded debt despite the intention of the constitutional drafters. Equally important, there is no effective constraint on the uses of the proceeds from these borrowings, permitting the State to borrow for operating purposes as well as capital investments. The proceeds of the Local Government Assistance Corporation’s borrowing were used to make aid payments to school districts and localities, and the proceeds of the Tobacco Settlement Corporation’s borrowing were used to help cover the State’s deficits in fiscal years 2003, 2004 and 2005. In addition, some authority borrowing was used to “purchase” assets from the State so that the money could be applied to the operating budget including, for example, the “sale” of a prison to the Urban Development Corporation and roads to the Thruway Authority.

The City of New York also has used authorities to circumvent its debt limit. Because of the rapid increase in real estate values over the past decade, the City’s debt limit is currently well above the amount of outstanding debt—\$70.4 billion versus \$59.1 billion.¹⁰ However, in the mid-1990s a combination of hard economic times and a growing capital budget put the City close to its debt limit. In order to continue borrowing, the City obtained state legislation creating the Transitional Finance Authority

(TFA). It used the device of dedicated taxes; a portion of the City's income tax was allocated to pay debt service on the new authority's bonds.¹¹ Another form of City borrowing outside the constitutional limit is the Sales Tax Asset Receivable Corporation (STARC). Created in 2004 to replace the outstanding debt of the Municipal Assistance Corporation, its bonds are backed by state sales tax revenue paid to the City through the State's Local Government Assistance Corporation. The City's Tobacco Settlement Asset Securitization Corporation, created in 1999, issued bonds outside the constitutional debt limit that are backed by court-ordered tobacco company payments. The City also uses lease-purchase agreements with multiple authorities including the Dormitory Authority and the Urban Development Corporation.

Insufficient Oversight and Coordination of Revenue-Backed Debt. Although authorities are misused to avoid debt limits, it is desirable for authorities to borrow for other reasons. Debt supported by revenues generated by authority investments, such as water systems, bridges, and housing, are a legitimate and vital use of authorities' powers and capacities.

While project revenue-backed debt is generally an appropriate and desirable form of authority borrowing, the way in which this borrowing takes place in New York raises two important issues: (1) limited coordination with capital planning by state agencies, and (2) inadequate advance review of the projects.

Investments financed by project revenue borrowing are not coordinated with the State's capital plan for its direct agencies, leading to fragmentation of capital planning. State capital plans are prepared by the Governor on a rolling five-year basis and are reviewed and authorized by the Legislature. An example of successful coordination between the State government and an authority is State legislation which requires that the Metropolitan Transportation Authority (MTA) prepare a five-year capital plan, and that the plan be subject to approval by a Capital Program Review Board. Authorities other than the MTA are not required to prepare multiyear capital plans and their capital plans are not subject to review by the Governor's Division of the Budget or by the Legislature. Each state authority develops its own procedure for capital planning, and the plan is reviewed only by the authority's board. Yet several State authorities control large-scale capital assets and make substantial annual capital investments financed with their independent revenues. State authorities with capital assets valued at more than \$1 billion include the Thruway Authority, the Long Island Power Authority, and the New York Power Authority.

Project revenue borrowing is not subject to sufficient advance review to protect the State or the relevant local government from an authority taking on a project that might not be financially viable. The Public Authority Control Board (PACB), established in 1975 to review and

approve some State authority borrowing, suffers from three limitations:

- (1) Much authority borrowing is exempt from PACB review, including large borrowers such as the New York State Power Authority, the Metropolitan Transportation Authority, and the Thruway Authority. In addition, all the local authorities are exempt. As a result less than one-third of all revenue-backed debt is subject to PACB review.¹²
- (2) The review of covered borrowings is not sufficiently rigorous or transparent. When the PACB reviews a proposed borrowing, the analysis behind its decision is not presented in public documents. An authority prepares an application for the PACB, and the PACB adopts a formal resolution of approval for the projects it accepts. However, the documents typically contain data relating only to the sources and uses of funds; they do not analyze whether the cost estimates are reasonable, whether the future revenue stream will make repayment of the debt likely, or whether the project has long-run financial viability.
- (3) The timing of the review is typically a "last step" in the planned borrowing that can delay transactions and limit the flexibility of authorities in taking advantage of market conditions for low-cost borrowing.

Ineffective Use of Private Conduit Debt. Authorities are the mechanism by which states can bestow federal tax benefits on private organizations. By borrowing on behalf of a private party, the government entity can gain a federal tax exemption for the interest paid on the debt. In competitive capital markets, this lowers the interest rate that the borrower must pay. Thus, in effect, by borrowing on behalf of a private party, a public authority gives that party a subsidy at the expense of the federal government. In New York, the State also grants exemptions to state and local income taxes, increasing the value of the subsidy.

In 2004 the total amount of private conduit debt issued by authorities in New York was about \$40 billion. State authorities (principally the Dormitory Authority) account for more than half this total, the New York City Industrial Development Agency nearly one-fifth, and other local IDAs more than one-fifth.¹³

While desirable and appropriate in certain situations, this type of borrowing poses a significant problem. The allocation of the benefits of tax-exempt borrowing among private parties is not guided by a set of strategic priorities that maximize the social return and avoid counter-productive competition among multiple authorities. Federal laws set the rules for what types of projects are eligible for private conduit borrowing and, for some purposes, cap the amount that can be issued. The State Legislature determines the broad allocation of the state's cap annually.

Generally, the Legislature divides the statewide cap into thirds. One-third is allocated to local governments, one-third is allocated to state agencies, including state authorities, and the last one-third is set aside for a “statewide reserve” and is jointly administered by the Department of Economic Development and the Division of the Budget.

Some of the conduit debt that authorities issue is not subject to the cap. This is primarily borrowing for health care and higher education institutions. Such borrowing has little strategic guidance from state officials, which in some cases has led to suboptimal use. One result, evident in the hospital sector, is a surplus of facilities. As a result, a recent gubernatorial commission recommended closing some hospital facilities financed with conduit borrowing by the Dormitory Authority. New subsidies were recommended to retire that debt with the expectation that future operating savings will justify the needed additional subsidy.¹⁴

Limited Progress on Transparency and Governance

The most important step taken in the name of “authority reform” was creation of the Authority Budget Office (ABO) under the Public Authorities Accountability Act. The nature of the office was itself a matter of controversy. Some reformers wanted any agency charged with monitoring authorities to be independent in the sense that it not be accountable directly to either the Governor or legislative leaders. At the same time the State Comptroller, who already had some role in monitoring authorities, wanted to enhance the powers of his office. The eventual legislation put the new ABO under the Governor and within the Division of the Budget. However, the act called for cooperation between the ABO and the Comptroller’s Office.

Since its creation, the ABO has focused on three of its mandated activities: advancing transparency by collecting and maintaining publicly available information on authorities’ finances, training authority board members, and conducting reviews of authorities’ compliance with requirements of State laws including the Public Authorities Accountability Act and other good management practices.

With respect to transparency, the ABO worked with the Office of the State Comptroller to design and implement the Public Authorities Reporting Information System (PARIS), an electronic reporting system that makes information submitted by authorities available in a standard format on the Internet. However, during the system’s first year compliance was a problem. Of the 268 authorities required by statute to submit budget reports by June 30, 2008, only 165, or 62 percent, had done so. For submission of required annual reports, the compliance rate was 65 percent.¹⁵ At the end of the second year the compliance rates were 70 percent and 63 percent, respectively, and the

staff was concerned that some of the reported information was of questionable accuracy.¹⁶

To promote responsible governance, the reform law required authority board members to participate in State-approved training programs. The ABO has approved the personnel and curricula of 11 training organizations and has developed a partnership with the City University of New York as an additional source for training of board members. From the start of the program in 2006 through mid-2009, more than 2,000 board members and staff from 41 state authorities and 260 local authorities participated in approved training. While these absolute numbers are impressive, they represent only limited compliance with the law. No board members from two state authorities and 52 local authorities had attended training, and many other authorities had some board members who have not yet participated.¹⁷

The ABO has developed protocols for compliance review and in the year ended June 30, 2008 completed five such reviews. In the next year they completed three additional reviews with the reports of two released by June 30, 2009 and the third to be released after review and comment by the authority staff. The results are not encouraging from the perspective of authority concern for good governance and management practices. While the ABO found two of the five authorities examined in the first year (the Environmental Facilities Corporation and the Albany County Airport Authority) to be well functioning with a well-informed board, the favorable review was tempered by recommendations to continue to improve transparency and accountability by updating policies and procedures.

The three other reviews indicated serious compliance issues. At the Colonie Industrial Development Agency, “...progress toward compliance with certain provisions of the Public Authorities Accountability Act and other laws has been limited. In particular, the Agency has consistently failed to meet certain reporting requirements, has not established required policies and guidelines, and record management and retention practices have been inadequate.”¹⁸ At the Olympic Regional Development Authority, the ABO found that “while the Board of Directors does oversee operations at a summary level, a more thorough review of supporting financial operations including additional long-term capital and financial planning is needed.”¹⁹

Most troubling was the situation at the Seneca County Industrial Development Agency. The ABO found “...examples where the Board may not have acted in adherence with Open Meetings law, did not fully adhere to its bylaws and resolutions, signed or relied on documents that were incomplete or inaccurate, and did not make all relevant material available to the public, or did not thoroughly document the basis for its actions.”²⁰ Moreover, the Agency’s response to the review was that the require-

ments of the law were viewed only as aspirational goals and not firm requirements.

The efforts of the ABO are likely to continue to yield some progress toward greater transparency and better governance. But the limited compliance with reporting and other requirements highlights an issue anticipated in the Final Report of the State Commission. It noted that the ABO lacked needed enforcement powers:

The powers of the ABO as currently structured cannot accomplish the Commission's objectives...[t]he Act itself left the ABO's power and role unclear. If the ABO's powers are only implied, we question whether the public authorities will fully comply with the ABO's assertion of power. To carry out effective oversight, the role and power of the ABO must be legislatively created...[t]hese missing elements must be filled by new legislation.²¹

The Debt Problems Worsen

If the ABO is a weak remedy for the problems of transparency and governance, it still is better than the absence of action to deal with debt problems. As a result, the debt situation has worsened as past trends continue.

State Supported Debt. The state continues to borrow against its future revenues by using authorities rather than general obligation debt. Between the end of fiscal

year 2004 and fiscal year 2009, the state's outstanding debt grew by \$4.9 billion from \$46.8 billion to \$51.7 billion. (See Table 1.) Yet during this period outstanding general obligation debt actually declined. All the growth was in the form of debt issued by authorities, and the general obligation share of outstanding debt fell from 8.1 percent to 6.4 percent.

This pattern is projected to continue in coming years even after approval of a general obligation bond issue of \$2.9 billion for transportation in 2005. Use of this new authority will increase outstanding general obligation debt from \$3.3 billion at the end of fiscal year 2009 to about \$4.0 billion at the end of fiscal year 2014, but state debt issued by authorities will grow even more. Thus, the general obligation share of total state debt at the end of 2014 is projected to be a modest 6.7 percent.

It is worth noting that the debt totals in Table 1 do not include the \$2.3 billion outstanding from the STARC and about \$2.0 billion in Building Aid Revenue Bonds (BARBs) issued by the TFA. While these issuers are authorities classified as New York City authorities, the revenue supporting these bonds are, respectively, state sales tax revenues and state education aid payments. The State Comptroller has suggested that this debt should be considered state-related debt;²² in that case the total outstanding state debt at the end of fiscal year 2009 would be about \$56 billion. In the case of STARC, the borrowing is for operating rather than capital purposes, since the refinancing of Municipal Assistance Corporation bonds with

Table 1
New York State Related Debt Outstanding, 2006-2014 at Fiscal Year-End
(Millions of Dollars)

	Actual						Projected				
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
General Obligation	3,804	3,654	3,470	3,302	3,221	3,323	3,566	3,882	4,030	4,119	3,984
Authority Debt	42,968	43,094	43,462	44,836	46,358	48,407	50,966	53,435	55,080	55,840	55,883
Dormitory Authority	13,157	13,099	13,989	15,287	15,825	17,010	18,481	20,184	21,598	22,009	24,208
Thruway Authority	8,526	8,896	8,607	9,238	9,889	10,398	10,942	11,386	11,485	11,543	11,586
Empire State Development Corporation	6,061	6,294	6,363	6,267	6,914	7,524	8,175	8,954	9,538	9,534	9,201
Local Government Assistance Corporation	4,569	4,449	4,317	4,204	4,021	3,848	3,651	3,449	3,221	2,981	2,748
Tobacco Settlement Financing Corporation	4,551	4,495	4,278	4,084	3,870	3,551	3,208	2,839	2,443	2,018	1,562
Metropolitan Transit Authority	2,395	2,354	2,311	2,266	2,219	2,169	2,117	2,063	2,005	1,945	1,882
Housing Finance Agency	1,267	1,317	1,398	1,334	1,388	1,474	1,768	1,820	1,876	1,869	1,769
EFC/NYSERDA*	536	638	727	759	862	1,085	1,260	1,358	1,487	1,524	1,598
MBBA Prior Year School Aid Claims	510	507	504	484	464	442	419	396	371	345	319
Other	1,397	1,046	967	912	906	906	943	987	1,056	2,072	1,011
Total State Related Debt	46,772	46,748	46,932	48,139	49,579	51,730	54,532	57,317	59,110	59,959	59,867
General Obligation Debt as Percent of Total	8.1%	7.8%	7.4%	6.9%	6.5%	6.4%	6.5%	6.8%	6.8%	6.9%	6.7%

Sources and Notes: All 2004 data with the exception of the Tobacco Settlement Financing Corporation, MBBA and a portion of "Other" is from NYS Division of Budget, 2004-05 *Capital Program and Financing Plan Update*, November 14, 2004, pg. 20; additional data from NYS Office of the State Comptroller, *Comprehensive Annual Financial Report (CAFR)* 2004, pg. 26. All 2005 data with the exception of the Tobacco Settlement Financing Corporation, MBBA and a portion of "Other" is from the 2005-06 *Enacted Budget Capital Program and Financing Plan*, April 25, 2005, pg. 27; additional data is from the NYS *CAFR* 2005, pg. 26. 2006 data, 2006-07 *Enacted Budget Capital Program and Financing Plan*, May 26, 2006, pgs. 71-72. 2007 data, 2007-08 *Enacted Budget Capital Program and Financing Plan*, April 25, 2007, pgs. 76-77. 2008 data, 2008-2009 *Enacted Budget Capital Program and Financing Plan*, May 14, 2008, pgs. 61-62. All 2009-2014 data, 2009-10 *Enacted Budget Capital Program and Financing Plan*, May 1, 2009, pgs. 61-61.

* EFC - Environmental Facilities Corporation, NYSERDA - New York State Energy Research and Development Authority.

STARC bonds was intended to provide fiscal relief for the City of New York's operating budget.

Some of the State's new authority borrowing is being used for operating purposes, albeit in subtle ways. Two examples are in the state's fiscal year 2010 adopted budget. The Environmental Facilities Corporation is required to transfer \$95 million of its currently available cash to the State's general fund, and was authorized to borrow an additional \$95 million to replace that. Similarly, the Battery Park City Authority was authorized to transfer some of its cash balances to the general fund while simultaneously receiving increased borrowing authority.²³

The State's borrowing practices are expected to approach or exceed borrowing limits established by State legislation by the fiscal year 2013 or 2014. The Debt Reform Act of 2000 required that (1) debt issued after April 1, 2000 be used only for capital purposes, (2) debt outstanding could not exceed 4 percent of the state's personal income, and (3) debt service on such debt could not exceed 5 percent of the state's all-funds receipts.²⁴ The latter two provisions were phased in over 10 years and 13 years, respectively.

These statutory debt caps proved relatively generous because they applied only to newly issued debt and excluded previously outstanding debt because the legislature subsequently exempted large amounts of new debt from the limit, and because personal income rose rapidly during much of the post-2000 period. However, the Division of the Budget projected that the capital plan included as part of the enacted fiscal year 2010 budget would lead to borrowing that exceeds the cap in fiscal year 2013,²⁵ but the Division subsequently revised its projections to indicate borrowing would remain \$700 million below the cap through fiscal year 2014.²⁶ The narrowing of the available margin is due to the combination

of a slowdown in personal income growth as a result of the current severe recession and the pace of new borrowing; the variability in the estimates is due primarily to the assumptions made about the volatility of personal income in the projections.

New York City Debt. Like the State, the City of New York has continued to rely heavily on authority borrowing. Between the end of fiscal year 2004 and fiscal year 2009, the City's debt increased by \$19.2 billion to nearly \$82.7 billion. (See Table 2.) Of the increase, nearly \$11.0 billion was in authority debt. As part of this growth, two new authorities were created—the STARC with outstanding debt of nearly \$2.3 billion and the Hudson Yards Infrastructure Development Corporation (HYIDC) with \$2.0 billion. The HYIDC bonds are backed by payments in lieu of taxes from real estate owners who make investments in the area, but until such development takes place the City pays the interest on the bonds. In addition, the TFA was given new authority to issue BARBs for another \$1.4 billion. The City's Water and Sewer Finance Authority, whose bonds are backed by water and sewer charges, also increased its debt substantially. As a result, even though regular TFA borrowing was reduced, the City's general obligation debt accounted for a smaller share of total outstanding debt at the end of fiscal year 2009 than at the end of fiscal year 2004.

Table 2
New York City Related Debt Outstanding, 2004-2009 at Fiscal Year-End
(Millions of Dollars)

	Actual					Projected
	2004	2005	2006	2007	2008	2009
General Obligation and Other*	31,378	33,903	35,844	34,506	36,100	39,644
Authority Debt	32,076	33,787	34,646	40,078	41,733	43,053
Transitional Finance Authority (TFA)	13,364	12,977	12,233	13,307	12,828	12,674
TFA Building Aid Revenue Bonds (TFA BARBs)	NAP	NAP	NAP	1,300	2,000	1,394
Tobacco Settlement Asset Securitization Corp (TSASC)	1,256	1,283	1,334	1,317	1,297	1,271
Capital lease and city-guaranteed	2,848	2,766	2,719	2,611	1,831	1,750
Municipal Assistance Corp (MAC)	1,758	NAP	NAP	NAP	NAP	NAP
Sales Tax Asset Receivable Corp (STARC)	NAP	2,552	2,470	2,368	2,339	2,287
Hudson Yards Infrastructure Corp (HYIC)	NAP	NAP	NAP	2,100	2,067	2,000
Water Finance Authority	12,850	14,209	15,890	17,075	19,371	21,677
Total City Related Debt	63,454	67,690	70,490	74,584	77,833	82,697
General Obligation Debt as Percent of Total	49.4%	50.1%	50.8%	46.3%	46.4%	47.9%

Sources and Notes: Actual data from the New York City Office of the Comptroller, Comprehensive Annual Financial Reports (NYC CAFR) for Fiscal Years 2004 to 2008, with the exception of the Water Finance Authority. Actual data for the Water Finance Authority from the City of New York, Office of Management and Budget Analysis, Executive Budgets for Fiscal Years 2004 to 2008. 2004 data, *NYC CAFR 2004*, pg. 21, and *City of New York Executive Budget Fiscal Year 2005*, pg. 111; 2005 data, *NYC CAFR 2005*, pg. 21, and the *Executive Budget FY2006*, pg. 116; 2006 data, *NYC CAFR 2006*, pg. 23, and the *Executive Budget FY2007*, pg. 111; 2007 data, *NYC CAFR 2007*, pg. 24 and the *Executive Budget FY 2008*, pg. 85; 2008 data, *NYC CAFR 2008*, pg. 24, and the *Executive Budget FY2009*, pg. 73; 2009 data for General Obligation, TFA, and TSASC is from the *Executive Budget FY 2009*, pg. 73, data for TFA BARBs from NYS Office of the State Comptroller, *Debt Impact Study*, January 2008, pg. 28, data for STARC based on actual debt outstanding as of prior fiscal year-end and projected debt retirements is SFY 2009 from *Debt Impact Study*, pg. 29, 2009 HYIC debt outstanding is an estimate.

* Other includes Samurai Funding Corp.
NAP-not applicable.

Project Revenue Debt. Eight large authorities account for the bulk of project revenue debt issued by state authorities. (See Table 3.) At the end of fiscal year 2008 these entities had about \$44.1 billion in outstanding debt.

based on an updated needs assessment, and it has not yet released an updated assessment for developing the next plan spanning 2010-2014. The projects in the current plan have suffered from delays and cost overruns, suggesting weak project management.²⁸

Another problematic issuer of project revenue debt is the Urban Development Corporation (recently operating as the Empire State Development Corporation, or ESDC). Its borrowings are subject to review by the PACB, but this review has become politicized and sometimes uses criteria other than financial viability. Perhaps the most widely covered example of PACB rejection of a project was the veto of the football stadium proposed by Mayor Michael Bloomberg as part of the plan for

Table 3

Estimated Project Revenue Backed Debt Outstanding, 2003 and 2008 at Fiscal Year-End

(Millions of Dollars)

<u>Issuer</u>	<u>2003</u>	<u>2008</u>	<u>Percent Change</u>
Metropolitan Transportation Authority (MTA) (a)	15,872	22,687	30.0%
NYS Thruway Authority (b)	1,709	2,238	23.6%
Housing Finance Agency (HFA) (c)	4,273	7,590	43.7%
Urban Development Corporation (UDC) (d)	492	1,250	60.6%
Long Island Power Authority (LIPA) (e)	7,146	6,831	-4.6%
Power Authority of the State of New York (f)	2,526	2,287	-10.5%
Battery Park City Authority (g)	1,162	1,044	-11.3%
Niagara Frontier Transportation Authority (h)	196	183	-6.9%
Total Estimated Project Revenue Backed Debt	33,376	44,110	24.3%

Sources: 2008 numbers: (a) NYS Office of the State Comptroller, *Comprehensive Annual Financial Report (CAFR) 2008*, pg. 66, project revenue debt is calculated as the difference between total and state funded amounts; (b) NYS Thruway Authority, *Annual Report 2008*, pgs. 30-32; (c) Housing Finance Agency, *Annual Report 2008*; (d) *NYS CAFR 2008*, pgs. 3, 44, 66, calculated as the difference between the total and the state and city funded amounts; (e) and (f) *NYS CAFR 2008*, pgs. 44-45; (g) Battery Park City Authority, *Basic Financial Statements, October 31, 2008 and 2007*, pg. 20; (h) Niagara Frontier Transportation Authority, *Basic Financial Statements, March 31, 2009*, pg. 22. All data for 2003 from Citizens Budget Commission, *Public Authorities in New York State*, April 2006, with the exception of the Housing Finance Agency, which is from NYS Office of the State Comptroller, Public Authority Information, <<http://www.osc.state.ny.us/pubauth/data/authorities/HFA.htm>> (July 3, 2009). 2004 UDC data is as of 2004 fiscal year-end.

More than half this total is accounted for by the Metropolitan Transportation Authority (MTA). The MTA's large and growing debt is problematic in three ways. First, it is not fully backed by true "project revenues." While fares and tolls provide a large share of the MTA's revenues, it also is heavily dependent on dedicated taxes, some of which must be appropriated by the State Legislature each year. In this sense, the MTA's borrowing is as much State-supported debt as it is independent-revenue-backed debt. Second, the debt service related to the MTA's borrowing has put pressure on its operating budget. The combination of growth in debt service and in operating expenses led the MTA in 2009 to both impose significant fare increases and obtain a new, dedicated regional payroll tax. Even with these new measures, the MTA will require additional fare increases and other new revenues to support its operations and its capital investment plan in less than two years.²⁷ Third, the debt supports a capital investment program that is not based on updated needs assessments and is poorly managed. The MTA's current five-year capital plan spanning 2005-2009 was not

developing the Hudson Yards and as part of New York City's bid for the 2012 Olympics. The project had approvals from the relevant municipal agencies, and the involvement of the ESDC for a part of the project had also been approved by the ESDC board. However, the legislative representatives on the PACB rejected the project at a late stage. Assembly Speaker Sheldon Silver had his representative vote against it on grounds that development in that area would compete with development in lower Manhattan (a part of his district).²⁹

The State's two large power-generating authorities are not subject to PACB review, their capital plans are not formally coordinated with planning of other state agencies, and their capital planning procedures do not receive significant public attention. Both entities have reduced their outstanding debt. A more complete review of their capital plans would be necessary to judge if this results from sound financial management or reflects underinvestment in needed infrastructure.

Private Conduit Debt. The large and growing amount of private conduit debt issued by authorities consists primarily of two types. (See Table 4.) Fully \$22.8 billion of the \$47.2 billion total has been issued by industrial development agencies, with the New York City IDA accounting for nearly half that sum. Another \$16.4 billion has been issued by the Dormitory Authority, largely for nonprofit organizations.

The IDA borrowings are typically part of packages including tax exemptions put together to attract or retain firms to the areas served by multiple agencies. The activities continue to be subject to the same criticisms raised by reformers in previous years. The agencies sometimes compete with each other, raising the cost of any justifiable subsidies, and sometimes give incentives that are based on political access more than economic need. The limited

transparency surrounding negotiations with private firms limits the accountability of the IDAs.

Much of the increase in New York City IDA conduit debt is related to the building of baseball stadiums for the New York Yankees and the New York Mets. The stadiums in which the teams previously played were built and owned by the City's Parks Department, and were leased to the teams for their use. The costs of building and later renovating these stadiums were covered with general obligation debt and were part of the City's capital budget. The arrangements for financing the new stadiums make use of conduit debt. The IDA issues bonds on behalf of the teams' owners, and the bonds are repaid with payments in lieu of taxes (PILOTs) from the owners. Rather than the Parks Department owning the facilities, new private entities that are subsidiaries of the teams lease the stadiums from the IDA and control them. In the case of the Mets the conduit borrowing is about \$613 million; for the Yankees the initial borrowing was about \$943 million for the stadium plus \$295 million for related parking facilities, and the team requested an additional \$370 million in conduit financing in 2009 to cover previously unanticipated costs. These transactions, and particularly the more expensive ar-

Table 4
Estimated Private Conduit Debt Outstanding, 2004 and 2008 at Fiscal Year-End
Millions of Dollars

Issuer	2004	2008
Port Authority of New York and New Jersey (a)	1,379	1,118
State Authorities (b)	22,015	23,280
Dormitory Authority of the State of NY	14,694	16,438
Health Care Facilities	9,379	9,246
Education	5,314	7,192
NYS Energy Research & Development Authority (NYSERDA)	3,705	3,626
State of NY Mortgage Agency	3,298	2,948
NYS Environmental Facilities Corporation	318	267
NYC Industrial Development Agency (c)	7,471	10,831
Industrial Development Agencies* (excl. NYC) (d)	9,383	11,968
Erie County	N/A	1,135
Nassau County	N/A	964
Suffolk County	N/A	818
Syracuse	N/A	653
Dutchess County	N/A	628
Monroe	N/A	550
Albany City	N/A	499
Westchester County	N/A	496
Hempstead	N/A	473
All other	N/A	5,752
Total	40,248	47,197

Sources and Notes: (a) The Port Authority of New York and New Jersey, Financial Statements and Appended Notes, years 2004 and 2008; privately funded amount represents Special Project Bonds outstanding. (b) Data for 2004 from Citizens Budget Commission, *Public Authorities in New York State*, April 2006. 2008 data from the following: Dormitory Authority of the State of New York, Schedule of Bonds and Notes Outstanding, March 31, 2008, pgs. 6-19; NYSEDA, Financial Statements, March 31, 2008, pg. 22 and 5; State of NY Mortgage Agency from NYS Office of the State Comptroller, *NYS CAFR 2008*, pgs. 44-45; NYS Environmental Facilities Corporation, *2008 Annual Report*, pg. 30. (c) Data for 2004 from Office of State Comptroller, Financial Data for Local Governments, <<http://www.osc.state.ny.us/localgov/datanstat/findata/2003idas.xls>> (November 28, 2005). Data for 2008 from NYC Industrial Development Authority, Audited Financial Statements FY2008, conduit and bonds payable. (d) Data for 2004 from Office of State Comptroller, Financial Data for Local Governments, <<http://www.osc.state.ny.us/localgov/datanstat/findata/2003idas.xls>> (November 28, 2005). Data for 2008 provided by the Office of the New York City Comptroller and the New York State Authority Budget Office.

N/A - Not Available.

* Figures exclude debt issued on behalf of local governments.

rangement with the Yankees, have been questioned as large tax subsidies unjustified by economic development benefits; in addition, the legality of the arrangement with the Yankees under Internal Revenue Service rules has also been questioned.³⁰

IDAs can and do provide conduit borrowing for nonprofit entities, but the bulk of this activity is handled by the Dormitory Authority. The recent decline in that authority's outstanding conduit debt for health facilities (see Table 4) suggests some rationalization of investment in that sector as a result of heightened cost-control concerns. However, debt for educational institutions has grown notably, suggesting possible future issues of financial viability for that sector.

Conclusion

Public authorities play a major role in providing services to New Yorkers and raising capital for public and private facilities. But their potential benefits are being limited by practices that hinder their effective governance and misuse their borrowing capacity. Efforts at reform in 2005 and 2006 yielded only modest progress before they waned in the light of more dramatic events in Albany.

After a reversal in party control of the State Senate in July 2009, an authority reform bill initiated in the Assembly was passed by the Senate and is, at the time of this writing, awaiting delivery to the Governor. It includes several positive measures that bolster the powers of the ABO, support a more independent role for authority board members, and potentially limit procurement and other abuses by authorities. However, it also compromises the independence of authority boards by making their large contract awards subject to approval by the State Comptroller, and—most importantly—it does not address the serious debt problems related to authorities.

A revived movement to enhance the powers of the ABO, to pursue a constitutional amendment that effectively limits the uses and amount of State-supported debt, and better oversight for authority capital planning and borrowing is needed to enable New York's authorities to better serve the public. These are the directions that "authority reform" should take in the second half of 2009 and beyond.

Endnotes

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3. Office of the N.Y. State Comptroller, Public Authority Reform: Reining in New York's Secret Government (Feb. 2004); see also Office of the N.Y. State Comptroller, Strengthening State Procurement Practices: Producing the Best Results for New Yorkers (April 2005).
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8. *Id.* at 11 (data from New York State Board of Elections presented by Brecher and Brill).
9. The five authorities are the Urban Development Corporation, Housing Finance Agency, Thruway Authority, Dormitory Authority and Environmental Facilities Corporation.
10. OFFICE OF THE N.Y. STATE COMPTROLLER, BUREAU OF FISCAL AND BUDGET STUDIES, FISCAL YEAR 2009 ANNUAL REPORT OF THE COMPTROLLER ON CAPITAL DEBT AND OBLIGATIONS, January 2009 at vii, 1, tbl. 1 (setting the limit as of July 1, 2008 and debt outstanding as of June 30, 2008).
11. As its name indicates, the TFA was initially intended to serve as a transitional mechanism, pending enactment of a new constitutional debt limit. However, no constitutional amendment providing for a different debt limit has been proposed by the City. In fact, TFA interest rates have generally been lower than rates for City general obligation bonds, so the City has sought to rely increasingly on the TFA to support its capital program even when the constitutional debt limit was not a factor. In addition, in 2006 the TFA was authorized to borrow against state aid pledged for public school capital projects.
12. CITIZENS BUDGET COMM'N, *supra* note 7, at 18, fig. 1 (showing the data from 2004 which includes all project revenue and private conduit debt, totaling an estimated \$96.1 billion).
13. *Id.* at 19, fig. 7.
14. See N.Y. HEALTH CARE COMM'N IN THE 21ST CENTURY, FINAL REPORT: A PLAN TO STABILIZE AND STRENGTHEN NEW YORK'S HEALTH CARE SYSTEM (Dec. 2006).
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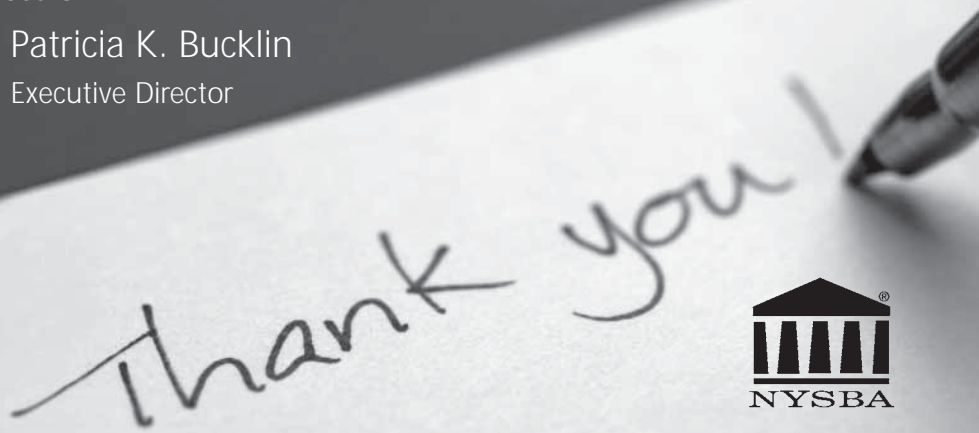
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Public Authority Controversies: Root Causes and Lessons Learned

By Scott Fein

Root cause analysis (RCA) has become a popular problem solving methodology among management consultants.¹ RCA is premised on the assumption that incidences of systemic problems may be minimized or eliminated by identifying and addressing the root cause of the problem, as opposed to merely fixing the surface symptoms. RCA seeks to determine what happened, why it happened, and what can be done to reduce the likelihood of reoccurrence. It seeks to distinguish between human causes (people acting without authority) and action and organizational causes (is the system or process policy used to make decisions faulty?).²



The question is whether an RCA could have application to public authority reform in New York State. In 2005, the Public Authorities Accountability Act (PAAA) was enacted primarily to enhance the operational and fiscal transparency of state and local public authorities.³ With greater understanding of the operation of public authorities, the legislature and Governor concluded that a second phase of authority reform was warranted. This past December the Public Authorities Reform Act of 2009 was signed into law. The Act in many respects is unprecedented and appears to go well beyond what other states have adopted. It should, when fully implemented, enhance compliance, board independence, programmatic and fiscal operations, and provide a new standard of contract review. Commentators suggest that in due course a third phase of reform should be considered to address several of the bedrock fiscal issues including limitations on conduit financing and State supported debt.

In evaluating the potential efficacy of the newly enacted reform and any need for additional reforms, we thought it worthwhile to look backward and seek to identify the root cause(s) of several of the more significant public authority operational problems of the last fifty years.

To provide geographical breadth, authorities selected operate in different states. To provide topical diversity, each of the authorities' missions differ...ranging from housing to highway infrastructure, mass transit to energy generation.

The Urban Development Corporation of New York State (UDC)

In 1975, the Urban Development Corporation (UDC) achieved an unusual distinction: it became the first major issuer of municipal bonds since the Great Depression to default on its obligations. The results were notable. Private capital markets shut their doors to the State, and New York's impending fiscal problems were exacerbated. The UDC's origin, similar to most public authorities, began with a desire to improve the quality of people's lives.⁶

The UDC was created in 1968. New York State was facing a severe housing shortage. It was suggested that there was a 500,000-unit gap between the market and demand. The impact was particularly pronounced on minority residents in urban areas.

"We thought it worthwhile to look backward and seek to identify the root cause(s) of several of the more significant public authority operational problems of the last fifty years."

Soon after Nelson Rockefeller took office, he stated that increasing affordable housing for low-income residents would be among his administration's objectives. Beginning with the post-war period and return of the GIs, the State's focus had been on assistance for middle-income groups. No meaningful attention had been paid to low-income residents. By the late 1950s, middle class flight from the City was increasing. Urban blight was on the rise.

The State Constitution required public approval of indebtedness. Governor Rockefeller sponsored a referendum seeking public approval of funds to support a housing initiative. The referendum was defeated on five separate occasions. The Governor, in response, created three public authorities to try to stem urban decay. Of the three, UDC was the most innovative, established to build low-cost housing, provide jobs, and eliminate urban blight. To ensure it had sufficient revenue the Governor arranged that the UDC would have authorization to issue \$2 billion in bonds backed by the moral obligation of the State to repay the bonds. The objective was for the UDC to build housing with an economic mix of residents to stabilize the area. The housing was to contain 70 percent of residents with middle and moderate incomes, 20 percent low incomes, and 10 percent low-asset senior citizens.⁷

The first challenge was largely political. The State legislature and the Mayor of New York objected to the establishment of the UDC. The UDC was intended to be a super-authority, authorized to override local zoning in order to avoid the “not in my backyard” objections and unduly politicizing the process. The UDC was, by design, to be unstoppable.

Within a year after its creation, the UDC had developed plans for 50 projects throughout 23 cities within the State. Less than two years later it had 45,438 housing units in various stages of completion. Although focused on urban renewal in New York City, the bond revenue was also used for projects statewide.

Problems developed quickly. The projects failed to, and did not have the potential to, generate sufficient revenue to pay the debt service. Projects, even at their inception, failed to meet basic revenue feasibility standards. Each time the legislature or media raised a question concerning the means to satisfy the approximately \$1 million-a-day debt service, the Chief Executive Officer of the UDC said, “I don’t believe there is any evidence to support your conclusion and I do not propose to go looking for any. We are going to build as much as we can. The need is now.”⁸ In large measure UDC’s response was easily understood. The Governor, using a relatively new financing model, grounded the UDC debt on the “moral obligation of the state.” With guidance from John Mitchell, a then well thought of bond lawyer, a mechanism was developed to overcome Wall Street’s reluctance to purchase non-guaranteed authority revenue bonds. The concept was to secure the bonds, not by the State’s full faith and credit, but by the State’s non-binding promise, or moral obligation, to use State revenue to make up any shortfalls in debt service.

While the UDC was to enjoy notable success with projects on Roosevelt Island and in Battery Park City, it had encountered major challenges in efforts to build low-income housing in middle class neighborhoods. Many of their inner city projects, which were the principal impetus for the UDC, proved difficult to implement. A number of the projects were unable to pay off their bonds.⁹

By the 1970s, the UDC was moving away from its stated mission. At the encouragement or insistence of elected officials, it underwrote projects such as the Jacob Javits Center and Apollo Theater. The projects further stretched the Authority’s resources.

In 1973, Moody’s¹⁰ publicly raised questions concerning the UDC’s ability to support debt service based upon its revenue stream and lowered the Authority’s bond rating. From that point, problems cascaded. In 1975, the UDC defaulted on bonds. Ultimately Governor Carey and Governor Cuomo and the legislature stabilized the UDC, but limited its future role to safe economic development. However, the lure of bond revenue was difficult to resist. Governor Cuomo used the UDC revenue to construct and

maintain prisons, following the defeat of a public referendum, and Governor Pataki looked to the UDC to help rebuild lower Manhattan after 9/11.¹¹

The UDC default has been subject to considerable analysis by commentators. There appears to be consensus that the root causes of the UDC’s crisis included that:

1. The UDC mission was unduly broad and, in some measure lacked clarity...the “build we must” mandate constituted the mission, vision, implementation strategy.
2. Elected officials considered the UDC bond revenue a cornucopia that without limit could achieve objectives.
3. The enabling legislation expressly authorized the UDC to preempt local zoning codes and unilaterally overrule local objections. By marginalizing the concerns of the local communities, it introduced barriers to implementation that ultimately undermined the projected revenue streams.
4. There was no economic feasibility analysis conducted to determine if the rental income and other proceeds could satisfy the debt service.
5. There was little fiscal oversight...neither the Legislator, State Comptroller, nor any other elected official carefully monitored on an ongoing basis the finance and expenditures of the UDC.
6. The UDC’s reports to the Legislature and public did not contain sufficient detail to inform on issues confronting the Authority.
7. Wall Street appeared more concerned about enjoying the benefits of debt issuance than making an ongoing and meaningful effort to monitor the fiscal condition of the authority.
8. Many of the UDC’s board members were not selected based upon relevant expertise, but rather were friends or colleagues of the appointing authority, and thus, unlikely to take issue with the requests for off-mission or questionable programmatic expansion.

Massachusetts Bay Transportation Authority (MBTA)

Beginning in the 1800s, private railroads and horse-drawn trolleys provided public transportation in the Boston area. In 1853, much of this was eclipsed by electric street trolleys and in 1947, the Massachusetts Transit Authority (MTA) acquired much of the rolling stock and responsibility for public transit.

As the successor to the MTA, the Massachusetts Bay Transit Authority (MBTA) was established in 1964 to provide bus, ferry, commuter rail and subway service to the greater Boston area, including 78 municipalities.

The MBTA has become the largest consumer of electricity in Massachusetts and the second largest land owner. Initially, the MTBA was formed to help subsidize existing commuter rail operations. Over time, the MTBA absorbed these local service lines.¹²

The MTBA's ability to bond projects without voter approval led to inevitable expansion in scope. The most recent expansion in scope occurred at the same time that a revenue limitation was imposed on the authority. The consequence was a dramatic increase in debt.

From the establishment of the MBTA in 1964, the operating deficit grew each year. To back its capital program, the MBTA issued bonds backed by the Commonwealth's full faith and credit, with the Commonwealth responsible for a contractual obligation to pay a portion of the debt service.

In 2000, the Commonwealth, facing fiscal pressure, sought to reduce its contribution to the MBTA. Establishing a program referred to as Forward Funding, the MBTA was given its own funding stream (20 percent of the Commonwealth's sales tax revenue and an assessment on the cities and towns in the MBTA district). The Authority was also given full responsibility for the amount of debt that had accumulated to that point. The debt referred to as "Prior Obligations" or "Legacy Debt" makes up a significant portion of the MBTA's enormous debt load.¹³

Since 2000, the Legacy Debt and ongoing debt have materially increased. Smaller than anticipated revenue growth, larger operating expenses and slower sales tax growth (which constitutes 55% of the MBTA's revenue base) added to the debt. Aggravating the situation further were the costs the MBTA was obliged to assume as a result of the Big Dig's air pollution mitigation settlement. In order for the Commonwealth to comply with federal air pollution standards resulting from increased traffic created by the enhanced Central Artery, public transit had to be expanded. The Commonwealth looked to the MBTA, which was required to bond an additional \$1.8 billion to satisfy this obligation. Commentators have suggested that the projects should have been factored into the Big Dig's budget and not paid for by the MBTA.¹⁴

As a result, the MBTA is in a spiral in which it cannot generate revenue necessary to achieve a state of good repair, improve service quality, retain and attract riders and increase revenue over time.¹⁵ Notably, MBTA is currently the transit authority with the highest debt service expenses as a percentage of its operating budget in the nation.

In an effort to address the growth in debt and increase coordination among the other Commonwealth public transit authorities, a new super-authority has been proposed. The new authority would absorb existing transit and turnpike authorities. Its nine-person board will be dominated by city planners, rail transit official and special interests. The Governor will only have two appointees.

They will have considerable discretion to issue bonds and allocate revenues among the merged authorities.¹⁶

The MBTA, much like the New York UDC, was founded on a desire to improve the quality of people's lives. The attraction of a single entity to provide an affordable option for mobility, easing traffic congestion, saving millions of gallons of oil and corresponding emissions, reducing sprawl, and decreasing automobile accidents was undeniable. What went wrong?

- The MTBA operated, with respect to fiscal issues, on a largely autonomous basis.
- The seven-member MBTA board was controlled by local interests focused on increasing service to their towns rather than the overall welfare of the authority.
- Gubernatorial and legislative fiscal oversight was, in practice if not by design, limited.
- Elected officials felt comfortable adding programmatic responsibilities to the MBTA, with insufficient consideration for their corresponding cost.
- Feasibility studies were developed; however, they quickly proved unrealistic.
- When strapped for cash in 2000, elected officials of the Commonwealth simply reconfigured the relationship with the MBTA so that the Authority would assume the Commonwealth's share of prior debt.
- There was insufficient transparency. The public was largely unaware of the amount of debt the MTBA was amassing as a result of the continuing operations and new programmatic initiatives.

The New Jersey Turnpike Authority

By the 1930s, US-1, which passed through New Jersey, was often clogged with traffic. Superhighways were planned to supplement US-1, but the Depression and then World War II suspended any further planning and construction. In 1947, the concept of a superhighway was revisited, and the following year the legislature enacted the New Jersey Turnpike Act which, in 1950, created the New Jersey Turnpike Authority. The Authority was established based upon the premise that the Authority would be completely financed by the sale of revenue bonds to private investors. The Turnpike Authority currently operates two toll supported highways—the New Jersey Turnpike and the Garden State Parkway, the latter of which was acquired by the Authority in 2003.

By the early 1980s, having acquired the reputation as one of the more congested and dangerous roadways in America, the Turnpike was in need of expansion and repair. The then longtime Chairman of the Authority was persuaded that the most efficient way to raise money to

undertake the repairs was to engage in fiscal arbitrage. Relying principally on the guidance of the investment banking house that originated the idea and the Authority staff, the Chairman decided to plan a \$2 billion tax-exempt offering. The concept would be to engage in arbitrage; that is, to invest the bond proceeds with the investment banking house in investments having a higher rate of return (the following year, the practices of engaging in arbitrage with the proceeds of tax-exempt bonds were prohibited by federal law). The legislature was not involved in evaluating the financing scheme. Unlike most states, the Governor of New Jersey has veto power over the policies of most State public authorities, including the Turnpike Authority. Although the Governor had misgivings, he perceived the bond offering to be a done deal and was told by the Authority's executive director there was no other alternative to address Turnpike congestion. Moreover, suggested the Chairman, the arbitrage scheme was too far along and any effort to rescind it would jeopardize the State's fiscal position on Wall Street. As it turned out, the financing approach was fatally flawed. The highway construction costs materially exceeded even the wildest projections. Arbitrage profits were insufficient to pay for the debt service. Significant toll increases were required.¹⁷

Compounding the problem, in 2003 the State decided that the Turnpike Authority should assume operational responsibility for the toll-free Garden State Parkway. This was accomplished by merging the New Jersey Highway Authority into the New Jersey Turnpike Authority. The merger added considerable responsibilities and capital costs without a corresponding funding source.¹⁸

The deficit grew to such an extent that in 2008, the Governor proposed a 50% toll increase for four four-year periods. Under this plan, which was rejected, the tolls would have increased from \$6.45 to \$43.92 in 2022. A series of ever more curious proposals to maintain the roadways and pay debt service followed. The State explored privatizing the New Jersey Turnpike to generate cash. Failing that, the Governor considered privatizing fast lanes. Most recently, temporary relief appeared in the context of the American Recovery and Reinvestment Act, which made available funds for infrastructure improvements. The Act required projects to have met with environmental approvals. Despite the fact that the Turnpike was never subject to such approvals, the Authority Board proceeded to bond \$1.375 billion under the Act. The Governor challenged the decisions, asserting it was illegal. The impasse remains.¹⁹

Commentators suggested the key problems were:

- The failure of the elected to remain mindful of fiscal limitations and revenue projections.
- The decision by elected officials to increase the scope of the Authority's operations without a reliable revenue analysis.

- The failure of the Governor and legislature to examine the underlying arbitrage proposal.
- The potential for collusion and the existence of conflicts of interest in the bond financing and arbitrage approach.
- The lack of specialized training among board members.
- The increase in responsibilities imposed upon the Turnpike Authority without a corresponding increase in funding.
- A lack of transparency in explaining the fiscal issues and constraints to the public.

State of Washington Public Power Supply System

The State of Washington Public Power Supply System (WPPSS) was created in 1957 to guarantee low-cost electric power to homes and industry in the Northwest. It was established as a joint operating agency of smaller Washington State public utilities. Its corporate structure was designed to insulate utility decision-making from legislative and gubernatorial control. The board of directors was comprised of members of the various utility districts, each of whom would receive and pay for power produced by WPPSS.

WPPSS's major accomplishment had been to build and operate the Hanford Reactor generating system that converted heat from the federal plutonium-producing reactor into electricity. By the 1960s, it appeared that hydroelectric resources would not be sufficient to provide electric power over the long term to the Northwest. In 1968, they proposed a hydro-thermal power plan which envisaged completion of 20 large thermal power plants, mostly nuclear, in the region by 1990. The public utilities were concerned that the investor-owned utilities would control the new generating facilities unless they acted quickly. Most of the public utilities were too small to consider development of a nuclear project on their own. WPPSS looked like the best structure for the cooperative venture.²⁰

By 1973, WPPSS was chosen to build three large nuclear plants. Eighty-eight regional public utilities agreed to participate in the project. Engineering work for the first plant began in 1971 and the construction was estimated to cost \$400 million. By 1984, the construction was more than eight years behind schedule and the cost of the plant had risen to \$3.2 billion. Notwithstanding this delay and cost overrun, WPPSS agreed to build two more nuclear plants. Tax-exempt bonds to support the construction would be issued on an as-needed basis. Problems ensued. Each of the five plants slipped years behind its original schedule and each suffered billions of dollars in cost overruns. The original estimated cost for completing the five plants was \$4.5 billion; this grew to \$23.8 billion. The energy demand grew less than half of the estimate which prompted the

WPPSS plan. The credit market declined to lend more money. The utilities faced a task of paying for construction that would not likely result in an operating facility. The death knell was a Washington State Supreme Court decision in 1983 concluding that the agreements entered into between the local utilities and WPPSS lacked legal basis for contract and were null and void.²¹

In 1981, WPPSS voted to terminate plants four and five. The following year, it halted construction on plant 1 and, in 1983, on plant 3. Upon termination, WPPSS was the largest single issuer of municipal bonds in the country.

The circumstances which gave rise to the ultimate default were broad in scope:

- Elected officials who, without sufficient analysis, encouraged expansion of WPPSS responsibilities and capital plan.
- Insufficient management and engineering expertise and experience by WPPSS to undertake the projects.
- WPPSS was a small organization (some 81 people at its inception) which simply could not manage the contractors, who ended up managing the projects.
- WPPSS reports and meeting minutes were less than transparent and failed to reflect the problems plaguing the projects.
- The WPPSS Board was comprised of a representative from each member utility and met quarterly. They were amateurs in the field of nuclear power and represented local perspectives and simply rubber-stamped decisions made by staff and the consultants.
- WPPSS management chose to design and build the plants on a concurrent schedule, leading to inevitable cost overruns.
- On the issue of financing, there was little coordination and even less forecasting. A coherent strategy for minimizing costs, including interest, did not exist.
- Even as interest rates for borrowing rose beyond expectations, financing was not slowed.
- Elected officials had virtually no involvement in decisions relating to bond financing; rather, investment house and bond advisors developed and coordinated the strategy of bond offerings.
- Brokerage firms continued to sell WPPSS bonds without disclosing the management and construction problems.
- The bond-rating agencies ignored the warnings and rated the bonds highly.

It appears that faltering public authority governance and fiscal problems for each of the four authorities are the

product of two general organizational weaknesses: significant control by elected officials over programmatic issues, without a corresponding concern about the feasibility or adequacy of revenue to support the programmatic initiatives. With respect to each of the four authorities, elected officials appeared captivated by the availability of bond revenue outside of the conventional state capital budgeting process. Exacerbating the problem, the boards of the four authorities examined neither imposed sufficient discipline on expenditures, nor insisted that projects requested by elected officials demonstrate that these activities were revenue neutral.

"It appears that faltering public authority governance and fiscal problems for each of the four authorities are the product of two general organizational weaknesses: significant control by elected officials over programmatic issues, without a corresponding concern about the feasibility or adequacy of revenue to support the programmatic initiatives."

It is possible that the following remedial actions may help forestall future occurrences:

- (i) Careful monitoring by elected officials of authority debt.
- (ii) Establishing limitations on the cumulative debt each authority can issue.
- (iii) Ensuring transparency in reporting the existence of the debt to the public and documenting how the authority debt adds to the State's overall indebtedness.
- (iv) Independent professional review of proposed authority projects to ensure the revenue stream is sufficient to satisfy indebtedness.
- (v) Ensuring that proposed projects are consistent with the statutory mission of the authority.
- (vi) Enhancing authority governance through greater independence and professionalism of board members.
- (vii) Monitoring the relationship between the authority and investment banks to ensure the mechanism for issuing debt accord with acceptable investment principles.

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11. See generally JERRY MITCHELL, *PUBLIC AUTHORITY AND PUBLIC POLICY: THE BUSINESS OF GOVERNMENT* (1992); Clark, *Rapid Rise*, *supra* note 10; TIMOTHY B. CLARK, *CRISIS IN THE MAKING* (1981).
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14. MASS. PIRG EDUC. FUND, MBTA CHRONOLOGY (2003); MBTA ANNUAL AND FINANCIAL REPORTS, *supra* note 12.
15. MASS. TRANSP. FIN. COMM'N, *TRANSPORTATION FINANCE IN MASSACHUSETTS: AN UNSUSTAINABLE SYSTEM* (2007), available at http://www.eot.state.ma.us/downloads/tfc/TFC_Findings.pdf.
16. See generally AXELROD, *supra* note 7.
17. N.J. TURNPIKE AUTH., ANNUAL AND FINANCIAL REPORTS (1994-2008); Wikipedia, *The New Jersey Turnpike* (last visited Sept. 10, 2009).
18. See generally ANGUS GILLESPIE & ARON MICHAEL, *LOOKING FOR AMERICA ON THE NEW JERSEY TURNPIKE* (1989); MICHAEL LAPPOLA, *IMAGES OF AMERICA: THE NEW JERSEY TURNPIKE* (2008).
19. See generally DERRICK LONG, *UNYOKING THE CASH COW* (2008).
20. History Link.org, *Washington Public Power Supply System (WPPSS)*, http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5482 (last visited Sept. 10, 2009); Harriet King, *End May Be Drawing Near in Suit on '83 Bond Default*, N.Y. TIMES, Oct. 31, 1988, available at <http://www.nytimes.com/1988/10/31/business/end-may-be-drawing-near-in-suit-on-83-bond-default.html>; WASH. STATE PUB. POWER SUPPLY SYSTEM, ANNUAL AND FINANCIAL REPORTS (1990-2007).
21. See generally *Chemical Bank v. Wash. Pub. Power Supply System*, 99 Wash.2d 772 (1983); Daniel Pope, *Environmental Constraints and Organizational Failure: The Washington Public Power Supply System*, 19 BUS. & ECON. THEORY (1990); AXELROD, *supra* note 7; Howard Gleckman, *WPPSS: From Dream to Default*, THE BOND BUYER (1984); Harold Rogers, Jr., *What Went Wrong With WPPSS?*, MUN. FIN. J. (Winter 1984); JAMES LEIGHLAND & ROBERT B. LAMB, *WPPSS: WHO IS TO BLAME FOR THE WPPSS DISASTER?* (1986).

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Interpreting the Public Authorities Accountability Act of 2005

By Judson Vickers

The Public Authorities Accountability Act of 2005 (the “PAA Act”)¹ was signed into law by the Governor four years ago. Since then, not much has surfaced on how to interpret and apply the act, which most would agree can be vague or even hopelessly ambiguous in many respects. There has been no case law or law review articles addressing the PAA Act, and there is little guidance (authoritative or otherwise) to assist those subject, or potentially subject, to the act.



This article does not purport to be a comprehensive interpretative guide to the PAA Act. Through the use of a few examples, however, it does attempt to provide (primarily for local authorities) a framework for navigating some of the more challenging provisions of the act. The areas of the PAA Act addressed herein are: (1) which entities (specifically, not-for-profit corporations) fall within the definition of “local authority”; (2) the proper scope of the PAA Act given the inconsistent use of terminology; and (3) the contours of the board member independence requirement. This article concludes that the best approach to interpreting these and other problematic provisions in the act is a “rule of reason” approach that emphasizes legislative intent over literal interpretations that would yield unreasonable or irrational results.

Background

Public authorities have existed in New York State since the Port of New York Authority (now the Port Authority of New York and New Jersey) was created almost 90 years ago.² Since that time, numerous authorities have been established to, *inter alia*, finance the construction and maintenance of transportation projects (such as bridges and roads) and other public facilities (such as schools, hospitals and housing developments).³ Estimates of the number of authorities in existence today in New York State range from less than 300⁴ to more than 1,000.⁵ As observed by a commission appointed by the Governor in 2005 to assess the need for public authority reform, “[t]he historical expansion in the number and importance of public authorities paralleled the growth in size and complexity of government.”⁶

Efforts to more closely regulate public authorities have had a long history, as well.⁷ The most comprehensive legislative effort was the PAA Act, which was enacted after a series of private and public corporate scandals and irregularities that came to light in the early part of the decade. In the private sector, in late 2001 and early 2002, there was the collapse of Enron, which was followed closely by the demise of other corporations like World-Com and Tyco. The federal government’s response was the Sarbanes-Oxley Act, which sought to rectify at least some of the problems that led to these corporate downfalls by enhancing regulatory oversight, corporate disclosure and corporate governance standards for publicly held companies.⁸

“This article concludes that the best approach to interpreting these and other problematic provisions in the act is a ‘rule of reason’ approach that emphasizes legislative intent over literal interpretations that would yield unreasonable or irrational results.”

Thereafter, in New York State, investigations by the State Legislature and Comptroller revealed a variety of irregular practices by some of New York’s public authorities, most notably the attempted sale by the Canal Corporation (a subsidiary of the Thruway Authority) of development rights to the Erie Canal corridor for \$30,000.⁹ The state’s initial response was essentially two-fold. Legislatively, several bills aimed at increasing the state’s regulatory control over public authorities were introduced in the State Legislature in 2004. The most comprehensive of these bills was the proposed Public Authorities Reform Act of 2004, which was developed by the State Comptroller and Attorney General. This proposed act would have directly regulated state authorities in areas such as debt issuance, corporate governance, lobbying and procurement, leaving the Temporary Commission on Public Authority Reform (to be established by the proposed act) to provide recommendations regarding entities with local, interstate or international jurisdiction.¹⁰ That same year, the Governor appointed the Public Authority Governance Advisory Committee chaired by Ira Millstein (the “Millstein Committee”)¹¹ to develop a set of “Model Governance Principles” for state public authorities, which attempted

to incorporate elements of the Sarbanes-Oxley Act and other best practices standards. In its June 2004 report, the committee set forth its recommendations, many of which were subsequently incorporated into the PAA Act (at least in concept).¹²

The following year, the bill that eventually would become the PAA Act (Governor's Program Bill #90—S.5927)¹³ was introduced. Though S.5927, which primarily amended the Public Authorities Law, included some of the concepts contained in the Sarbanes-Oxley Act and the Public Authorities Reform Act of 2004 (which was not reintroduced in 2005), it reflected more of the work of the Millstein Committee. Unfortunately, S.5927 had the appearance of a bill that was hastily drafted and/or pieced together from separately drafted sections. The bill contained, and now the PAA Act contains, numerous inconsistent and vague provisions, as well as other carelessly worded provisions that create confusion where there should have been more clarity.

Despite the bill's flaws, S.5927 was passed by the Legislature on June 24, 2005 and signed into law as the PAA Act by the Governor on January 13, 2006.¹⁴

PAA Act Interpretation for Local Authorities

As noted, the PAA Act was not artfully drafted, which can present significant challenges for local authorities seeking to determine whether the act applies to them and, if so, the scope and nature of their compliance. Exacerbating these interpretation issues is the further problem that many of the traditional tools of statutory construction are not available for directly deciphering the meaning or legislative intent of many of the act's provisions. For example, in some instances, the plain meaning of words cannot be used because the resulting interpretation would be inconsistent with other provisions of the act or what appears to be the overall purpose of the act, or would be plainly absurd. In addition, the legislative history of the act is generally unhelpful. The Introducer's Memorandum in Support for S.5927 (the "Introducer's Memo") does not discuss the bill in detail,¹⁵ and the available Assembly and Senate debate transcripts are not illuminating either.¹⁶ Although the Introducer's Memo asserts that the bill would represent an enactment of the Millstein Committee's "Model Governance Principles," the Millstein Committee's recommendations and analysis are not always helpful. Moreover, a comparison between the PAA Act and the committee's principles reveals that the two diverge in significant areas.¹⁷

Under these circumstances, the primary guiding principle for interpreting the PAA Act should be a rule of reason that is, as best as can be determined, consistent with legislative intent in passing the bill.¹⁸ As courts have advised, the primary consideration in interpreting statutes is to ascertain and give effect to the intention of the Legislature.¹⁹ "When several provisions of a statute are drafted

in such a way that literal interpretation could result in a 'skewed and inartful interlock,' the court will 'approach the statute's provisions sequentially and give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions.'"²⁰ Statutes should be read "so as to avoid an unreasonable or absurd application of the law."²¹ "While some statutes are so clear as to foreclose courts from construing or interpreting them, in an appropriate case the courts may depart from a too literal reading of the statute when such a reading destroys the meaning, intention, purpose or beneficial end for which the statute was designed."²²

What follows is an application of these principles to selected areas of the PAA Act. They are not the only areas of ambiguity in the act, nor are they necessarily the most important, but they highlight some of the PAA Act interpretation obstacles that face local authorities and provide a framework for applying the act as a whole.

Defining Local Authority

The first, and arguably the most challenging, issue a would-be local authority must confront is whether the act even applies to it. Obviously this inquiry is critical because a determination that the PAA Act applies requires the entity to undertake obligations that range from burdensome reporting requirements to a potential alteration of the entity's board structure or even the way the entity is permitted to do business.

The PAA Act defines a local authority as:

- (a) a public authority or public benefit corporation created by or existing under this chapter or any other law of the state of New York whose members do not hold a civil office of the state, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government or governments; (b) a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government; (c) a local industrial developmental agency or authority or other local public benefit corporation; or (d) an affiliate of such local authority.²³

Paragraphs (a) and (c) typically don't present any interpretation problems. The authorities described in these provisions are (or are closer to) what one might call "classic public authorities," like the New York City Health and Hospitals Corporation and the New York City School Construction Authority. The primary interpretation problem lies in paragraph (b), which on its face broadly includes any not-for-profit corporation as long as it is "affiliated with, sponsored by, or created by" a local government.²⁴

At first glance, it would appear as though Public Authorities Law § 2(2)(b) encompasses not-for-profit corporations ranging from a locally controlled economic development corporation (such as the New York City Economic Development Corporation) to a private not-for-profit corporation that receives contractual or grant funds from a local government. Whereas it seems clear that municipally created, controlled and funded local development corporations should be subject to the PAA Act, it at least intuitively seems inappropriate to subject (say) a municipal contractor to the full scope of the act simply because it is, in whole or in part, “sponsored by” the municipality as a result of receiving contract payments. If a distinction between the two is appropriate, and it is hard to argue that it is not, the question is where along the continuum should the line be drawn?

Although there is scant authority to guide localities on the meaning of this provision, what little there is suggests that the targeted entities were those that manage public projects, issue debt, or otherwise engage in economic development activities on behalf of the locality. In its report, the Millstein Committee indicated that public authorities are those “created to undertake specific purposes to serve the public” and those whose “activities cover a wide spectrum of public projects and initiatives, from building infrastructure to developing and maintaining the State’s waterways to financing debt.”²⁵ Similar statements can be found in the State Comptroller’s reports on public authorities,²⁶ as well as the Introducer’s Memo.²⁷ With this scant authority in mind, the three criteria set forth in Public Authorities Law § 2(2)—namely, “affiliated with, sponsored by, or created by”—will be looked at *seriatim*.

The PAA Act defines “affiliated with” as “a corporate body having substantially the same ownership or control as another corporate body.”²⁸ The question remains, however, what constitutes sufficient “ownership or control” by a local government to bring an entity within this definition? Arguments ranging from mere appointment authority by a local elected official to the type of corporate domination necessary to pierce the corporate veil could be made.²⁹ Neither extreme seems appropriate. The day-to-day operations of a not-for-profit corporation cannot be said to be controlled by a local official where the board members are appointed for a term of years and cannot be removed at will by the official, and the “complete domination” necessary to impose corporate liability would seem to be too strict a test. A more reasonable approach would take into account appointment authority, but would additionally require that a majority of the board be appointed by one or more local government officials and serve at the pleasure of such official(s). Such a test would serve to include those entities that are truly controlled by the local government, as the PAA Act requires,³⁰ but would exclude those that are free to manage their affairs without government interference.

The “sponsored by” aspect of Public Authorities Law § 2(2) might be the most problematic inquiry of the local authority assessment. The American Heritage Dictionary of the English Language defines “sponsor” as including “[o]ne that finances a project or an event carried out by another person or group.”³¹ This “plain meaning” would include not-for-profit corporations that contract with local governments (as previously noted), as well as other entities, such as cultural institutions, that receive grants from the locality to subsidize their operations and programs. In this instance, however, the dictionary definition of sponsorship should not exclusively control.³² Though evidence of the Legislature’s intent is slim in this area, it seems doubtful that the State Legislature intended the PAA Act to invade the arm’s-length contracting process or to apply to independent entities merely because they receive government grants. Given the overall intent of the PAA Act to regulate those entities that act as an arm of (or at least on behalf of) state and local governments,³³ a workable definition of “sponsored by” probably should take into account programmatic control as well as funding. Such a definition would include entities that issue debt for local government purposes and those that are at least primarily supported by the local government and use such support to further programs controlled by the local government. More autonomous entities, such as not-for-profit corporations that expend government funds pursuant to competitively procured contracts or pursuant to arrangements that give them programmatic and administrative control over their own activities, would be excluded.

As with the other two criteria, “created by” on its face can be overly broad in light of the purposes of the PAA Act, since it is entirely possible for a local government to create a not-for-profit corporation only to relinquish control over it at a later date. One way this can happen is for a local government, as accommodation to a private party, to perform the legal requirements necessary for incorporation (including acting as the corporation’s incorporator and/or initial directors), then subsequently turn over legal control of the entity to such party.³⁴ Another is where a not-for-profit corporation created and controlled by a local government becomes independent over a period of time because of changes in government policy or for other reasons.³⁵ It seems doubtful that the PAA Act was intended to cover such entities that have no connection to a local government other than the mere fact of creation. Although the PAA Act and its legislative history provide no direct guidance here, the other state and local authorities described in Public Authorities Law § 2 that include an element of creation are “public authorit[ies] and public benefit corporation[s] created by or existing under this chapter or any other law of the state of New York,” which suggests that legislation or some other official policy declaration might be an appropriate prerequisite. If this is the case, then it could be argued that a local law, rule or regulation authorizing the corporation’s creation would

be necessary before it would be considered “created by” a local government.

In sum, if the above criteria were to be applied, those entities that the Legislature appears to have been concerned with when it passed the PAA Act—namely, not-for-profit corporations established for economic development and other local public purposes—would be included within the scope of the PAA Act. Excluded would be entities like local libraries and similar fund-raising entities that have decision-making autonomy.³⁶

Scope of Local Authority Compliance

After a local authority determines that it should be classified as such, there still remains the question of the extent to which the PAA Act (or even the Public Authorities Law as a whole) applies to the authority. Of course, in instances where the act differentiates between state and local authorities, the portion of the act the local authority must comply with is clear. However, in at least two areas, the PAA Act creates interpretation problems: (1) where the PAA Act refers to “public authority” rather than “local authority” or “state authority,” and (2) where the PAA Act refers to a “local authority heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York” rather than just “local authority.” Upon closer examination, however, these definitional inconsistencies appear to be the result of careless drafting and should not affect application of the PAA Act to local authorities (except where such authorities are otherwise excluded). Again, the guiding principle should be what appears to be the Legislature’s intent rather than the mere fact that different terminology was used.³⁷

Where the PAA Act refers to “public authority” (which the act does not define) rather than “local authority” and/or “state authority” (which are the proper, defined terms), the errors likely were the result of: (1) hasty, last-minute drafting and/or the wholesale inclusion of new sections without proper conforming edits; or (2) simply careless initial drafting that went uncorrected. Most of the problematic provisions arguably belong in the first group. These provisions—namely those contained in PAA Act §§ 20 (relating to property dispositions), 27 (relating to the Authority Budget Office)³⁸ and 28 (relating to the Office of the State Inspector General)—were added to Governor’s Program Bill #69 (S.5642) in June 2005 to create Governor’s Program Bill #90 (S.5927).³⁹ In these instances there are indications in the PAA Act that the intent of the drafters was to apply §§ 20 and 27 to state and local authorities despite the incorrect use of terminology.⁴⁰ Both PAA Act §§ 20 and 27 include an isolated reference to Public Authorities Law § 2,⁴¹ as well as references that appear to complement (albeit imperfectly) local authority reporting requirements.⁴² The scattered provisions in the second group include Public Authorities Law § 2824(2)-(3). Here, “public authority” seems to be used as shorthand for state and local authority, which are not generalized in this man-

ner in other subdivisions of that section. Because there appears to be no reason to create a separate (sub)category of public authorities for these isolated sections, one should assume “state and local authority” was intended.⁴³

Provisions of the PAA Act that refer to a “local authority heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York” were included in the initial version of the PAA Act (S.5642), so their inclusion in the final version of the PAA Act was not the result of the redrafting that took place in June 2005. Rather, the drafters apparently thought in these instances—namely, those contained in PAA Act §§ 15-17 (relating to annual reports, budget reports and independent audits, respectively)—the language was an appropriate technical change to conform the provisions to their state authority counterparts, which in part were already included in state law. Although the wisdom of these “technical changes” is debatable, “local authority heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York” likely should be construed to mean “local authority” as that term is defined in Public Authorities Law § 2(2).⁴⁴ Both terms are used seemingly interchangeably in the sections in question,⁴⁵ and these sections relate to other provisions applicable to “local authorities.”⁴⁶

The foregoing should not lead one to conclude that all references to “public authority” in the Public Authorities Law must be construed to include local authorities as defined by Public Authorities Law § 2(2). Although the Introducer’s Memo states that section 2 of the PAA Act “would amend section 2 of the Public Authorities Law to define public authorities for the purposes of the Public Authorities Law to include State and local authorities,”⁴⁷ the provision in fact defines “local authority” and “state authority,” not “public authority.” There does not appear to be any other indication that the drafters (let alone the Legislature) contemplated that Public Authorities Law § 2(2) would have such broad application. One would think that there should be more legislative clarity before blindly imposing an entire chapter on entities not previously subject to such regulation.⁴⁸

Board Member Independence

Another ambiguous area of the PAA Act relates to the concept of board member independence. The two aspects of the PAA Act that require “independent” board members are the PAA Act’s mandatory committee provisions,⁴⁹ and the provision that requires board independence.⁵⁰

With respect to the latter, the PAA Act provides:

Except for members who serve as members by virtue of holding a civil office of the state, the majority of the remaining members of the governing body of every state or local authority shall be independent members...For the purposes of this

section, an independent member is one who:

(a) is not, and in the past two years has not been, employed by the public authority or an affiliate in an executive capacity;

(b) is not, and in the past two years has not been, employed by an entity that received remuneration valued at more than fifteen thousand dollars for goods and services provided to the public authority or received any other form of financial assistance valued at more than fifteen thousand dollars from the public authority;

(c) is not a relative of an executive officer or employee in an executive position of the public authority or an affiliate; and

(d) is not, and in the past two years has not been, a lobbyist registered under a state or local law and paid by a client to influence the management decisions, contract awards, rate determinations or any other similar actions of the public authority or an affiliate.⁵¹

“Affiliate” is defined earlier in the PAA Act as “a corporate body having substantially the same ownership or control as another corporate body.”⁵² For full board assessments, one must first exclude any “members who serve as members by virtue of holding a civil office of the state.” Then, the independence criteria must be applied. For committee assessments, one applies only the independence criteria.

Several aspects of this definition create interpretation issues. First, the definition of “independent member” is set forth in § 2825 and, by its terms, is for the purposes of that section only. Technically, therefore, the term “independent member” in § 2824 (the provision relating to committees) is undefined. In keeping with a rule of reason for interpretation of the act, however, it should be assumed that the Legislature intended the definition to apply to both sections.

Second, the provision that states “[e]xcept for members who serve as members by virtue of holding a civil office of the state” technically does not take into account local authority boards. Although “civil office of the state” appropriately refers exclusively to state officials in the context of the definitions of state and local authority,⁵³ there appears to be no valid reason to treat state and local officials differently for the purposes of Public Authorities Law § 2825(2). Extending “civil office of the state” to local *ex officios* would be the preferred construction of Public Authorities Law § 2825(2) and the Legislature should clarify its intent in this regard.

Finally, even if local *ex officios* are excluded from the board membership assessment, further construction problems potentially exist in Public Authorities Law § 2825(2)(a)-(b)⁵⁴ for: (1) local officials who do not serve *ex officio*, and (2) mandatory committee members who are local officials (whether or not they serve *ex officio*). Both paragraphs (a) and (b) of Public Authorities Law § 2825(2) conceivably could prevent local officials from being considered independent (thereby disqualifying them from service on the required committees and potentially disqualifying them from service on local authority boards) because the local government could be construed to be an affiliate of the local authority⁵⁵ and/or local governments occasionally are reimbursed in excess of \$15,000 for services their employees perform for local authorities. There are, however, several reasons why such a construction would be unreasonable and that these provisions should be construed in accordance with their likely purpose—namely, to regulate such relationships that involve private entities: (1) use of the word “executive,” rather than “public official” or “public officer” (as used in Public Authorities Law § 2825(1)), is consistent with confining the regulation to such entities; (2) Public Authorities Law § 2825(1) contains a caveat that indicates that public officers should not be ineligible for local authority board membership by reason of their public office; and (3) most importantly—and possibly the impetus behind the modification to Public Authorities Law § 2825(1)—the Millstein Committee in its 2004 report expressly recognized that employment with the state or local government should not be a basis for declaring a board member non-independent.⁵⁶

In sum, as the discussion in the two preceding paragraphs highlights, local authorities act at the behest of local governments and, therefore, it makes sense to ensure that they remain accountable thereto. It would be unreasonable to permit (or in some cases require) a local government to establish a local authority to carry out a public project only to require that government to relinquish control to “independent” individuals. Any interpretation of the independence requirement of Public Authorities Law § 2825 should not lose sight of this “political reality[.]”⁵⁷

Conclusion

As the foregoing illustrates, interpreting the PAA Act can be difficult in many respects. Rather than addressing these interpretation issues and fine tuning the PAA Act, many subsequent efforts to amend the act have focused on adding to the act, frequently seeking to create additional broad provisions conceived with a particular large authority or transaction in mind and insufficient regard for the potentially detrimental scope of the provisions (particularly with respect to smaller local authorities).⁵⁸ How state and local authorities should be regulated involves policy determinations that are beyond the scope of this article. However, those who seek such regulation should be mindful of the potential scope and implications

of any proposed regulation given the varying size and functions of authorities in the state. As the Millstein Committee admonished in 2004, “governance reform is not a ‘one-size-fits-all’ solution.”⁵⁹

“How state and local authorities should be regulated involves policy determinations that are beyond the scope of this article.”

Endnotes

1. Public Authorities Accountability Act, ch. 766 L. 2005, 228th Sess. (N.Y. 2005) (codified as amended at PUB. AUTH. LAW §§ 2 *et seq.* (2006)).
2. See, e.g., CITIZENS BUDGET COMM’N, PUBLIC AUTHORITIES IN NEW YORK STATE 1 (Apr. 2006).
3. See generally *id.*, at 1; NEW YORK STATE COMM’N ON PUB. AUTH. REFORM REPORT 3 (May 17, 2006).
4. AUTH. BUDGET OFFICE, ANNUAL REPORT ON PUBLIC AUTHORITIES IN NEW YORK STATE 2 (July 1, 2009).
5. [Http://www.osc.state.ny.us/pubauth/byclass.htm](http://www.osc.state.ny.us/pubauth/byclass.htm) (N.Y. State Office of the Comptroller website, as of November 25, 2009). It isn’t precisely clear why there is such a discrepancy, though the difference probably is the result of how one defines “public authority” and/or whether subsidiaries are included in the total.
6. PUBLIC AUTH. REFORM REPORT, *supra* note 3, at 3.
7. See, e.g., N.Y. STATE OFFICE OF THE COMPTROLLER, PUBLIC AUTHORITY REFORM—REINING IN NEW YORK’S SECRET GOVERNMENT, 7-10 (Feb. 2004).
8. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002).
9. See, e.g., N.Y. STATE OFFICE OF THE COMPTROLLER, PUBLIC AUTHORITIES IN NEW YORK STATE—ACCELERATING MOMENTUM TO ACHIEVE REFORM, 15-24, 32-33 (Feb. 2005).
10. S.7301, 227th Sess. (N.Y. 2004).
11. This committee was reconstituted as the New York State Commission on Public Authority Reform in February 2005 pursuant to Executive Order 135 (the “Millstein Commission”).
12. N.Y. STATE PUB. AUTH. GOVERNANCE ADVISORY COMM., DRAFT INTERIM REPORT 7-11 (June 22, 2004).
13. A shorter version of the bill (Governor’s Program Bill #69–S.5642) had been introduced a few weeks earlier. This version of the bill was expanded during legislative negotiations to include entire sections relating to property dispositions, the Authority Budget Office and the Office of the State Inspector General.
14. As of the date this article was completed, a bill that would substantially amend the PAA Act has passed the Assembly. See A.40012, 232nd Sess. (N.Y. 2009) (hereinafter “A.40012”). Preliminary indications are that the Senate will pass a parallel version of the bill and that the Governor will sign the bill into law. Although A.40012 contains drafting ambiguities similar to those contained in the original PAA Act, and likely creates additional interpretation problems similar to the ones addressed herein, the bill’s provisions would not directly impact on the specific issues discussed in this article. Accordingly, this article does not discuss this bill in detail. However, those instances where A.40012 touches upon the issues discussed herein are noted.
15. See Memorandum, Sen. Leibell, in Support of S.5927, 228th Sess. (N.Y. 2005).
16. See, e.g., Senate Debate Transcripts for ch. 766 L. 2005, 228th Sess. (N.Y. 2005); Assembly Debate Transcripts for A.5626, 228th Sess. (N.Y. 2005); Assembly Debate Transcripts for A.9010/A.9010C, 227th Sess. (N.Y. 2004).
17. The PAA Act did not charge an administrative entity with interpreting the act or enforcing any of its provisions, and failed to include any civil or criminal enforcement mechanisms, which meant that there would be little chance that PAA Act issues would be resolved by means of administrative or judicial guidance (other than non-binding Attorney General opinions addressing state authority matters). A.40012 would give the newly created Authorities Budget Office, which in effect would be an enhanced version of the Authority Budget Office created by the PAA Act, the power to promulgate regulations to effectuate the purposes of sections 1-7 and 2800-2932 of the Public Authorities Law that relate to its statutory responsibilities. See A.40012 § 5 (proposed new Public Authorities Law § 6(1)(h)). However, A.40012 stops short of granting the agency any civil enforcement authority greater than compelling compliance with its subpoena power. As previously noted, there is no case law addressing the PAA Act, and the two reported Attorney General opinions discussing the act have dealt with fairly narrow property disposition issues. See 2007 Op. Att’y Gen. F2; 2006 Op. Att’y Gen. F4. In addition, there is a surprising lack of helpful articles and other secondary sources.
18. Even though the two Attorney General opinions discussing the PAA Act, see note 17, *supra*, may not constitute significant persuasive authority beyond the circumstances presented and may be flawed in certain respects, these opinions are notable for their adoption of an interpretative view of the PAA Act that seeks to reconcile the language of the act with its overall purpose, while at the same time taking into consideration the programmatic needs and realities of authorities.
19. *Consedine v. Portville Cent. Sch. Dist.*, 12 N.Y.3d 286, 290 (2009); *Riley v. County of Broome*, 95 N.Y.2d 455, 463-64 (2000).
20. *Ryder v. City of New York*, 32 A.D.3d 836, 837 (2d Dep’t 2006) (quoting *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420 (1990)), *appeal dismissed*, 8 N.Y.3d 896 (2007).
21. *Id.* (quoting *People v. Santi*, 3 N.Y.3d 234, 244 (2004) (internal quotation marks omitted)).
22. *Khrapunskiy v. Doar*, 49 A.D.3d 201, 204 (1st Dep’t) (citing McKinney’s Statutes § 111 (1971)), *appeal dismissed*, 10 N.Y.3d 926 (2008).
23. N.Y. PUB. AUTH. LAW § 2(2).
24. Though not discussed in detail here, whether an entity is an affiliate of a local authority because such authority has “substantially the same ownership and control” over the entity could create additional interpretation issues, as well.
25. DRAFT INTERIM REPORT, *supra* note 12, at 1.
26. See, e.g., PUBLIC AUTHORITY REFORM REPORT, *supra* note 7, at 3.
27. Leibell Memorandum, *supra* note 15. Moreover, in reports issued after the passage of PAA Act, both the Millstein Commission and the Authority Budget Office indicated their view that the scope of the act with respect to local not-for-profits extended no further than to local development corporations. See PUBLIC AUTHORITY REFORM REPORT, *supra* note 3, at 24-25, app. K; ANNUAL REPORT ON PUBLIC AUTHORITIES, *supra* note 4, at 2.
28. N.Y. PUB. AUTH. LAW § 2(4).
29. See, e.g., *DeGraziano v. Verizon Commc’ns, Inc.*, 325 F.Supp.2d 238, 245-46 (E.D.N.Y. 2004).
30. The “ownership” element of Public Authorities Law § 2(4) seems out of place in the context of public authorities, since local governments don’t control public authorities via the type of shareholder interest one would see in the private sector.
31. American Heritage Dictionary of the English Language 1679 (4th ed. 2006).

32. See McKinney's Statutes § 234 (1971).
33. See *supra* notes 25–27, and accompanying text.
34. An example of such an entity is a housing fund development corporation created with the assistance of the New York City Department of Housing Preservation and Development pursuant to article 11 of the Private Housing Finance Law.
35. An example of such an entity is the Public Health Research Institute, which was created by Mayor LaGuardia in 1941. See, e.g., http://www.phri.org/overview/over_over.asp (Pub. Health Research Institute website, as of November 25, 2009). The institute, which may even have been “affiliated with” and “sponsored by” New York City, see *City to Support Health Research*, N.Y. Times, July 5, 1942, no longer has any connection with the City.
36. A.40012 would give the new Authorities Budget Office the authority to “develop a comprehensive definition of *public authorities* including a consolidated listing by class and name.” A.40012 § 5 (proposed new Public Authorities Law § 6(1)(j)). It is likely (though not certain) that the drafters of A.40012 intended to give the new Authorities Budget Office the authority to develop comprehensive definitions of “state authority,” “local authority” and/or “interstate or international authority” rather than “public authorities.” See “Scope of Local Authority Compliance,” *infra*. If that is the case and A.40012 becomes law, it is recommended that the new Authorities Budget Office keep in mind the principles discussed in this section when developing those definitions.
37. See McKinney's Statutes § 236 (1971).
38. This uncoded provision would be repealed by A.40012.
39. See *supra* note 13.
40. By its express terms, PAA Act § 28 (codified at N.Y. EXEC. LAW ART. 4-A) does not apply to local authorities.
41. N.Y. PUB. AUTH. LAW § 2896(1) and PAA Act § 27(1) (uncodified).
42. Compare N.Y. PUB. AUTH. LAW § 2800(2) with § 2896(3) and PAA Act § 27(1) (uncodified).
43. A.40012 also includes such inconsistent terminology. See, e.g., *supra* note 36.
44. An argument that “local authority heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York” was intended to mean something different than “local authority” certainly would not be without merit. For example, it could be argued that the phrase was intended to exclude not-for-profit corporations, since such corporations technically are created *pursuant to* the Not-for-Profit Corporation Law.
45. See, e.g., N.Y. PUB. AUTH. LAW § 2800(2).
46. Compare N.Y. PUB. AUTH. LAW § 2800(2)(a)(8) with § 2824(1)(d).
47. Leibell Memorandum, *supra* note 15.
48. A cursory review of the Public Authorities Law to determine which provisions would be subject to local authorities were they to be automatically classified as public authorities under the Public Authorities Law reveals that most (if not all) of the potentially problematic provisions are contained in article 9 of the Public Authorities Law.
49. These committees include an audit committee and a governance committee. See N.Y. PUB. AUTH. LAW § 2824(4), (7). A.40012 would add a finance committee requirement for authorities that issue debt. See A.40012 § 11 (proposed new Public Authorities Law § 2824(8)). With an exception for boards with fewer than three independent members, A.40012 would require such committees to be comprised of a minimum of three independent members, which members would have to constitute a majority of the committee. A.40012 §§ 10-11 (proposed new Public Authorities Law § 2824(4), (7) and (8)).
50. N.Y. PUB. AUTH. LAW § 2825(2).
51. *Id.*
52. N.Y. PUB. AUTH. LAW § 2(4).
53. See N.Y. PUB. AUTH. LAW § 2(1)-(2).
54. Public Authorities Law § 2825(2)(c)-(d) could create similar construction problems, but these probably are not as pressing for local governments and local authorities as those presented by § 2825(2)(a)-(b).
55. See N.Y. PUB. AUTH. LAW § 2(4). An earlier version of A.40012 would have helped clarify this aspect of the PAA Act by changing Public Authorities Law § 2825(2)(a) to read: “an independent member is one who: (a) is not, and in the past two years has not been, employed by the public authority or a related authority or public benefit corporation in an executive capacity.” S.1537-C/A.2209-C, 232nd Sess. (N.Y. 2009) (emphasis added). It is not clear why this change was dropped from A.40012.
56. DRAFT INTERIM REPORT, *supra* note 12, at 10. In its “Frequently Asked Questions,” the Authority Budget Office essentially agreed with the Millstein Committee, but oddly added that the appointment of a government employee to an authority board “is not a recommended practice.” See <http://www.abo.state.ny.us/frequentquestions/faq.html#boardmemberindependence> (Authority Budget office website, as of November 25, 2009).
57. DRAFT INTERIM REPORT, *supra* note 12, at 10. The Millstein Committee's report further notes that it would hurt an authority's ability to attract qualified candidates if state and local officials potentially were disqualified on independence grounds. *Id.*
58. These efforts, including A.40012, arguably have not sufficiently addressed special concerns presented by locally controlled state authorities. These authorities are frequently subjected to the specter of state-level regulation along with state controlled authorities, even though they can have as few as one state board member. See N.Y. PUB. AUTH. LAW § 2(1). An example of such regulation is the provision in A.40012 that would subject all state authorities to State Comptroller contract approval regardless of board composition. See A.40012 § 14 (proposed new Public Authorities Law § 2879-a).
59. DRAFT INTERIM REPORT, *supra* note 12, at 7. The Millstein Committee sought to address differences among state and local authorities through the use of a waiver mechanism that could serve to exclude authorities from any inappropriate requirements. *Id.* at 11. That waiver mechanism was not included in the PAA Act, and A.40012 would only include a waiver option for annual reporting requirements. See A.40012 § 6-a (proposed new Public Authorities Law § 2800(4)).

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The Reality v. Legality of Conduit Financing by the State—Public Authorities, the Chosen Financiers

By George H. Weissman

Introduction

Conduit financing, or otherwise referred to at times as conduit borrowing, is the mechanism for obtaining tax exempt financing for certain private and also public entities in New York State. For example, in order to fund and replace the “House That Ruth Built,” the New York City Industrial Development Agency has issued in excess of \$1.2 billion of tax-exempt bonds to help finance the design and construction of the new Yankee Stadium, also sometimes called the “House That George Built.”¹ Not to be outdone, the New York Mets have begun the 2009 baseball season in a new stadium known as “CitiField” that in all likelihood would not have been built without approximately \$630 million of tax exempt financing, again issued by the New York City Industrial Development Agency.²



commentators and the Internal Revenue Service, it is the explosion of conduit financing by governmental entities, especially the State of New York, for both governmental and arguably non-governmental purposes, that has caused State Comptrollers for the last forty years to rail against the issuance of state-supported debt by the State’s public benefit corporations. Also known as public authorities, these legislatively created public corporations⁵ are now responsible for well over ninety percent of state-supported debt issued on behalf of New York State.⁶ It is this practice, commonly referred to as “backdoor borrowing,”⁷ that has caught the attention of commentators and reformers alike.

The purpose for the creation of public authorities is simple: since 1846, the New York State Constitution has prohibited the State from contracting debt without a referendum approved by the voters, other than for short-term debt, refunding of existing debt, maintaining the peace, or fighting forest fires.⁸ This constitutional requirement, also known as the people’s resolution, has made financing New York’s needs and desires for public improvements exceedingly complicated. While the State has continually attempted to finesse this constitutional restriction through varying means, public authorities have provided the most effective and legally defensible mechanism available for obtaining borrowed funds through the long term capital market in order to undertake necessary (and in some instances questionable) spending and improvements.

This article will examine types of financing by public authorities, the evolution of conduit financing on behalf of the State, legal issues that have affected conduit financing, and the form of conduit financing and its usage today. It is not meant to be exhaustive, but rather to provide the reader with an insight of how the State has managed to meet its financing needs.

Borrowings by Public Authorities

Exactly when the public authorities began conduit financing on behalf of the State is open to debate. In finding the answer to this question it is first important to understand the nature of borrowing by public authorities. From the State’s perspective, there are essentially three types of debt offerings by public benefit corporations: debt for the corporate purposes of, and paid directly by, a public authority from revenues generated by tolls, fares, or other sources under its control; conduit borrowings by a public authority on behalf of and paid for by non-governmental or governmental entities, and debt paid for by State ap-

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By definition, the Yankees and Mets stadium projects are traditional forms of conduit financing, which is defined as:

A form of financing in which a government or government agency lends its name to a bond issue, although it is acting only as a conduit between a specific project and bondholders. The bondholders can look only to revenues from the project being financed for repayment, and not by the government or agency whose name appears on the bond.³

A multitude of not-for-profit entities in New York including colleges, universities, hospitals, and museums, as well as for-profit entities, are beneficiaries of conduit financing.⁴

While the use of tax-exempt financing for stadiums and other items such as golf courses has raised the ire of

propriations through a service contract, statute, or similar arrangement—State-supported debt. Certain debt offerings may involve more than one of these debt payment features.

The first group of debt issuers would include entities such as the Port Authority of New York and New Jersey, the Metropolitan Transportation Authority (including the Triborough Bridge and Tunnel Authority), or the New York State Thruway Authority. Each of these public authorities issues debt backed by revenues derived from operations that may consist of tolls, fares, rents, concessions, or other sources. Each of these public authorities issues debt for the purpose of executing capital improvements to its operating infrastructure. In the case of the Port Authority, this includes the Hudson River transportation crossings south of the Tappan Zee Bridge, the three major airports in the New York metropolitan region, certain port operations in both New York and New Jersey, and the PATH railroad system. The Metropolitan Transportation Authority runs the largest mass transportation system in the United States, which includes subways, buses, commuter railroads, bridges, and tunnels. The Thruway Authority is responsible for the longest tolled highway system in the United States.

Despite what some may think, this type of public authority as originally envisioned does not fall into the category of conduit borrower on behalf of the State. Although both the Port Authority and the Thruway Authority initially received state appropriations to start their missions, both have sufficient operational revenues to maintain their self sufficiency without additional revenues provided from state-enacted sources. Over the years the mission of both the Port Authority and the Thruway Authority have been expanded to undertake programs or perform operations that may have formerly been under the jurisdiction of a state. However, both these public authorities have been able to integrate these new functions without reliance of state-generated revenues. As will be discussed *infra*, the Thruway Authority has become a conduit borrower for the State of New York, while the states of New York and New Jersey have expanded the mission of the Port Authority. And, although the Metropolitan Transportation Authority is highly dependent on State of New York-imposed taxes and fees for maintaining its operations on a self-sustaining basis, the issuance of certain debt by the Metropolitan Transportation Authority is for its own corporate purposes and not dependent on the State for support.

The second category of debt is issued by public authorities such as the Dormitory Authority, Housing Finance Authority, and Environmental Facilities Corporation. Each of these entities issues debt backed by agreements by a party other than the State. The Dormitory Authority issues debt for independent colleges and

universities, not-for-profit corporations providing medical and residential health care services,⁹ educational, or other public services. The Housing Finance Agency, *inter alia*, offers financing to for-profit and not-for-profit developers for the purpose of encouraging the construction and preservation of affordable housing in communities throughout New York State.¹⁰ Again, these types of debt offerings are generally not for State purposes and are not dependent on state appropriations for the payment of debt service.

It is the last category of borrowing—by public authorities and backed by State appropriations—that has caused many to believe that the constitutional prohibition against borrowing found in article VII, § 11 of the New York State Constitution has been rendered meaningless. Public authorities that issue debt but do not construct, operate, maintain, and use the improvements to liquidate the debt financed are generally viewed as conduit financiers. Even the public authorities that liquidate their own indebtedness may employ conduit financing for their own purposes or those of the State. The State has employed public authorities to borrow on a conduit basis to eliminate short-term borrowing or resolve short-term operating deficits.

"Today, conduit financing by public authorities is virtually the exclusive source of borrowed funds for State infrastructure needs."

In addition, the State does not only employ this financing mechanism primarily for its capital needs. The State has created public authorities to rectify the finances of municipalities when access to the capital markets has been curtailed due to poor financial management and has also permitted municipalities to use the proceeds of debt issued by public authorities to circumvent the constitutional tax and debt limitations found in article VIII of the New York State Constitution. The Municipal Assistance Corporation created for New York City in 1975,¹¹ and for the City of Troy in 1995,¹² as well as the Nassau County Interim Finance Authority created in 2000,¹³ are just three such examples of public authorities that were employed to provide market access for municipalities to remedy both operating deficits and the need to obtain capital for infrastructure improvements through the issuance of debt. The New York City Transitional Finance Authority was created in 1997¹⁴ for the purpose of permitting the City to obtain capital for infrastructure as it bumped up against the constitutional tax and debt limits. Additionally, the Dormitory Authority, as well as the Environmental Facilities Corporation, issue debt on behalf of municipalities for statutorily enumerated purposes.¹⁵

Conduit Financing for the State

Today, conduit financing by public authorities is virtually the exclusive source of borrowed funds for State infrastructure needs. The reason for this is quite simple. Since 1990, New York has undertaken referenda for six different bond acts totaling approximately \$14.6 billion. Of these six proposals that were put before the voters, only two passed, totaling \$5.65 billion.¹⁶ In fact, annual expenditures for state-related capital purposes over the next five years are estimated at \$46.6 billion. Of this amount, approximately twenty percent will be federal funds. Slightly more than twenty-six percent will be spent on a pay-as-you-go basis from State resources, and this assumes a better than twenty percent increase from current pay-as-you-go spending in State Fiscal Year 2009-10. Therefore, more than half of the State's total capital spending will be funded with debt. If past practice holds true, ninety percent or more of the remaining spending will be from debt that is issued by public authorities on a conduit financing basis.¹⁷

Putting aside the various proposals developed by the Office of the State Comptroller and others over the past three decades, only one of which has been put to the voters in 1995 and rejected, the need in New York State for voter approval of full faith and credit general obligation debt remains a vestige of the 1846 constitutional convention. At that time the ill sought to be cured was near bankruptcy of New York and other states that had become enamored with public improvements such as canals and railroads and were responsible for the debt issued to construct these improvements.¹⁸ Once the Erie Canal was built and successful, every legislator wanted a canal in his district. Has anything changed over the last one hundred-sixty years?

The questions for the reader are at least threefold: first, what is State-supported debt and how is it issued by public authorities; second, when did the State start using public authorities for the conduit financing of State-supported debt, and third, what capital (and other) needs are funded by conduit borrowing through the use of State-supported debt issued by the State's public authorities? State-supported debt is currently defined as

bonds or notes, including bonds or notes issued to fund reserve funds and costs of issuance, issued by the state or a state public corporation for which the state is constitutionally obligated to pay debt service or is contractually obligated to pay debt service subject to appropriation, except where the state has a contingent contractual obligation.¹⁹

Bonds and notes for which the State is constitutionally required to pay debt service are general obligation, full faith and credit debt. The debt issued by a public

authority that is paid for by the State, subject to appropriation by the Legislature, is State-supported debt.

There are two primary means that public authorities use to issue State-supported debt. Formerly, the most common method involved a lease through a lease-purchase or lease-lease-back arrangement between a State agency and public authority. Under this method, a public authority either obtains title to, or a leasehold interest in, the capital improvement being financed. Concurrently, the public authority issues debt for the improvement and the improvement is leased back to the state agency. The lease back to the state agency requires that agency, subject to appropriation by the Legislature, to pay the public authority an amount annually equal to the debt service (principal and interest) due on the bonds and generally any other costs incurred by the public authority in connection with the administration of the outstanding bonds, which may include fees due any credit or liquidity facility or trustee fees. Sometimes the underlying improvement serves as security to bondholders in the event debt service is not paid; other times, the underlying improvement in a lease financing arrangement is not available to bondholders in the event debt service is not paid.

The second method used to issue State-supported debt involves some form of a contract, sometimes called a service contract or financing agreement. Under this arrangement there is no transfer or leasing of the improvement being financed and the improvement is not available as security for the bondholder. Rather, the state agency and the public authority execute an agreement whereby the State agency agrees to make payments to the public authority, subject to appropriation by the Legislature, to cover annual debt service and the other previously mentioned costs associated with the debt. The public authority makes the bond proceeds available for the improvement being undertaken.

There may be a third method of issuing what would appear to be State-supported debt by a public authority that requires no underlying agreement. Instead, the public authority that issues the debt is statutorily directed to provide a certification to the State Comptroller for the amount required to pay debt service and other associated costs.²⁰ This amount is paid subject again to appropriation by the Legislature. The New York State Comptroller considers this debt to be contractual.²¹ The explanation for this categorization may be that the payment mechanism is being viewed as a statutory contract or that some form of payment agreement that is not statutorily required has been executed between a state official and the public authority.

Pinpointing when the first issuance of state-supported debt occurred is difficult. For example, a series of enactments in the 1950s authorized the State to enter into agreements with the then New York State Employees' Retirement System to lease or purchase (i) a building

for the needs of the Retirement System, (ii) buildings in Albany and Syracuse, and (iii) a complex of State buildings in Albany on what is now known as the Harriman State Campus.²² At that time a limited use of the State Employees' Retirement System assets to provide financing for State buildings with a guaranteed rate of return from the State through lease payments garnered little notice, possibly due in part to the fact that the State Comptroller is also the sole trustee of the State Employees' Retirement System.

As noted in the Staff Report on Public Authorities prepared by the Temporary State Commission on the Coordination of State Activities in 1956 (also known as the Hults Commission after its Chairman, Senator William Hults), all public authorities required some form of initial governmental support in order to begin undertaking and advancing the public improvement for which they were created.²³ While repayment of these advances was somewhat haphazard, in the event the public authority issued bonds and started operating the improvement, the State was not called upon for debt service support. This is true even of the Thruway Authority, which was authorized by the voters in 1951 to issue up to \$500 million of debt that was guaranteed by the State.

Based upon the definition that now exists in the State Finance Law related to state-supported debt, it can be argued that the Dormitory Authority of the State of New York provided the first conduit financing by a public authority. Originally created in 1944²⁴ to assist the State's eleven Teacher Colleges (now part of the State University of New York) by financing, constructing, and operating dormitories and attendant facilities, the Dormitory Authority sold its first bonds in July 1949.²⁵ In December 1954, the Dormitory Authority and the State University signed a lease removing the Authority from the direct operation and maintenance of the dormitories. The lease required the Dormitory Authority to finance and build the dormitories and then turn them over to the State University, which in turn provided sufficient funds for annual debt service payments and other costs.²⁶ Although the argument remained that the room rentals and fees liquidated the debt, the underlying lease required payment by the State University, an agency of the State.²⁷

The model of using lease payments to public authorities to support the issuance of conduit debt was soon followed elsewhere. In 1962, the State decided to undertake the expansion of the educational facilities of the State University of New York. Rather than seeking approval of the voters, Governor Rockefeller proposed, and the Legislature passed, amendments to the New York State Housing Financing Agency Act authorizing a new financing program.²⁸ These amendments, *inter alia*, authorized the Housing Finance Agency to enter into leases with the newly created State University Construction Fund, a public benefit corporation.²⁹ Tuition and fees from students

were paid into the State University Income Fund and these moneys were available to be paid under the lease between the Construction Fund and the Housing Finance Agency for debt service payments on outstanding bonds.

Quickly using the model designed for expanding the State University, in 1963 the Legislature passed and Governor Rockefeller signed legislation for the improvement and expansion of State facilities for the mentally disabled.³⁰ In order to obtain financing for this program, the Mental Hygiene Facilities Improvement Fund, a public benefit corporation, was created with the power to enter into leases with the Housing Finance Agency. The Mental Hygiene Facilities Improvement Fund received all payments for the care, maintenance, and treatment of patients, and these moneys were deposited in the Mental Hygiene Services Fund. The Housing Finance Agency issued bonds based upon lease payments to it by the Mental Hygiene Facilities Improvement Fund from the Mental Hygiene Services Fund.

In both these programs a public benefit corporation was placed between the State and the public authority issuing debt, insulating the State from the transaction. However, State funds, whether tuition or patient revenues, were the actual source of payments. And although legal support exists for the theory that funds of a public benefit corporation or public authority are not funds of the State,³¹ there is little doubt that this represents conduit financing on behalf of the State. Finally, it would be dilatory not to note that the Housing Finance Agency bonds originally issued for both the State University and Mental Hygiene programs contained the moral obligation pledge to replenish reserve funds should they be drawn upon for debt service. While not all moral obligation debt was necessarily State-supported debt issued through conduit financing, the issues related to moral obligation debt have been well documented and will not be discussed.

The lease model between a statutorily created public benefit corporation using moneys for debt service directly from the State, or from the State to an intermediary public authority, became the vehicle for the State to create and use public authorities for the purpose of financing needed public improvements. A fair number of statutes were enacted by the Legislature for numerous purposes.³² During the 1960s, State Comptroller Arthur Levitt started to detail the number and types of non voter-approved debt that, although not technically State debt, had the same fiscal impact.³³ Concurrently, Comptroller Levitt also noted that the State was not only using the lease method with public authorities for the issuance of State-supported debt; the State had also entered into similar arrangements with local governments for the construction of State office buildings and complexes, such as the Empire State Plaza in Albany.³⁴

Another method available to the State to obtain financing is through the use of a service contract or other

financing agreement. One of the first service contracts, however, was not directly for a State program. By 1981, the Metropolitan Transportation Authority's mass transit system had fallen into a state of disrepair. Years of underfunding the capital needs of the largest mass transit system in the country, along with the systematic deferred maintenance of the rolling stock and infrastructure in order to promote the suspect policy of maintaining a low fare, created a system that had failed. The Metropolitan Transportation Authority's Chairman at that time, Richard Ravitch, proposed a number of new funding initiatives in order to begin the process of bringing the system back to a state of good repair.

"State Comptrollers, past, present, and future, will always raise questions when public authorities issue debt that is not backed solely from operations and contains some form of financial support from the State."

For a number of years, the State had appropriated approximately \$40 million annually for the capital purposes of the Metropolitan Transportation Authority's subways and commuter railroads. Chairman Ravitch proposed two changes to that annual appropriation: first, the State should increase the annual appropriation to \$80 million; second, and more importantly, he sought legislative authorization for the Metropolitan Transportation Authority and the State, through the Division of the Budget, to execute one or more service contracts not to exceed thirty-five years, thereby permitting the Authority to issue service contract bonds.³⁵ The statute was clear that payment by the State under the service contract was subject to annual appropriation by the Legislature and the debt issued by the Metropolitan Transportation Authority was not debt of the State.

Subsequently, the use of service contracts or other financing agreements eventually became the preferred method for conduit borrowing on behalf of the State, unless the Legislature determined that the availability of the asset being financed provided additional security for the bonds or other political considerations existed for using a lease structure. From a legal perspective a service contract is a much simpler financing structure than leases between parties that also may include a transfer of title to real property.

Legal Issues

The legal questions relating to public authorities and the issuance of debt have generally stemmed from several constitutional provisions that exist, in addition to the standard prohibition against the State incurring full faith

and credit indebtedness without approval of the voters. In response *Williamsburgh Savings Bank v. State*,³⁶ where the Court of Appeals permitted a claim to be brought against the State based upon a moral obligation theory, the 1938 Constitutional Convention proposed, and the voters approved, several amendments to the State Constitution that affect the issuance of debt. A portion of article X, § 5 prohibits the State or political subdivisions from assuming the liability from the obligations of public corporations and precludes the Legislature from doing so, unless the State or the public subdivision takes over the properties of the public corporation. Article VII, § 8 and article VIII, § 1 prohibit the State or a municipal corporation, respectively, from giving or loaning any money or property to an individual or private entity or from giving or loaning its credit to any individual, private, or public corporation.

State Comptrollers, past, present, and future, will always raise questions when public authorities issue debt that is not backed solely from operations and contains some form of financial support from the State. Although Comptroller Levitt had been questioning the wisdom of the ever-increasing amount of conduit debt that was being issued and financed with State revenues during the 1960s, in 1972 he authored a blistering review of a newly enacted State-supported debt program to be undertaken by the Thruway Authority.

By way of background, in 1971 the voters in New York rejected a proposed transportation bond issue in the amount of \$2.5 billion. The rejection of this bond issue exacerbated a budget problem for the State that was resolved, in part, through increased taxes on fuel that were enacted at an extraordinary session of the Legislature in December 1971.

In 1972, the Legislature enacted a financing proposal that authorized the Thruway Authority to issue bonds that would be used to reimburse the State for expenditures arising from the reconditioning and preservation projects for State highways and other major arterials.³⁷ Those state expenditures were actually incurred by the Department of Transportation. The bonds were to be paid from a portion of the newly enacted fuel taxes that were set aside in a special fund. Included in the agreements between the Department of Transportation and the Thruway Authority for the payment of debt service by the Department were either deeds or leases to the Authority to the portions of the highways where the projects were undertaken. The Thruway Authority then issued use permits to the Department of Transportation coterminous with either the deeds or leases. Upon redemption of the Thruway Authority's bonds, the highways reverted back to the Department of Transportation. These bonds, which could not have a maturity longer than the period of probable usefulness of the work performed, became known as "pothole bonds," as the work performed by the Department of Transportation was basic reconditioning

and minor structural work, which included a fair amount of filling potholes.

Comptroller Levitt's letter to Governor Rockefeller's Counsel recommending disapproval of the bills contained the following arguments that best focus the legal issues that have forever encircled the use of conduit financing by public authorities:

This bill as pointed out quite clearly in the statement of legislative findings, is designed to accomplish, through the use of the financing powers of the Thruway Authority, that which the State cannot accomplish itself through the normal appropriation process because of budgetary limitations. In summary, the bill provides that the State will, in effect, advance its own funds to pay for highway reconditioning and preservation projects undertaken by the Commissioner of Transportation; will be repaid by the proceeds of bonds and notes issued by the New York State Thruway Authority; and, will earmark certain tax revenues, and pledge those revenues, to the Thruway Authority as the fund out of which the debt service requirements of the Thruway Authority on *its* bonds will be met.

In the past, numerous schemes have been devised to avoid the constitutional restrictions on the creation of state indebtedness. Laws creating public authorities have provided that the State would appropriate funds sufficient to meet the debt service reserve requirements of the authorities involved. In other instances, appropriations have been made which serve as a guaranty to the holders of the obligations of public authorities in the event a loan made by an authority is not repaid. This bill goes much further. Certain tax revenues are earmarked, and may be pledged and assigned to a public authority. This pledge of revenues will become part of the contract between the Thruway Authority and its bondholders. Thus, the State is irrevocably committed to the division of tax revenues for the payment of the bonds of the Thruway Authority issued for the purposes of this program.

In our opinion, this financing scheme is a thinly veiled indebtedness of the State, raising a question as to whether it violates the restrictions of Article VII, Section 11 of the New York State Constitution. If,

on the other hand, the *form* of the scheme prevails and the indebtedness is treated as that of the Thruway Authority, it is quite clear that State tax revenues will be the source of payment of the obligations issued by the Thruway Authority, raising a question of constitutionality in view of the last paragraph of Section 5 of Article X of the New York State Constitution.³⁸

Nevertheless, when the agreements to implement this program between the Department of Transportation and the Thruway Authority arrived on Comptroller Levitt's desk for his approval or rejection, he felt constrained to approve the agreements because the Attorney General, as the State's chief legal officer, had previously approved the agreements. This did not, however, stop Comptroller Levitt from questioning the fiscal wisdom on another State-supported borrowing program.³⁹

The courts in New York have always given the Legislature considerable latitude in applying the State Constitution to both borrowing constructs and the use of public authorities. At this juncture the case law is well settled in New York that conduit financing by a public authority for either State or local purposes is legal. Nevertheless, it is still important to understand the Court of Appeals' interpretation of the underlying principles permitting the issuance of this form of debt.

While there are a significant number of cases that have been litigated over the years, several cases provide the actual framework for conduit financing by public authorities. As public authorities were originally created to issue revenue-supported debt, most of the initial cases always raised the question whether the debt of a public authority was also the debt of the state or municipal corporation that obtained use of the public improvement. The drafters of these statutes were always very careful to insure that the Legislature, when enacting a statute for the creation of a public authority, clearly stated that the debt incurred by a public authority is not debt of the municipality or State. While the statutory construct reviewed in *Robertson v. Zimmermann*⁴⁰ by the Court of Appeals was subsequently limited by changes in 1938 to the State Constitution, a fundamental premise was established in *Robertson* that the debt of a public authority is not the debt of the State or municipality.⁴¹

Without intentionally giving short shrift to many of the earlier decisions that review the framework for the issuance of debt, the following two cases, coming after the 1938 constitutional amendments, examine the application of article VIII, § 1 of the State Constitution and the actual limitations of that section as they apply to a municipality in giving or loaning any money, property, or credit to any individual, or private or public corporation. Article VII, § 8 of the Constitution is the companion provision that applies to the State.

The Court of Appeals in *Union Free School District v. Town of Rye*, involving the payment by a town of uncollected school taxes to a school district, held that Article 8, Section 1, while prohibiting the gift or loan of money from a public corporation to an individual or private entity, permits a public corporation (a town) to provide another public corporation (a school district) with a gift of money, so long as it for a public purpose.⁴² This provision of the Constitution does prohibit, however, the gift or loan of credit to an individual, or public or private corporation or association. This decision was the basis for the Court of Appeals in *Comereski v. City of Elmira*, dispensing with the constitutional challenge to a contract between the City of Elmira and the Elmira Parking Authority that provided for the City to make payment to the Authority of not more than \$25,000 in any calendar year should the Authority experience a deficit.⁴³ The Court in *Comereski*, citing *Union Free School District* as “flat authority,” held that the City may make a gift of public funds to a public authority for a proper public purpose.⁴⁴ Most telling in *Comereski* was Judge Desmond’s admonition that

[w]e should not strain ourselves to find illegality in such programs. The problems of a modern city can never be solved unless arrangements like these [used in other States, too] are upheld, unless they are patently illegal. Surely such devices, no longer novel, are not more suspect now than they were twenty years ago when, in *Robertson v. Zimmerman* we rejected a charge that this was a mere evasion of the constitutional debt limitations, etc. Our answer was this: “Since the city cannot itself meet the requirements of the situation, the only alternative is for the State, in the exercise of its police power, to provide a method of constructing the improvements and of financing their cost. The statute in question affords an equitable and proper method of accomplishing such a result.”⁴⁵

The next two cases impacting the use of conduit financing involved the near bankruptcy and bailout of the City of New York in the mid-1970s. In *Wein v. City of New York (Wein I)*, the Court rejected a number of challenges to the Stabilization Reserve Corporation, created for the purposes of stabilizing the City’s finances.⁴⁶ The Court upheld subsidies for debt service to the Corporation whether from the City or the State and stated that debt issued by the Corporation was not debt of the City or the State and that a gift of money to a public authority does not violate the constitutional restriction on contracting debt.

In *Wein v. State of New York (Wein II)*, the Court rejected a challenge against the State providing cash to the City of New York and Municipal Assistance Corpora-

tion for the City of New York that was raised through the issuance by the State of revenue anticipation notes.⁴⁷ A significant portion of the decision in *Wein II* focused on the State’s short-term borrowing practices. The Court was clear, however, that once the State obtains the cash from the borrowing, the payment to the Municipal Assistance Corporation after appropriation does not constitute a gift or loan of credit.

The case that brought forth all the salient issues relating to conduit financing on behalf of the State was *Schulz v. State of New York*.⁴⁸ In 1993, the State enacted a four-year, \$20 billion program designed to aid all modes of transportation.⁴⁹ Both the Thruway Authority and the Metropolitan Transportation Authority were authorized to issue State-supported debt. The Thruway Authority’s debt was to be issued to fund State highways, bridges, and other programs. The Metropolitan Transportation Authority’s debt was authorized for mass transportation purposes. The enabling act was clear that the debt of the two authorities was not debt of the State; the debt was to be considered special obligations of each authority secured solely from appropriations, and agreements or payments by the State were executory only to the extent of moneys available to the State.

Mr. Schulz alleged that the legislation violated the provisions of the Constitution against the State: incurring indebtedness without voter approval in article VII, § 11; lending its credit to a public corporation in article VII, § 8; and the assuming the debt obligation of a public corporation in article X, § 5. This case provided the Court of Appeals with the opportunity to either sanction the continued use of conduit financing by public authorities or bring an end to the use of public authorities for this purpose.

At the outset, Chief Judge Kaye afforded deference to the Legislative enactment that addressed programs in need of public funding and that the burden of proof standard for declaring an act unconstitutional is beyond a reasonable doubt.⁵⁰ Her decision clearly stated that the debt of a public authority, an independent entity with a separate corporate existence from the State, is not the debt of the State. Further, future gifts of money to a public corporation do not invoke the prohibition against the gift of credit to a public corporation. As to Mr. Schulz’s argument that debt issued under the enabling act would constitute moral obligation bonds, as the only hope of repayment was from the State appropriations, Chief Judge Kaye was emphatic—the enabling act means what it says—there is no requirement to appropriate, and annual appropriation does not create debt.⁵¹ While Mr. Schulz did not meet his burden of proof for declaring this act invalid, this decision effectively answered all the questions that had been raised by many commentators and others over the years related to conduit financing by public authorities.

One last case worth noting is the *Local Government Assistance Corporation v. Sales Tax Asset Receivable Corporation*.⁵² From a political standpoint, this litigation was started by two unlikely allies in the arena of conduit financing—the Governor and the Comptroller, as both are involved with the governance of the Local Government Assistance Corporation (“LGAC”). This is also a case that involved imprecise drafting of a statute. The case involved the refinancing of the last several years of Municipal Assistance Corporation (“MAC”) debt incurred in the course of rectifying the City of New York’s finances from the 1970s. In 2003, the City was again facing financial difficulty. Over the Governor’s veto, a mechanism was created to refinance this outstanding MAC debt and use a portion of the State’s sales and compensating use tax made available through appropriation to LGAC. Eliminating the MAC debt service would provide the City with approximately \$500 million for immediate budget relief, while the State would take on additional State-funded debt service to the tune of \$170 million for a thirty-year period. LGAC was to make this payment annually to the City.

While LGAC challenged the enabling act on several grounds, the act did create confusion, as LGAC argued, that the required payment of \$170 million to the City—the amount equaling the new debt service—obligated the State to make the payment without an appropriation. The LGAC argument was not without merit; the literal words of the statute in question did purport to negate the requirement for an appropriation.⁵³ The Court found, however, when reading the enabling act and the LGAC statute together, that the language LGAC found objectionable related to the timing of the payment and not appropriation of the payment.⁵⁴ Nevertheless, drafters should take heed that imprecision can lead to challenges.

Current Conduit Financing

Public authorities are responsible for obtaining most of the borrowed capital funds now available for State or State-related purposes.⁵⁵ The Division of the Budget, recognizing the myriad state-supported conduit financing programs that had been enacted over the years to meet numerous demands, sought to reduce and streamline debt issuance by public authorities for these purposes. In 2001, the State enacted the Revenue Bond Financing Program as a means to efficiently finance multiple purposes in few consolidated transactions.⁵⁶ Under this program, the Dormitory Authority, the Thruway Authority, the Housing Finance Agency, the New York State Environmental Facilities Corporation, and the New York State Urban Development Corporation, also known as the Empire State Development Corporation, were authorized to issue Personal Income Tax Revenue Bonds (“PIT Bonds”). These five public authorities are currently the primary issuers of state-supported debt used for capital improvements. Upon enactment, the Revenue Bond Financing Program

replaced virtually all individual State-supported debt programs with the exception of four specific revenue-based programs.⁵⁷

Putting aside the actual mechanics, the PIT Bond program is a relatively straightforward financing program. On a monthly basis, twenty-five percent of the State’s personal income tax receipts are deposited into the Revenue Bond Tax Fund. So long as an appropriation exists, these funds are available to make payments under the applicable financing agreements between the Division of the Budget and the five public authorities previously mentioned. Once the sufficient funds have been set aside for the monthly payments, the remaining tax receipts flow to the General Fund. In the event moneys are insufficient in the Revenue Bond Tax to meet financing agreement (debt service) payments under the financing agreements, the State’s General Fund is required to fund the difference.

While there can be no liens on the amounts on deposit in the Revenue Bond Tax Fund, the State has agreed that in the event that the Legislature fails to make appropriations to fund all financing agreement payments, or after appropriations there is a failure to make a financing payment, the greater of twenty-five percent of the State’s personal income tax receipts, or six billion dollars (\$6,000,000,000) are locked in the Revenue Bond Tax Fund and not available to fund State operations. This is a strong incentive for the State to “do the right thing.”

“While the Dormitory Authority was created for financing, constructing, and operating dormitories and attendant facilities, the mission of the Dormitory Authority has expanded exponentially.”

Based upon the amount of money that is currently generated by the State’s personal income tax annually (approximately \$37.2 billion), the amount available to make financing agreement (debt service) payments on a pro forma basis (\$9.8 billion), and a coverage ratio approaching seven times outstanding finance agreement (debt service) payments,⁵⁸ along with the financial penalties for the failure to appropriate, PIT Bonds carry a Triple A (AAA) rating from Standard & Poor’s, one of the three major rating agencies. Since an AAA rating is the highest rating available, the cost of debt service for PIT Bonds is less than the cost would be if these programs were still financed individually. Finally, and most telling, the AAA rating on the PIT Bonds is even higher than the State’s rating for its full faith and credit general obligation debt, which only carries an AA rating. Conduit debt issued through PIT Bonds on behalf of the State is now considered more credit-worthy than State general obligation debt, as measured by Standard and Poor’s.

It would appear that the largest issuer on conduit debt on behalf of the State is the Dormitory Authority. While the Dormitory Authority was created for financing, constructing, and operating dormitories and attendant facilities, the mission of the Dormitory Authority has expanded exponentially. The Dormitory Authority is now responsible for financing the following infrastructure programs on behalf of the State using PIT Bonds (in addition to dormitories for State University of New York and certain facilities for the Department of Health using the original revenue specific financing programs):

- Educational facilities for the State University of New York (“SUNY”) and City University of New York;
- The State’s fifty-percent share of educational facilities for SUNY community colleges throughout the State;
- Facilities for State and voluntary institutions for the Department of Mental Hygiene, which includes the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities, and the Office of Alcoholism and Substance Abuse Services;
- Facilities for the State Education Department, the Department of Health, the Office of Court Administration, the Office of General Services, and the Office of the State Comptroller; and
- Grants for the State’s Expanding Our Children’s Education and Learning Program (EXCEL), Healthcare Efficiency and Affordability Law for New Yorkers (HEAL-NY), and almost two dozen grant programs for local governments, not-for-profits and other entities.

This is only a partial list of programs that the Dormitory Authority finances for the State on a conduit basis using the PIT Bond program.

The Thruway Authority is responsible for financing at least two important highway programs for the State of New York. The Thruway Authority issues State-supported debt to fund the New York State Department of Transportation’s capital program under the Dedicated Highway and Bridge Trust Fund.⁵⁹ This is the primary source of funds for matching federal highway grants and funding other State highway programs. The Thruway Authority also finances the State’s payments to municipalities for certain local highway and bridge improvements under what is known as CHIPs—the Consolidated Highway Improvement Program⁶⁰—and several other programs enacted by the State using PIT Bonds.

The Empire State Development Corporation finances state facilities and economic development grant programs on behalf of the State. State facilities financed by Empire State Development Corporation include correctional and

youth facilities and other projects needed by State agencies. Similar to the Dormitory Authority, Empire State finances numerous grant programs for local governments, not-for profits and other entities. All these programs are financed using PIT Bonds.

The Housing Finance Agency finances over a dozen housing assistance programs established by the State providing families of low and moderate income with affordable housing using PIT Bonds. These programs offer grants and loans to municipalities, not-for-profit organizations and for-profit developers. The housing programs are in both urban and rural areas and include multi-family and single-family housing, rental as well as owner-occupied housing. Four separate public benefit corporations are responsible for the different programs: the Affordable Housing Corporation, the Homeless Housing and Assistance Corporation, the Housing Trust Fund Corporation, and the Housing Finance Agency.⁶¹

The Environmental Facilities Corporation finances a number of programs on behalf of the State using the PIT Bond program, including, but not limited to, environmental infrastructure projects, the remediation of hazardous waste sites, the Western New York Nuclear Service Center, the Pipeline for Jobs Fund, as well as matching funds to the Water Pollution Control Revolving Fund.⁶²

Public authorities have also been used by the State on a conduit basis to fund certain cash needs. In 1990, LGAC was created for the purpose of eliminating the annual intra year short-term “Spring Borrowing” that had grown to over \$4.0 billion to make payments to school districts and for other governmental assistance programs.⁶³ LGAC bonded out the annual short-term borrowing by the State for the purposes of making these aid payments. Debt service is paid through the set aside and appropriation of a percentage of the State’s sales tax. Included in this legislation were strict limitations on future short-term borrowings. Although a form of backdoor borrowing, commentators and even the Comptroller hailed LGAC as an important step in fiscal reform for the State.

Over the years there have been other instances when the State has used conduit financing by public authorities to undertake questionable borrowing practices. One of the most infamous transactions occurred almost twenty years ago during a severe economic downturn when the State “sold” Attica prison to the Urban Development Corporation for cash to provide budget relief. The State then leased it back in order to make debt service payments. Around the same time, the State attempted to obtain cash from the Thruway Authority by having the Authority issue \$80 million of service contract bonds to replace the cash that was going to be used for pay-as-you-go capital projects, and the State would pay debt service on the bonds. This transaction never came to fruition as Comp-

troller Regan brought suit challenging the underlying statute,⁶⁴ and the State ultimately abandoned the financing.

In 2003, during another period of fiscal distress, the State created the Tobacco Settlement Financing Corporation for the purpose of securitizing future payments under the 1998 Master Settlement Agreement executed between most states and several of the largest tobacco companies.⁶⁵ The State sold its right to receive payments from the Master Settlement to the Tobacco Financing Settlement Corporation. This Corporation issued in excess of \$4.5 billion in bonds and the available proceeds were used by the State for general funds purposes. Under the State Finance Law discussed previously, these bonds are not considered State-supported debt, as there is no ongoing amount to be appropriated by the State and only a contingent contractual obligation supports the bonds in the event payments from the Master Settlement Agreement that have been assigned are insufficient to meet debt service. However, the Comptroller has taken the position that this debt should be considered State-supported debt and his position is not without merit.⁶⁶ Another complaint expressed by the Comptroller and others is that State-supported debt under the debt reform statute enacted in 2000 is supposed to be for only capital works or purposes, and not used for operating purposes.⁶⁷ The Comptroller has made a similar argument of relating to the refinancing of the MAC debt discussed earlier in the Sales Tax Asset Receivable Corporation case.⁶⁸

Conclusion

Conduit financing on behalf of the State clearly brings to the fore the reality-versus-legality argument of who is responsible for this type of debt. This distinction has caused State Comptrollers and government reformers alike to call for changes in how the State uses public authorities to finance State and State-related expenditures. However, the citizens of the State have chosen, for various reasons, to reject the most recent attempt to reform the State's borrowing practices. Further, the continued difficulty in obtaining voter approval for full faith and credit general obligation debt for needed improvements has sent the State in the only available direction. The courts have avoided the policy debates and followed their judicial role when interpreting the constitutional provisions relating to the issuance of conduit debt.

Even during the recent meltdown in 2008 of the financial markets, the State's use of public authorities for conduit borrowing survived relatively unscathed. The bankruptcy of Lehman Brothers did cause disruption in the orderly disposition of certain variable rate debt, but this was more the result of a lack of liquidity in the market, as opposed to credit issues with State-supported debt. The Legislature and the Executive both appear to recognize the importance of public authorities, notwithstanding the occasional need by some to grandstand against certain

authorities for real or perceived mistakes. Public authorities are no different than every other institution public or private—no entity is perfect. All state-supported conduit financings by public authorities, whether for capital or other purposes, are authorized by the Legislature and the Executive. Barring a depression, the failure of the Legislature to enact appropriations on a timely basis, or an event that causes a fundamental shift in the voters' understanding of New York's debt practices, conduit borrowing by public authorities has become an efficient and effective means of financing the State's capital needs.

"Conduit financing on behalf of the State clearly brings to the fore the reality-versus-legality argument of who is responsible for this type of debt."

Endnotes

1. Official Statement, New York City Industrial Development Agency, \$258,999,944.60 Pilot Revenue Bonds Series 2009A (Yankee Stadium Project) (Jan. 28, 2009).
2. Official Statement, New York City Industrial Development Agency, \$82,280,000 Pilot Revenue Bonds Series 2009 (Queens Baseball Stadium Project) (Jan. 28, 2009).
3. GARY L. GASTINEAU AND MARK P. KRITZMAN, DICTIONARY OF FINANCIAL RISK MANAGEMENT 71 (1999).
4. See N.Y. PUB. AUTH. LAW §§ 1675 *et seq.* (2009); N.Y. UNCONSOL. LAW §§ 6251 *et seq.* (2009); PRIV. HOUS. FIN. LAW §§ 40 *et seq.* (2009).
5. See N.Y. GEN. CONSTR. LAW § 65 (2009).
6. See New York State Office of the State Comptroller, Frequently Asked Questions about State Debt, www.osc.state.ny.us/press/debtfaq.htm (last visited Sept. 10, 2009).
7. See CITIZENS BUDGET COMM'N, PUBLIC AUTHORITIES IN NEW YORK STATE 14 (2006), available at <http://www.cbcny.org/PubAuthorities.pdf>.
8. See N.Y. CONST. art. 7, §§ 10, 11 (2006).
9. Another type of debt that has been issued by public authorities creates a contingent contractual liability upon the State. Certain programs such as the distressed hospital program, N.Y. UNCONSOL. LAW §§ 7411 *et seq.* (2009), have a state service contract providing a source of payment in the event the entity responsible for debt service is unable to meet its financial obligations. From a statutory perspective, this is not considered to be State-supported debt. See N.Y. STATE FIN. LAW § 67-a(1) (2009).
10. New York State Housing Finance Agency, Mission, <http://www.nyhomes.org/index.aspx?page=47> (last visited Sept. 13, 2009).
11. N.Y. PUB. AUTH. LAW §§ 3030 *et seq.* (2001).
12. *Id.* §§ 3050 *et seq.*
13. N.Y. PUB. AUTH. LAW §§ 3650 *et seq.* (2000).
14. N.Y. PUB. AUTH. LAW §§ 2799-aa *et seq.* (2001).
15. N.Y. PUB. AUTH. LAW § 1678 (2007); *id.* § 1678.
16. See CITIZENS BUDGET COMM'N, PUB. AUTHS. IN N.Y. STATE 11 (2006), available at <http://www.cbcny.org/PubAuthorities.pdf>.
17. See N.Y. STATE DIV. OF THE BUDGET, 2009–10 EXECUTIVE BUDGET FIVE YEAR CAPITAL PROGRAM AND FIN. PLAN 29 (2009), available at <http://publications.budget.state.ny.us/eBudget0910/capitalPlan/CapPlan.pdf>.

18. See William J. Quirk and Leon E. Wein, *A Short Constitutional History of Entities Commonly Known as Authorities*, 56 CORNELL L. REV. 521 (1971). While this article is one of the more definitive works on the history of state and local debt in New York, it is worth noting that with the Panic of 1837, states called on the federal government to assume more than \$200 million of outstanding debt. This event is eerily similar to state calls made in 2009, when many states requested the federal government to guarantee or provide liquidity for state debt.
19. N.Y. STATE FIN. LAW § 67-a(1) (2009).
20. N.Y. PUB. AUTH. LAW § 3240 (2001).
21. See New York State Office of the State Comptroller, Frequently Asked Questions about State Debt, www.osc.state.ny.us/press/debtfaq.htm (last visited Sept. 10, 2009).
22. N.Y. RETIRE. & SOC. SEC. LAW § 13(h) (1999).
23. See TEMP. STATE COMM'N ON COORDINATION OF STATE ACTIVITIES: STAFF REPORT ON PUBLIC AUTHORITIES UNDER NEW YORK STATE 261 (1956).
24. Dormitory Authority of the State of New York, DASNY History, www.dasny.org/history/index.php (last visited Sept. 10, 2009).
25. While it is likely that the State University collected room rentals from students at this time, there would have been no legal prohibition against the Dormitory Authority from collecting those moneys in a direct fashion similar to a transportation authority collecting tolls or fares.
26. *Id.*
27. It is unclear whether the lease payments were appropriated at that time as they are today.
28. See 1962 Laws of N.Y. ch. 251.
29. *Id.*
30. 1963 Laws of N.Y. ch. 932.
31. See *Smith v. Levitt*, 30 N.Y.2d 934 (1972).
32. See, e.g., 1966 Laws of N.Y. ch. 782 (City University of New York financing program).
33. See OFFICE OF THE STATE COMPTROLLER, ANNUAL REPORT OF THE COMPTROLLER (1969); OFFICE OF THE STATE COMPTROLLER, ANNUAL REPORT OF THE COMPTROLLER (1968); OFFICE OF THE STATE COMPTROLLER, ANNUAL REPORT OF THE COMPTROLLER (1967).
34. *Id.*
35. See 1981 Laws of N.Y. ch. 314, § 16. A Report by the Office of the State Comptroller—*New York State's Debt Policy; A Need for Reform*—states that the first contractual obligation was executed by the State in connection with the financing and construction of the Jacob Javits Convention Center in New York City. See *infra* note 66. A review of 1979 Laws of N.Y. ch. 35, the authorizing statute for this project, finds that a series of leases and subleases was used to effectuate the State's rental/debt service payment (see 1979 Laws of N.Y. ch. 35, §§ 9, 13).
36. *Williamsburgh Sav. Bank v. State*, 243 N.Y. 231 (1926).
37. See 1972 Laws of N.Y. ch. 648–49.
38. See Report to the Governor on Legislation, Arthur Levitt to Michael Whiteman (May 25, 1972).
39. See Memorandum of Approval from Comptroller Arthur Levitt (July 26, 1972).
40. *Robertson v. Zimmermann*, 268 N.Y. 52 (1935).
41. *Id.* at 62–63.
42. *Union Free Sch. Dist. v. Rye*, 280 N.Y. 469, 480–81 (1939).
43. *Comereski v. Elmira*, 308 N.Y. 248, 251, 254 (1955).
44. *Id.* at 252.
45. *Id.* at 254 (citations omitted).
46. *Wein v. City of N.Y. (Wein I)*, 36 N.Y.2d 610, 613, 621 (1975).
47. *Wein v. State (Wein II)*, 39 N.Y.2d 136, 140 (1976).
48. *Schulz v. State*, 84 N.Y.2d 231 (1994).
49. See 1993 Laws of N.Y. ch. 56.
50. *Schulz*, 84 N.Y.2d at 237, 241.
51. *Id.* at 248–51.
52. *Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 2 N.Y.3d 524 (2004).
53. *Id.* at 536.
54. *Id.* at 537.
55. While payment of debt service comes from State funds, it is important to note that the actual bond proceeds are not state moneys, but rather funds of the public authority. See *Smith v. Levitt*, 30 N.Y.2d 934 (1972).
56. See 2001 Laws of N.Y. ch. 383, Part I; STATE FIN. LAW § 68-b (2009).
57. But see 2009 Laws of N.Y. ch. 56 (authorizing the use of PIT Bonds during State Fiscal Year 2009-10 for mental hygiene facilities).
58. See Official Statement, Dormitory Authority of the State of New York, \$798,010,000 State Personal Income Tax Revenue Bonds (June 25, 2009).
59. See N.Y. Pub. Auth. Law § 385 (2008).
60. See N.Y. Pub. Auth. Law § 380 (2008).
61. See Official Statement, New York State Housing Finance Agency, \$230,000,000 State Personal Income Tax Revenue Bonds (June 6, 2008).
62. See Official Statement, New York State Environmental Facilities Corporation, \$279,355,000 State Personal Income Tax Revenue Bonds (Mar. 11, 2009).
63. See 1990 N.Y. Laws ch. 220.
64. *Regan v. Cuomo*, 182 A.D.2d 1060 (3d Dep't 1992).
65. See 2003 Laws of N.Y. ch. 62, Part D-3.
66. See Office of the State Comptroller, N.Y. State's Debt Policy; A Need for Reform 28 (Feb. 2005), available at <http://www.osc.state.ny.us/press/debtreport205.pdf>.
67. See 2000 Laws of N.Y. ch. 59.
68. Debt Policy, *supra* note 66, at 8.

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Are New York State's Public Authorities Performing Well? Who Knows?

By Dennis C. Smith

"Producer efficiency in the absence of consumer utility has no economic meaning."

Vincent Ostrom, "Can Federalism Make a Difference?" 1973

The creation of public benefit corporations, or public authorities as they are commonly called, is one of the great innovations of the progressive era in American public administration. Some of the largest and most important public authorities in America were created in New York State. The scale of public authorities is reflected in a report of the 2006 Commission on Reform of Public Authorities estimate, and *estimate* is all this expert body could do: public authorities generate "approximately" \$28.5 billion in revenue, and had \$113 billion in outstanding debt. While some authorities are too small or antiquated to count,¹ the ones that do count are responsible for vital public services.



separated from politics in order to improve performance. Today, that separation which was a favorite design feature of earlier reformers is characterized as lack of accountability by critics. This ironic circumstance is captured well in a classic book *The Public's Business: The Politics and Practices of Government Corporations*. Writing thirty years ago, Annmarie Hauck Walsh observed:

From time to time, critics charge that public authorities are autocratic, beyond the reach of the people, or unresponsive to political officials, but these criticisms focus on the very characteristics that advocates of government corporations regard as virtues. Public authorities provide a relatively independent base of operations for entrepreneurs in the public sector, providing managers with administrative power that is greater than that usually found within the regular hierarchies and bureaus of government. The corporate form a public authorities permits jobs be done and projects to be completed without the clamorous debates, recurring compromises, and delaying checks and counter checks to characterize the rest of American government. Successes of public authorities have in fact motivated much of the criticism. Critics on the left seek a more purposeful, dynamic and democratically controlled public sector. Those on the right seek to reduce the scope of government enterprise, or at least check its growth, and to limit its activities to those that aid private endeavors.

A list of the defining characteristics of authorities in a chapter on "Other Governments" in Pecorella and Stonecash's *Governing New York State* is a good summary of most of the topics in the discourse on authorities in the literature:

1. They are administered by boards and commissions, most of whose members are appointed by the Governor with the State Senate confirmation.
2. They borrow outside governmental debt limit.
3. They are exempt from taxation for both bonds and property, although in the latter instance, payments may be made in lieu of taxes.
4. They have the power of eminent domain.
5. They have discretion in establishing charges.
6. Their employees are independent of the civil service system.
7. They can pay higher salaries to their employees than the state proper. (Some top executives make more than the Governor.)
8. Their decision-making is isolated from the normal political process.

The idea of using "businesslike" organizations to carry out public functions was viewed as a way to remove politics from administration and achieve efficient government. Woodrow Wilson, in *The Study of Administration*, helped launch the field of public administration in the 1880s with a claim that administration can and should be

She went on to write, "In the persistent thrust of American politics toward strategic middle grounds, public authorities have withstood such assaults practically unscathed and continue to claim rights to independent management." In New York, at least, that ability to withstand challenges of lack of accountability may be ending. Part of the vulnerability of public authorities may be found in the flaw in their original design: the lack of provision for regular public reporting on their performance. Public authorities came into prominence at a time when public administration as a field had not developed the concept of performance measurement. In fact, as recently as the 1960s a prominent scholar, Anthony Downs, in a book entitled *Inside Bureaucracy* (1967) argued that a defining

feature of public organizations is their inability to measure performance.

The field of public management has changed dramatically in the last several decades, and no place has reflected that change more than the government of New York City. With the inauguration of the Mayor's Management Report in 1977, which twice a year publicly presents measures of agency performance, and with the introduction of performance management, the use of performance measures to manage for better outcomes, in the New York City Police Department in the mid-1990s, the City of New York has been on the cutting edge of public management innovation. The State of New York is only now undertaking to move agencies toward systematically measuring performance. A 2008 report on a national survey of states observed of New York State, "Even though the budget process seems to proceed without any intelligent use of performance measures, the bureaucracy is slowly stumbling toward a more performance-oriented approach to management."² Given their relative independence, public authorities may be trailing even the trailing edge of this movement.

Governance and Public Sector Performance

Measuring the performance of public organizations and the uses of those measures in managing outcomes is at the heart of "governance." Governance is, of course, broader than government. "Good" governance requires effective, responsive, efficient, honest and equitable performance of collectively mandated functions. The term "governance" reflects recognition of the role of private and nonprofit sector agencies in achieving public objectives. It also recognizes the role of citizen consumers of public services. Reporting performance is a key to meaningful transparency of government. Public management's focus on results or outcomes, and the use of performance measurement and management to achieve truly good governance, can only work if the public is in the loop in defining and assessing the quality of governance. The idea of "liberating" public organizations from political and other constraints in order to achieve more "efficiency in government," the high hope for some reformers and the firm belief of others, can only be remotely achievable if, as Vincent Ostrom argued long ago, there is some way to include consumer utility in the assessment of performance. That is why this examination of public authority performance here will focus so heavily on public reporting. If performance is invisible to the public, how can anybody expect public accountability?

Keeping the public informed is not merely a ritual obligation embedded in democratic theory. It is also very practical. For far too long the field of public administration in the United States and elsewhere focused almost exclusively on official actors, either political leaders or civil servants, without recognizing the extent to which the production of public services depends upon the private sector, nongovernmental and voluntary organizations,

and especially citizen consumers as participants in the process. When they work best, transparency and outcome measurement all are designed and implemented with co-productive governance in mind.

The concept of citizen "co-production" of public goods and services recognizes that public safety, public health, environmental protection, education, transportation, and most of the other services expected from government, depend upon citizen inputs, including their assessments, for effective, efficient, responsive, and equitable delivery. The dependence of urban police forces on citizens (for law-abiding behavior, reporting their own victimization and observed police misconduct, saying something if they see something in the fight against terrorism on subways, as well as serving as witnesses) are now recognized as keys to public safety, as is the critical contribution of students and their families to the efforts of educators. Similarly, health status in the community depends more than on environmental policies and conditions, and on citizens' lifestyle decisions more than on physicians, nurses and pharmaceuticals. Even the clinical contribution to health depends on patients' self-diagnosis of health problems and adherence to medical prescriptions. Therefore, any systematic approach to governance today takes into account the reality of co-production. Performance reporting on the Internet is today a reasonable indicator of the degree to which public agencies are oriented toward being accountable to the public they serve. When properly constructed, performance reporting on the Web also enables citizens to be more effective co-producers of public goods and services.

The goal is good governance (measured in terms of effectiveness, responsiveness, efficiency, honesty and equity). It is *not* e-government, transparent government, or measured government. As important as these are, they are all means to other ends. The achievement of public safety, environmental protection, energy efficiency, public mobility through transit systems, health, economic growth and prosperity, quality of community life depends today on e-government, transparency, and outcome measurement, but they should not be confused with the quality public service they were created to help produce.

New York State Authorities Can Learn from New York City Government

As explained in more detail elsewhere,³ New York City introduced the measurement of its agencies' performance in a formally transparent way in 1977 and operated that measurement system for almost two decades, without substantially improving public awareness or public sector performance. The key problem was that the measures collected were on dimensions of performance that mattered to citizens and their representative. Today, with a much greater focus on measures of outcomes, and a major expansion in the extent and utility of New York City government performance reporting available in the Citywide Performance Report (CPR) on the Web at <http://>

home.nyc.gov/html/ops/cpr/html/home/home.shtml, it is evident that in the administration of Mayor Michael Bloomberg the use of the tools of performance management is expected of all agencies. This includes regularly providing meaningful and easily accessible accounts of performance to the public. Citizens can enter their zip codes and find locally relevant indicator at “My Neighborhood Statistics” offered on the Web site of the New York City Mayor’s Office of Operations.

From Performance Measurement to Performance Management in New York City

The New York City Mayor’s Management Planning and Reporting System (MPRS) has been producing reports twice a year since 1977, but for its first two decades operated well below its capacity. For almost two decades it functioned almost exclusively as a report on certain aspects of performance that today we would characterize as inputs and activities. It had almost no measures of outcomes, and a 1990 study of its use by city agencies at the end of the Koch Administration found that the measures were hardly used for planning or management at all.⁴

The MPRS was designed as both a management tool and ultimately a mechanism for public accountability. The MPRS also provides the City’s oversight agencies (e.g., the Office of Management and Budget [OMB], and the Mayor’s Office of Operations) with a means to coordinate the large array of service requirements across agencies and to ensure adherence to the City’s overall service delivery priorities. The importance of this coordination is expressed through the annual process of budget preparation, which by the late 1980s was based on both resource and service issues. Finally, through the semi-annual Mayor’s Management Report, the system provides for accountability to the public. When it was first created it was the most comprehensive and the most transparent system of performance reporting of any big city in the United States. Even today few cities provide such detailed reports on performance, and with the innovative addition of Web-based Citywide Performance Report, updated monthly, other jurisdictions are falling farther behind. That judgment includes the State of New York in general and New York authorities in particular.

The State legislature has moved recently to mandate performance reporting by at least one authority, the MTA. As part of the resolution of a financing crisis facing the Authority this Spring new requirements were added as amendments to the vehicle and traffic law. Shorn of its legislative notation the language of A8180/Senate 5451 states:

THE AUTHORITY SHALL SUBMIT TO THE GOVERNOR, THE TEMPORARY PRESIDENT OF THE SENATE AND THE SPEAKER OF THE ASSEMBLY, ON OR BEFORE OCTOBER THIRTY-FIRST, TWO THOUSAND NINE, A PROPOSED AUTHORITY MISSION STATEMENT AND PROPOSED MEASUREMENTS.

THE PROPOSED MISSION STATEMENT AND PROPOSED MEASUREMENTS SHALL HAVE THE FOLLOWING COMPONENTS: A BRIEF MISSION STATEMENT EXPRESSING THE PURPOSE AND GOALS OF THE AUTHORITY; A DESCRIPTION OF THE STAKEHOLDERS OF THE AUTHORITY AND THEIR REASONABLE EXPECTATIONS FROM THE AUTHORITY, WHICH STAKEHOLDERS SHALL INCLUDE AT A MINIMUM: THE RESIDENTS AND TAXPAYERS OF THE AREA OF THE STATE SERVED BY THE AUTHORITY, THE PERSONS THAT USE THE SERVICES PROVIDED BY THE AUTHORITY, AND THE EMPLOYEES OF THE AUTHORITY AND ANY EMPLOYEE ORGANIZATION; THE GOALS OF THE AUTHORITY IN RESPONSE TO THE NEEDS OF EACH GROUP OF STAKEHOLDERS; AND A LIST OF MEASURES BY WHICH PERFORMANCE OF THE AUTHORITY AND THE ACHIEVEMENT OF ITS GOALS MAY BE EVALUATED.

THE AUTHORITY SHALL THEREAFTER REEXAMINE ITS MISSION STATEMENT AND MEASUREMENTS ON AN ANNUAL BASIS, AND PUBLISH ON ITS WEBSITE SELF EVALUATIONS BASED ON THE STATED MEASURES. Assembly A8180, Senate 5451, May 6, 2009.

The legislature, by requiring this public agency to link measures to mission, has in its own way, gone on record to say that it demands an outcome orientation in the move to performance reporting. The tradition of mission statements is that they are to present “a clear and succinct representation of the enterprise’s purpose for existence,” they are supposed to state what they do *that matters*. This is essentially synonymous with the definition of “outcomes” in contrast, for example, to activities, which refers to what is done in the belief that it will produce outcomes. The reference to multiple “stakeholders” is also a welcome reflection in the law of the reality that public organizations have to be guided by more than a singular (and some would say “mythical”) public interest, but must instead balance diverse demands on its performance scorecard. The law’s requirement that the mission and measures be reviewed annually is consistent with best practice that recognizes that public performance occurs in a dynamic, not static environment. So there is much to be praised—and to look forward to—in this recent legislation.

If it had been aimed at almost any other State authority it would have been a major advance in the way they are managed, and if it had been directed at all authorities in the State, or even those under the supervision of the

Public Authorities Control Board, it would have been a revolutionary step.

Ironically, in requiring the MTA to comply with these demands, it is only provoking a relatively minor adjustment of that Authorities' current practice. The MTA, almost alone among state authorities, has for a number of years, included performance reports on its Web site.

To answer the question, "What can the public learn about the performance of public authorities in the State of New York by examining their official Web sites"?, a review was conducted of the Web sites of all authorities included in the "List of Authorities" presented in the Public Authorities Control Board Web site. That list of fifty-four authorities conveniently includes their Web site addresses. The short answer to the question of whether the public can determine the mission of these authorities, the answer is mostly yes, if sometimes with some difficulty. To the question do public authorities present to the public up-to-date, clearly interpretable, and meaningful measures of performance in terms of the stated mission, the answer is a resounding, almost universal no. Most of the adjectives (mission related, timely, etc.) are irrelevant: the authorities Web sites typically do not systematically address the question of their performance, or present any systematic measures of the mission-related performance.⁵ If they mention "performance" at all it is in the form of anecdotal "success stories." If one probes the Environmental Facilities Corporation's 2008-09 annual report, which presumably aimed at compliance with legal requirements, it devotes the vast majority of its 153 pages to financial audit results. One finds only reports on *activities* (e.g., water projects funded) but no evidence to specifically support its opening claim that it "furthered its mission of improving the quality of life of New Yorkers, reducing and reversing water pollution throughout the State's waterways." (See the Environmental Facilities Corporation, <http://www.nysefc.org/home/index.asp>).⁶

The outstanding exception to the silence about mission-related performance on the official Web sites of State authorities is the MTA. On its Web site, under "Facts and Figures," one can click on "Financial and Performance Indicators." In turn,⁷ under "Performance Indicators" the MTA provides separate reports for each of its properties: New York City Transit, Long Island Railroad, MetroNorth Railroad, Long Island Bus, and Bridges and Tunnels. The NYT stats include some of the same measures (monthly ridership, mean distance between failures, wait assessment, and customer accident injury rate) and some separate measures for each. Buses' collision injury rates and scheduled trips completed are reported, and subways' weekly on-time performance is presented, in each case comparing the current year by month with the past year. The report on performance also presents trend results for 2004-2008. While clearly the list of measures presented does not answer all questions the MTA public might ask about performance related to its mission of safely and

expeditiously transporting residents and visitors (Riders, for example, do not use MetroNorth; they use specific lines. Subway riders may use multiple lines of the NYT, but would still find performance reported by line more informative), finding fault with the best example of public authority reporting performance data seems unfair. The MTA could do better, and is now mandated to do better, but most other authorities would well to follow its example.⁸

Prospects of Reform

The finding here that public authorities are not sufficiently accountable to the public is hardly a revelation. In the past decade alone there have been multiple reports by the State Comptroller's office, governors' commissions, public sector watchdog groups, and efforts to legislate greater accountability, with some success, by officials who have specialized in their attention on authorities. However, three years after the Governor's Commission on Public Authorities Reform called for authorities to have annual reports that include a section on "Activities and Accomplishment: Information on what services the Authority has provided, the efficiency of its operations, and the impact on the authorities' customers, using performance measurement techniques; and the authorities' goals for service delivery and performance in the future year or multiyear period," the Citizens Budget Commission report, *Public Authorities in New York State*, which also appeared in 2006, found that authorities' public reporting on their performance is "inadequate to provide accountability"; as reported here there has been little change. Admittedly, the CBC and Governor's Commission on Public Authority Reform reports, like the New York State Comptroller's 2006 report, *Billions of Dollars of Public Funds Committed Without Adequate Oversight*, were almost totally focused on issues of debt and financial "performance." But the fact that after three prominent reports in 2006 called attention to the problem of performance accountability, by the Fall of 2009, the only notable reform specifically addressed at performance reporting is the requirement of the MTA to report to key public officials, not to the public, largely what it already presents on its Web site, suggests the slow pace of reform so far.

The public reporting on authorities' performance, or the lack thereof, which has been the focus here, has followed the increasingly established public management standard, now largely followed in New York City government, that calls for public reporting of *outcomes*, not just the resources used, activities engaged in, or intermediate products or services obtained in pursuit of agency mission of serving the public. Had that outcome orientation guided earlier commission studies and calls for reform, they might have recognized that indebtedness is a means to an end. If an authority is not producing valuable public services, what justification can there be for any level of debt? This is not to discount the need to report on authorities' finances and financial management, but to keep in mind the fact that authorities are not banks or brokerage

houses—they are created for, and owe their continued legitimacy to, the public services they provide. They should be required, as the MTA now is required, to set goals for performance, recognizing multiple stakeholders, and report regularly to the Governor, comptroller and the Assembly and Senate measures that reveal the past and present outcomes and their plans for improvement. In addition, those reports should be easily accessible to the public, and all who represent the public. Would these changes make a difference? The experience of governments like New York City and the State of Washington⁹ that have pioneered this approach suggests that the answer is “yes.”

Endnotes

1. A Citizens Budget Commission report, Public Authorities in New York, counted 583 authorities which, with subsidiaries, some quite large themselves, total 740. The Public Authorities Board's "List of authorities" includes only 54, and the Red Book, "an illustrated yearbook of authenticated information concerning New York State, its departments and political subdivisions, and officials who administer its affairs," lists 24 authorities.
2. In Governing Magazine's periodic rating of State Government management practices, New York State has consistently received low marks in the categories related to performance measurement and management.
3. Dennis C. Smith with William Bratton, *Performance Management in New York City Compstat and the Revolution in Police Management*, in Dall Forsythe, ed., *Quicker, Better, Cheaper? Managing Performance in American Government*, Rockefeller Institute Press (2001); Dennis C. Smith, *Making Management Count*, Journal of Policy Analysis and Management, Summer, 2009.
4. As originally conceived, "The MPRS is carried out by individual agencies under the direction of a designated Management Plan Coordinator, and monitored and administered by the Mayor's Office of Operations. The MPRS allows for development of an annual agency plan, including a review of agency **mission** and **programs** which define the job of the agency, **performance plans** which determine how well and how much of the job is to be done, and planned **improvement projects** which detail efforts being taken to upgrade service delivery or operations management.
5. If one digs into the Capital District Transit Authority Web site one finds discussions in their 2008 Strategic Business Plan of "assessments of performance" that will be undertaken, but then lists only a couple measures, such a total number of customers, and customers per resource hour. The CDTA 2008-2009 annual report includes no measures of output or outcomes, but instead primarily inputs (budget numbers and expenditures).
6. Joseph F. Zimmerman in *The Government and Politics of New York State* (2nd Edition, SUNY Albany Press, 2008) cites, without describing the methodology or measures used, an unpublished dissertation by Wook-Jin Wang, *Are Public Authorities Accountable and Responsible: A Case Study of the New York State Environmental Facilities Fund* (Rockefeller College, SUNY Albany, 2004), that says that the answer is "yes." But the average citizen at most looks at a Web site, and cannot do a "case study."
7. The mission stated here is from interviews with officials. There is no easily obtained mission statement on the MTA Web site. Note: It is reasonable to assume that the legislation passed in May 2009 requiring the MTA to state its mission in a report to State officials will result in its inclusion on its Web sites, but the law does not require it to announce its mission to the general public.
8. While it is only an input measure, the MTA created under its previous president a new office with a full-time director with considerable experience in performance measurement in the NYC Mayor's Office of Operations, to lead and co-ordinate performance measurement and reporting in all the divisions of the Authority.

9. Larisa Benson, in *What Makes Washington State's GMAP [Government Management Accountability Program] Tick?*, recounts how the Governor of the State of Washington adapted the NYPD performance management approach in creating her own performance measurement and management program for state agencies.

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Oversight of Public Authority Contracts by the State Comptroller

By Kim Fine

Public authorities were created to (i) finance, construct and operate revenue-producing facilities for the public benefit; (ii) assist the public sector with projects intended to spur economic development; (iii) provide financial support for non-profit sector projects that serve public needs; and/or (iv) coordinate the development or management of resources that transcend traditional political boundaries. The benefits of public authorities to New York State include their ability to finance public improvements without increasing taxes, to assess fees on users to cover the costs of construction or operation, to avoid the use of broad-based dedicated revenue streams, to finance the public takeover of private enterprises, to remove entities and associated operations from the direct control of elected officials, and to provide a more flexible management environment than is typical of government.¹



area that would benefit from improved processes and increased scrutiny.

Recent Developments

In July 2009, the State Senate passed legislation that had passed the Assembly a month earlier revising elements of the Public Authorities Accountability Act of 2005 (A2209-C).³

In addition to creating an Independent Authorities Budget Office (ABO), the legislation empowers the State Comptroller to approve public authority contracts. Expanded oversight of public authority contracts by the State Comptroller was first requested by Comptroller Alan G. Hevesi in 2004 when he released a report providing a history of public authorities and citing instances where inadequate supervision resulted in questionable or improper actions.⁴ The legislative proposals were supported at the time by Attorney General Eliot Spitzer, who became the State's Governor in January 2007 and continued his calls for public authority reform in his first State of the State address. In the interim, then Governor George Pataki established the New York State Commission on Public Authority Reform, chaired by corporate governance expert Ira Millstein. Its recommendations informed the Public Authorities Accountability Act of 2005, which made some reforms but was viewed by many to not go far enough. The 2005 Act did not address the issue of review of public authority contracts by the State Comptroller.

Negotiations with the legislature to enhance public authority oversight were not successful during Spitzer's less than 15 months in office. In fact, the issue was not raised by Spitzer in his second State of the State address, delivered approximately 10 weeks before his resignation. When Governor David Paterson took office in March 2008, given the circumstances and the financial challenges facing the State, public authority reform was not a stated priority. However, in June 2008, Governor Paterson did issue an Executive Order establishing a task force comprised of leaders of public authorities that issue State-supported debt to study a procurement practice: the selection of underwriters for negotiated sales of State-supported bonds.⁵

Assemblyman Richard L. Brodsky, whose investigations and hearings as Chairman of the Assembly Committee on Corporations, Authorities and Commissions helped inspire efforts that resulted in passage of the Public Authorities Accountability Act of 2005, continued efforts to negotiate further reforms throughout 2008. Senator John J. Flanagan led his House's effort to promote reform but the

"As evidenced by audits conducted by the Office of the State Comptroller and other revelations, the award of contracts by public authorities is an operational area that would benefit from improved processes and increased scrutiny."

New Yorkers pay for public authorities in the form of rates, tolls, fees and taxpayer-funded subsidies. Revenues pay the debt service on authority-issued bonds. In most cases, New Yorkers use authority facilities because bridges, roads, subways, water systems and universities are granted monopoly status in the name of the public interest. As a result of the lack of oversight assigned to these entities, some have developed a culture of mismanagement and experienced a history of unethical and, at times, illegal activity.²

While the intended benefits of the independent operation of public authorities described in the 1967 study by the Office of the State Comptroller should not be curtailed by treating these entities exactly like State agencies, it is clear that additional oversight of authority operations is needed. As evidenced by audits conducted by the Office of the State Comptroller and other revelations, the award of contracts by public authorities is an operational

regular 2008 session concluded with no action. Unsuccessful in advancing a stand-alone bill, Assemblyman Brodsky tried to insert broad authority reform in a bill providing financial relief to the Metropolitan Transportation Authority (MTA) in March 2009; again, authority reform failed to advance.

In June 2009, the Assembly passed a bill sponsored by Brodsky with 140 votes and forwarded it to the Senate. Although delayed by uncertainty about leadership in the Senate that stalled all action for several weeks, the bill passed the Senate on July 16, 2009.⁶

The legislation requires public authorities to submit to the State Comptroller proposals for procurements of anticipated value of more than \$1 million. Within 45-days of receipt of a proposal, the Comptroller is to inform the authority whether the procurement will be subject to review and approval. If the Comptroller does so subject procurements to review and approval, the resulting contract will not be valid and enforceable without the Comptroller's express approval, unless the Comptroller fails to act on the contract within 90 days of submission to his or her office. The Comptroller also may initiate the requirement for a contract or category of contracts to be subject to his or her review and approval. Certain types of contracts are excluded from these provisions, such as those arising from an emergency.

The pre-approval process outlined in this legislation differs from that which applies to contracts of State agencies, and the legislation clearly states that it is not intended to change the Comptroller's existing authority to supervise the accounts of public authorities—generally or as specified in other sections of law.

State Agency Contracts

New York State agencies are subject to a procurement process through which commodities and services are obtained. This procurement process, established in the State Finance Law, generally governs State agencies only.⁷ Local governments must follow procedures outlined in the General Municipal Law, but there are limited rules⁸ governing procurements by public authorities in the Public Authorities Law.⁹ Article 5, section 4 of the New York State Constitution designates the Comptroller as the head of the Department of Audit and Control. In 1925, Article 5, section 1 of the Constitution was amended to specify the Comptroller's functions, and these functions included the duty to "audit all vouchers before payment and all official accounts." This constitutional amendment followed Chapter 342 of the Laws of 1913, which already required the State Comptroller to approve State contracts valued at more than \$1,000.

Before any contract made for or by any state charitable institution, reformatory, house of refuge, industrial school, officer,

department, board or commission, shall be executed or become effective, when such contract exceeds one thousand dollars in amount, it shall first be approved by the comptroller and filed in his office.¹⁰

The State Finance Law has been amended several times since 1913, but the requirement for pre-approval of contracts by the State Comptroller has remained an important part of the system of checks to avoid impropriety in the awarding of State contracts. The seminal case regarding the Comptroller's discretion to approve or disapprove contracts under section 112 of the State Finance Law is *Konski v. Levitt*,¹¹ in which the New York State, Appellate Division, Third Department held that the Comptroller had the independent power to find a vendor non-responsible, and that the Comptroller's refusal to approve a contract was justified in view of his knowledge that the vendor was under Grand Jury investigation for possible involvement with political corruption in the award of public contracts. This decision established two basic principles for future review of State contracts by the Office of the State Comptroller:

- The Comptroller's discretion to approve a contract under section 112 of the State Finance Law is wide-ranging. It is not simply limited to determining whether a contract is fair and reasonable.¹²
- The Comptroller's decision to approve or disapprove a contract will be upheld if the Comptroller has a rational basis for his actions.¹³

Currently, section 112(2) of the State Finance Law generally requires review and approval by the Comptroller of all contracts for or by a state agency, department, board, officer, commission, or institution valued in excess of \$50,000, and contracts for or by the Office of General Services valued at \$85,000 or more.¹⁴ The purposes of this requirement include protecting the public from governmental misconduct and improvidence, and ensuring that contracts are fair and reasonable.¹⁵ The Comptroller's review ensures State agency compliance with a number of statutory procurement requirements, the most comprehensive of which are set forth in section 163 of the State Finance Law, which was added by the "Procurement Stewardship Act" (PSA).¹⁶ The PSA established operating principles "to facilitate each state agency's mission, while protecting the interest of the state and its taxpayers and promoting fairness in contracting with the business community."¹⁷ The Office of the State Comptroller follows the operating principles of the PSA and considers various other factors in its review of State agency contracts.

To ensure that parties to a contract are aware that it cannot be effective until approved by the Comptroller, standard language required for all State contracts stipulates the values at which contracts require approval by the State Comptroller.

Public Authority Contracts

Unlike State agency contracts, prior to legislative action in 2009, with few exceptions, public authority contracts had not been subject to approval by the State Comptroller before they became effective. In general, public authorities are governed by boards of directors that are intended to provide oversight of operations including procurement. In addition, section 2879 of the Public Authorities Law requires public authorities to develop comprehensive procurement guidelines and to submit annual procurement reports to the State Comptroller and other officials.

To supplement its review of these annual summaries of procurement-related activity, the Office of the State Comptroller, pursuant to Article 10, section 5 of the Constitution,¹⁸ conducts audits of public authority contracting procedures and results.

A review of audit reports involving public authorities found that of those examining procurement processes, about 15 percent identified apparent abuses of procurement authority, 40 percent found disregard for procurement rules and the remainder, poor quality procurements resulting in apparent waste or inefficiency. In the first category, audits uncovered improper use of credit cards or use of credit cards to avoid competitive bidding, and adding work to existing contracts to avoid undertaking a new procurement. Disregard for procurement rules were found in cases where competitive bidding requirements or required board approval of an intention to contract were ignored, as well as failure to advance the State's minority and women-owned business enterprise (MWBE) contracting goals. Finally, poor quality procurements were noted in cases where documentation and justification to support purchases were lacking, or written guidelines or procedures did not exist.

The major public authorities whose contracts have been, either by statute or board resolution, subject to pre-audit by the State Comptroller in order to become effective are the Long Island Power Authority (LIPA) and the New York State Thruway Authority, along with its subsidiary corporation, the New York State Canal Corporation.

Section 1020-cc of the Public Authorities Law provides that all contracts of LIPA shall be subject to the provisions of the State Finance Law relating to contracts made by the State.¹⁹ As a result, LIPA contracts exceeding the threshold found in section 112 of the State Finance Law must be submitted to the Comptroller's Office for review and approval before they can become effective.²⁰

Unlike LIPA, the New York State Thruway Authority was not required by legislation to comply with the contracting provisions of the State Finance Law or to submit its contracts to the Office of the State Comptroller for pre-approval in order for its contracts to become effective. Shortly after the Authority was established in 1950,

however, its governing board adopted Resolution Number 19, requesting that the Comptroller "audit the funds of the Authority in the same manner as funds of a regular State agency are audited."²¹ That resolution, together with Article 10, section 5 of the Constitution, has consistently been interpreted by the Authority, the Office of the State Comptroller and, most recently, the courts,²² as authorizing the Comptroller to perform an approval function with respect to Thruway Authority contracts.

Resolution Number 757, adopted by the Thruway's board in 1965, held Authority procurements to the standards set forth in its own procedures, instead of those prescribed by the State Finance Law.²³ Although this changed the standards by which the Thruway conducted its procurements, the Authority continued to require the Comptroller's approval of its contracts before they became effective. When the New York State Canal Corporation was established as a subsidiary of the Thruway Authority in 1992, its contracts also became subject to review and approval by the Office of the State Comptroller before they become effective.

Contracts of various other smaller public authorities are submitted for the Comptroller's review and approval because of the nature of the entity, the nature of the contracts entered into or in response to scandals uncovered at the entity. The Attorney General opined that the Natural Heritage Trust, for example, possesses attributes of a State agency and, therefore, should be treated as a State agency.²⁴ Rentals and concessions (other than for exhibition purposes) entered into by the New York Convention Center Operating Corporation (Jacob Javits Convention Center) are expressly required by statute to be subject to prior approval by the State Comptroller.²⁵ The Hudson River Black River Regulating District has requested approval of its contracts by the Office of the State Comptroller for some 40 years, apparently in response to a procurement-related scandal.

Effects of New Reform

In State fiscal year (SFY) 2008-09, the Office of the State Comptroller reviewed 13,010 contracts valued at \$24.5 billion. In addition, it reviewed 22,132 contract amendments, for a total of 35,142 transactions valued at \$33.8 billion.

These statistics include 308 public authority contracts valued at \$2.06 billion and 448 public authority contract amendments, for a total of 756 transactions valued at more than \$4 billion. Of the 308 new public authority contracts reviewed, 253 were approved, at a value of \$1.75 billion.

By requiring public authorities to ask the Comptroller whether he or she wants to review a procurement and resulting contracts, and expressly granting the Comptroller the authority to pro-actively request pre-approval of

contracts and/or contract types, the number of authority contracts subject to pre-audit will likely increase significantly. Conditions at the time the proposed procurement is presented to the Comptroller, as well as the size and visibility of the project, may encourage the Comptroller to exercise oversight. For example, the New York Convention Center (a.k.a. Jacob Javits Convention Center) recently received approval from the Public Authorities Control Board to start a renovation project valued at \$463 million that may warrant the Comptroller's attention.²⁶

"Contract experts in the Office of the State Comptroller will use their experience with State agencies and select public authorities to educate public authority staff in the conduct of fair and competitive procurements."

The Comptroller also might employ past audit findings to determine which authority procurements could benefit from increased scrutiny. Since the provision empowering the Comptroller to inform an authority that its contracts will be subject to pre-approval does not include a limit in terms of estimated contract value, the Comptroller could elect to pre-audit all proposed credit card purchases of an entity where there has been a history of abuse. Similarly, extensions or material changes to existing contracts that may not have been bid competitively could be subjected to pre-approval.

In either case, the Comptroller's review will serve to improve procurements of the State's public authorities by providing lessons and imposing standard requirements. Contract experts in the Office of the State Comptroller will use their experience with State agencies and select public authorities to educate public authority staff in the conduct of fair and competitive procurements.

The legislation passed by both Houses represents a reasonable response to problems that have been uncovered, and a balanced approach to improving public authority procurement practices.

Endnotes

1. See Office of the State Comptroller, study No. 4, Public Authorities in New York State: A Financial Study, Comptroller's Studies for the 1967 Constitutional Convention (1967) (citing to the *Report of the Temporary State Commission on Coordination of State Activities* (1956)).
2. See Office of the State Comptroller, Public Authority Reform: Reining in New York's Secret Government 29-38 (2004), available at <http://www.osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf>.
3. A.2209-C, 232nd Sess. (N.Y. 2009) [hereinafter S.1537-C/A.2209-C] (currently awaiting gubernatorial approval).
4. Public Authority Reform, *supra* note 2.
5. N.Y. Exec. Order No. 10 (2008), available at http://www.ny.gov/governor/executive_orders/xeorders/pdf/eo_10.pdf.

6. S.1537-C/A.2209-C (2009).
7. See generally N.Y. State Fin. Law §§ 135-146 (2002 & Supp. 2006); §§160-168; §§ 79-d-179-p; §§ 179-q-179-ee. See also N.Y. High. Law § 38 (2001 & Supp. 2006); N.Y. Pub. Bldgs. Law § 8 (1996 & Supp. 2009) (provisions governing the award of highway construction and other public works contracts).
8. N.Y. Gen. Mun. Law §§ 100-109-b (1999 & Supp. 2006).
9. N.Y. Pub. Auth. Law §§ 2875-2880-a (2002 & Supp.2006).
10. See 1913 N.Y. Laws 637.
11. *Konski Eng'rs, P.C. v. Levitt*, 415 N.Y.S.2d 509 (3d Dep't 1979).
12. *Id.* at 510.
13. *Id.* at 511.
14. N.Y. State Fin. Law § 112 (2002 & Supp. 2009).
15. *City of New York v. State*, 87 N.Y.2d 982, 985 (1996); *Parsa v. New York*, 64 N.Y.2d 143, 147 (1984); *Konski Eng'rs, P.C.* 415 N.Y.S.2d at 509.
16. See 1996 N.Y. Laws 527.
17. N.Y. State Fin. Law § 163(2) (2002 & Supp. 2006).
18. N.Y. Const. art. 10 § 5 (vesting in the Comptroller the power to "supervise" the "accounts" of certain "public corporations," including most public authorities).
19. N.Y. Pub. Auth. Law § 1020-cc (2009).
20. N.Y. State Fin. Law § 112 (2002 & Supp. 2006). Currently, the State Finance Law approval threshold for the purchase of goods and services is \$50,000.
21. See *Worth Constr. Co., Inc. v. Hevesi*, 819 N.Y.S.2d 812 (3d Dep't 2006), *aff'd*, 8 N.Y.3d 548 (2007).
22. *Id.*
23. See Office of the State Comptroller, Public Authority Contracting Parties: Billions of Dollars of Public Funds Committed Without Adequate Oversight (2006), available at <http://www.osc.state.ny.us/pubauth/publicauthoritycontracting.pdf>.
24. 1974 Op. N.Y. Att'y Gen. 9 (1974).
25. N.Y. Pub. Auth. Law § 2564 (2002).
26. See Press Release, Office of the Governor of N.Y., Governor Paterson Announces Approval of Jacob J. Javits Convention Center Renovation and Expansion (Mar. 24, 2009).

Kim Fine served as Deputy Comptroller for Budget and Policy Analysis, coordinating various reform agendas advanced by the Office of the State Comptroller including public authority reform and procurement reform. During that time, in addition to authoring studies and policy reports, she oversaw the development of the Public Authority Reporting Information System through which authorities submit data to the Office of the State Comptroller and Authority Budget Office (ABO). Representing the Comptroller, she sat on the Advisory Council on Procurement Lobbying and served as co-executive director of the Local Government Assistance Corporation. She also served as Deputy Budget Director for the State, where her responsibilities included supervision of the ABO and involvement in framing and negotiating public authority reform legislation as well as Workers' Compensation reform. Kim continues to closely monitor developments in State government in her current role as Senior Vice President for Policy, Planning and Communications for Albany Medical Center.

Conduit Financing: A Primer and Look Around the Corner

By Kenneth W. Bond

Introduction

There are two kinds of municipal bonds: general obligations bonds (GOs) and revenue bonds. GOs are easy to understand because they are the kind of bonds referred to in state constitutions and statutes emanating from the post-Civil War 19th century—still today's black letter law on authority for states¹ and their local governments² to incur debt. If you read these old laws, they unequivocally restrain states and local governments from incurring debt without voter approval or exceeding debt limits based on percentages of real property values or types of governmental revenue.

Revenue bonds, in contrast, come in several varieties. But they all share one point in common: unlike GOs, their repayment of debt service is not an obligation derived from, or an encumbrance on, the taxing power or the taxable property of the state or any local government. All revenue bonds must be repaid from a source other than taxes. As Robert Amdursky put it so well nearly 20 years ago, the risk of repayment of GOs is on the taxpayer; the risk of repayment of revenue bonds is on the investor.³ The legal requirement that revenue bonds be repaid from a "source other than taxes" makes them akin to corporate or business obligations: if the revenues do not materialize, the bonds will not be paid. To some extent, the explosive growth over the past 35 years in federal securities regulation of municipal bonds, including initial disclosure and continuing disclosure requirements, is a function of the growth of revenue bonds relative to GOs. There's not much to worry about with GOs unless the tide washes out most of the taxable real property or the place becomes a ghost town.

In truth, however, GOs have limited application in modern public finance. Their constitutional and statutory restraint on borrowing is addressed to government finance within political boundaries of states and local governments frozen in time for 200 years. Those boundaries do not reflect concentrations in commercial and demographic activity where public works need to be built. Not surprisingly, GOs have turned out to be an inefficient mechanism to finance public works on the Wagnerian scale required for bridges, tunnels, airports and the like. With permissive court decisions which have upheld the constitutionality and validity of public corporations which transverse municipal and state boundaries, con-



duit forms and entities resembling business corporations more than governmental units have proliferated to the point where most of the public finance activity which is conducted in the United States today is subject to little or no voter or taxpayer input. Such remoteness from public scrutiny and mere *pro forma* public approval procedures⁴ to authorize revenue bonds is a blessing upon investment bankers and their patrons—quasi-government officials—in issuing billions of dollars of municipal securities secured by nothing more than an indirect pledge of the taxing power—clearly an unintended consequence of 19th century lawmakers.

The Special Fund Doctrine

The birth of revenue bonds was innocent enough and well intended in the public interest. In the late 19th century, in a U.S. Supreme Court case, taxpayers who objected to a city issuing constitutionally sanctioned general obligation bonds for a water project paid only out of water rents were sent home by the court with the comfort of knowing that the taxpayers would never be obligated to cough up the debt service if the water rents proved insufficient.⁵ Hence, the Special Fund Doctrine was established. The Doctrine provides the foundational exception to the restraint on GOs in that non-GOs may be validly issued if paid from a revenue other than taxes—water rents, sewer rents, electrical utility rates, highway tolls, and the like—which is derived from a public enterprise that provides a public service from a discrete source of revenue. Sometimes, these public enterprises are viewed as governments acting in a propriety function rather than a governmental function.⁶ In New York, municipal non-GO financing of a public enterprise is recognized through an elaborate "debt exclusion order" process upon application to the State Comptroller.⁷ In this process, ironically the debt never loses its characteristic as a GO secured by a pledge of the taxing power. Rather, the constitutional debt limit may be pierced without limit to the extent the "net revenues" from a public enterprise cover the debt service on public enterprise bonds. This process has led to the misconception that New York municipalities may issue "double barreled" bonds secured by both the taxing power and enterprise revenues. In fact, except for water debt which is excluded under the State constitution without resort to an order from the State Comptroller, and sewer debt which is subject to a one-time debt exclusion order and never looked at again as to the "net revenue" coverage, any other excluded public enterprise debt has the dangerous possibility of backing up into a municipality's debt, contracting margin should "net revenues" cover less than 100% of debt service in any year bonds are outstanding.

The Advent of the Conduit

Revenue bonds of states and local governments legally sustained on the authority of the Special Fund Doctrine might well have been the final word on an exception to constitutional debt restraints were it not for the automobile. At a time when street car lines, railroads and canals were regulated and financed as common carriers (and financed with corporate debt rather than municipal securities), much like airlines today, streets and highways were still largely a matter of local concern. But the growing acceptance of the automobile in the early 20th century as the accepted mode of private surface transportation meant that construction, financing and operation of highways, railway overpasses, bridges and tunnels needed to be uniform over several municipal boundaries. Hence, the advent of state highway authorities and, the greatest of them all, the Port Authority of New York and New Jersey ("PANYNJ").⁸ These macro state and interstate agencies were among the first "conduits," being entities of the state for a specific public purpose which overlay multiple municipal boundaries and whose debt was paid not from taxes but from operating revenues. This conduit structure fit squarely within the Special Fund Doctrine to form the legal basis for authority revenue bonds.

At the micro level, conduits take the form of special districts within a municipality to finance a public work that serves a community within a municipality, but not the entire municipality. Sometimes special districts have separate revenue bond authority, and sometimes only taxing or assessing authority to generate a revenue for the targeted public work.⁹ Again, the legal basis for these micro conduit districts is that their debt is paid from a revenue derived from the public enterprise, not from general real property taxes. By the 1930s, most states accepted conduit financing of public works through revenue bonds secured only by enterprise revenues. The public only paid for the service if they used it; bondholders were paid only if enough of the public used the service and paid for it.

Beyond the Special Fund Doctrine

A generally held view of conduit financing in the commercial world is that it involves the use of a special purpose vehicle by banks and financial institutions to hold off-balance sheet loans which collateralize a corporation's commercial paper; you know, something like Enron.¹⁰ Equating debt of PANYNJ or a state highway authority, for example, with Enron *financing* subsidiaries seems implausible, but there is an uncomfortable connection.

Once conduits became accepted as the vehicle for large-scale financings of revenue bonds for the rapidly expanding automobile and public utility infrastructure in the 1950s, courts were faced with the extent to which conduit financing could be expanded beyond clear public purposes, otherwise permitted using GOs, under the Spe-

cial Fund Doctrine. The issues the courts faced when these issues arose focused on (i) what constitutes a revenue, (ii) what constitutes a public purpose, and (iii) how is the lending or giving of credit prohibition to be applied.

Revenue: Until recently, courts were hesitant to define a "revenue" beyond a stream of payments for a public service, i.e., utilities (water, sewer electricity), toll roads, parking fees. For example, in *Winkler v. State School Building Authority*, the West Virginia Supreme Court reviewed a bond issue for the construction of public schools to be issued by a conduit entitled the "State School Building Authority."¹¹ The authority had no revenues generally accepted under Special Fund Doctrine analysis (i.e., the kids didn't pay tuition). Rather, the authority's bonds were payable from appropriations by the state legislature. While the case invalidated the proposed bond issue by equating annual appropriations as the practical equivalent of a full faith and credit, which had not been voted in violation of the state constitution, it more importantly held that the unlimited legislative appropriations were not "revenues." The court in *Winkler* laid out the requirements of the Special Fund Doctrine: (i) a special source of revenues must be identified from a public enterprise (i.e., water rents, highway tolls) and legally pledged to the repayment of the revenue bonds, and (ii) the amount of the revenues must limit the amount of the bonds which may be issued (i.e., what municipal bond attorneys call a "coverage test").¹² Unlimited appropriations fail the test.

But the guidance in *Winkler* was not recognized by courts in other states, particularly states like New York and New Jersey with large urban populations in need of large capital infusions for public works and public welfare. In *Bulman v. McCrane*, the New Jersey Supreme Court reversed the trial court decision in analyzing whether lease payments were a "revenue."¹³ Here, the state arranged for a developer to construct a facility to be leased to the state—without public bidding or a vote on incurring debt as the New Jersey constitution would require if the state issued debt directly. Although such arrangements were viewed by the trial court as naked evasions of the state constitution, the New Jersey Supreme Court found that if the rent were economic rent, where the investor simply recouped his cost and depreciation, rather than a financing lease where rent paid the debt service on the developer's borrowed funds, even if the developer borrowed on the strength of the state's credit or lease commitment, there was no violation of state restraints on incurring debt. So rent paid on economic leases became a form of revenue, although through a back-door approach, without analyzing the tests of the Special Fund Doctrine.

New Jersey again broke the barrier on limiting the definition of revenues in *Lonegan v. State* by upholding bonds of an "Educational Facilities Corporation" (EFC) paid solely from general legislative appropriations.¹⁴ One would think, as plaintiffs in the case argued, that the

clause in the New Jersey state constitution which forbids state debt to be issued “in any manner” without a vote of the people would prevent conduits like EFC from issuing debt for a state purpose. However, the court made clear that EFC, as an “independent authority,” is not bound by the state constitution on debt authorization matters. Further, the court was not impressed by the argument that because it was highly likely that the legislature would make annual appropriations every year to pay debt service on EFC bonds, it was *de facto* pledging the state’s full faith and credit, which under the state constitution requires a vote, finding that a mere legislative expression of intent to make future payments on EFC bonds was not a promise of the full faith and credit pledge, and thus, not state debt. After *Lonegan*, bonds for a public purpose issued by a conduit entity could find a safe harbor from constitutional restraint on debt simply by inserting a clause in the financing documents that payment of debt service is subject to annual legislative appropriation. And so, legislative appropriations—without limit as to amount and without a coverage test to limit the amount of debt issued—became the new revenue in “revenue bonds” of conduit issuers, even if the source of the appropriation were the same tax dollars securing the full faith and credit pledge on GOs. The Special Fund Doctrine was effectively dead.

One more New Jersey case illustrates the high point in judicial permissiveness in finding a revenue to breathe legality into non-GO conduit debt. In *Lance v. McGreevy*,¹⁵ investment bankers attempted to treat the securitization of future revenue streams from special taxes, represented as proceeds from a securitization bond issue, as a budget “revenue” for state law purposes. It seems that in drafting the budget for the state’s 2005 fiscal year, a \$1.5 million deficit (expenses in excess of revenues) could not be accounted for. In those heady days of subprime loans financed with collateralized mortgage obligations¹⁶ (not that long ago), the solution to a government deficit was to borrow the money. In *Lance*, the amount of the borrowing was the present value of the estimated stream of future taxes. This was too much even for the New Jersey justices. Bond proceeds, no matter how tortured the analysis, could never be a “revenue.” But the dissenters on the bench had no trouble in finding any source of funds as a revenue for budget purposes, since the definition of the term “revenue” they found “shrouded in ambiguity.”

An extrapolation of *Lance*, had the dissent prevailed in treating bond proceeds as a “revenue,” is not hard to imagine. Far from public enterprise revenues paid for debt service on financing facilities which provide a direct public benefit (the water you drink, the roads you drive on), state courts under the *Lance* dissent would have been authorized to effectively monetize every public asset into a “revenue.” All any state would have had to do is establish a conduit authority and borrow the present value of its future budget revenues to generate current

revenue with the proceeds of a conduit bond issue. That this practice, if legally permitted, would have exacerbated the fiscal woes of state and local governments in the grip of the current Great Recession is obvious.

Public Purpose: Although the scope of “revenues” available for conduit debt may appear to have been overstretched by judicial decisions, historically state authorities as conduit issues have limited their projects to those which the state or its local government could finance (educational facilities, utilities, roads and highways). These facilities are generally owned or controlled by the government directly and available for use by the public. In federal income tax parlance, which prescribes the availability of the federal tax subsidy of exemption from income taxation of interest on municipal bonds, they are “essential governmental function bonds.”¹⁷ On the analysis of public purpose, however, state law and federal tax law analysis diverge, the states being more expansive on defining public purpose and the feds being more restrictive. In state law, conduits at the micro level have played a key role expanding a new public purpose—economic development - which may be financed, if not always on a tax-exempt basis.¹⁸

One must start with the Panic of 1837 to appreciate economic development financing. During the expansion of the American interior following the War of 1812 and the development of the steam engine, railroad and canal building was at a frenzy. The financing vehicle of choice was the state or municipality which would issue debt to investors in Europe or New York City to finance these enterprises—owned not by the state or local government but by a privately held stock corporation. When the boom ended in the late 1830s, investors were often left with defaulted debt and worthless mortgages. Many states raised taxes and paid the debt; many repudiated the debt. This “financial fiasco” soon led to states adopting the restrictions on authorizing and issuing state and local government debt discussed herein. For all practical purposes, it was inconceivable, after the 1840s, that state debt could be issued to finance a private sector project on the notion that, like a railroad or canal, the project would increase employment, eliminate blight, and generally advance the economic well-being of the taxpayers in the state or local government.¹⁹ One hundred years later, the sanctity of the prohibition of lending or giving credit to a private person or corporation began to erode and economic development financing was born.

In the midst of the Great Depression, southern states began issuing state debt to finance economic development purposes. The public purpose, which could be financed, was the creation of new jobs in companies that moved to or expanded within the jurisdiction, induced to move or expand by local tax incentives and less expensive tax-exempt financing available by financing through the state or a local government. While economic development financ-

ing was resisted in many states for violating constitutional prohibitions on lending or giving credit,²⁰ by the end of the 20th century, most states had judicial permission to issue industrial development bonds for economic development purposes. However, to avoid the obvious conflict with the state constitutional prohibitions against lending credit or giving to private persons or corporations, state legislatures established separate authorities to serve as conduits for economic development financing.²¹

New York's economic development financing conduits are found at both the state²² and local government²³ levels. In most states, it is typical for the state to control economic development activity through a single state agency.²⁴ New York is one of a few states which permits the legislature to enact special laws to create industrial development agencies (IDAs) for the public purpose of economic development with the power to authorize and issue revenue bonds in every municipality—every county, city, town and village. According to a 2006 report of the State Comptroller on IDAs,²⁵ there are 115 active IDAs engaging in revenue bond issues, straight lease transactions,²⁶ and Payment in Lieu of Taxes (PILOTs) agreements.²⁷ Whether the proliferation of IDAs in New York has created measurable job growth and firmed up tax bases is subject to doubt. While some have criticized IDAs for various abuses,²⁸ the sad reality is that New York is a very high-cost and high-tax state. It is difficult to offer sufficient incentives to induce a business to move to New York from another state—indeed one of the Comptroller's observations is that IDAs "pirate" companies from one part of the state to another²⁹—a little like moving the deck chairs on the Titanic.

Lending or Giving of Credit: In New York, the battle against conduit financing was fought in the 1970s and 1990s on the issue of whether bonds of this or that state agency or authority violate the lending or giving of credit provisions of the State Constitution—and the conduits won. The lending of credit issue is rarely found in reviewing the financings of IDAs because, with a few exceptions, the exclusive source of debt repayment is the private person or corporation who incurred the debt.³⁰

In the case of state authorities, the source of funding is always public funds, usually a cocktail mixed with operating revenues (utility fees, operating rail revenues), special excise taxes, income taxes, sales taxes and legislative appropriations. Under any exception to the Special Fund Doctrine, it would be difficult to determine if it applied to any portion of the bonds issued. This sophisticated confusion in structuring state conduit debt has been embraced by the Court of Appeals as an excuse to not touch the question of legality of any conduit bond issue which comes before it.³¹ So unlimited conduit borrowing in New York is alive and well, notwithstanding review boards, authority reform legislation³² and proposed legislation calling for an "authorities budget office"³³ to tighten up loopholes in prior reform legislation.

Extreme judicial permissiveness in failing to uphold the debt constraints in the State constitution is reflected in the *Wein* cases from the 1970s and the *Schulz* cases from the 1990s. The story begins in the City of Elmira in the mid-1950s. Imagine those shiny new Packard Clippers, Studebaker Commanders and Nash Ambassadors lined up in front of newly installed parking meters courtesy of the City of Elmira Parking Authority—a duly enacted public corporation of the state. It seems that the coins in the parking meters were City of Elmira revenues, but the Parking Authority had issued the debt (Enron lawyers must have been familiar with *Comeresky v. City of Elmira*³⁴). Since the Parking Authority was short of money to pay debt service on its bonds, the City gave it the parking meter profits. Plaintiffs charged that the gift violated Article VII, § 8 of the State Constitution prohibiting gifts and loans. The court found no constitutional violation because while a loan is prohibited, and a gift to a private person is prohibited, a gift to another public corporation is not. Said the court: "We should not strain ourselves to find illegality in such programs. The problems of a modern city can never be solved unless arrangements like these...are upheld, unless they are patently illegal."³⁵

From the Elmira Parking Authority, it was onto the Stabilization Reserve Corporation (SRC) which issued bonds to finance operations of New York City following its 1975 financial crisis. In *Wein v. City of New York*,³⁶ the court, citing *Comeresky*, said this was only a gift of bond proceeds from one public corporation to another. And even though the City was obligated to pay SRC debt, it was not invalid City debt because the SRC legislation said so. Then the court reviewed revenue anticipation notes issued by the Municipal Assistance Corporation for the City of New York to reimburse New York City for expenses to balance the City's budget. In *Wein v. State*,³⁷ (*hereinafter Wein II*), the court, citing *Comeresky*, found no prohibition in financing a gift by one public corporation to another. However, it is Judge Jason's thoughtful sole dissent in *Wein II* which scholars of the State Constitution should read today. Judge Jason pointed out that the permissive gift between public corporations was intended by the drafters to be limited to available funds of the state, not money borrowed on the state's credit.³⁸ Had Judge Jason's rule been applied, the state's heavy debt burden today may not have been created with judicial permission over the past 35 years.

Finally, bonds issued by the NYS Thruway Authority were challenged in *Schulz v. State*³⁹ (*hereinafter Schulz III*) as a violation of Article VII, § 11 of the State Constitution which requires a public referendum on debt issued by the state. In an action brought by voters who gained standing to sue by a bare thread, plaintiffs alleged that a 1993 statute which authorized the Thruway Authority to issue debt secured by various state funds containing general tax moneys created *de facto* state debt which had not been approved by the voters. They argued that (i) the Thru-

way Authority debt was indistinguishable from the debt of the state because of revenue sources available to pay debt service, (ii) appropriations pledged annually for debt service for a valid state purpose (the Thruway, MTA facilities, etc.) were tantamount to a full faith and credit pledge requiring voter approval, and (iii) the state would never fail to appropriate each year because to do so would cause a default on Thruway Authority bonds, roil the municipal securities market and make it difficult for the state or its conduit authorities to ever borrow again. Article VII, § 5 of the State Constitution providing that debt of the state's authorities is not debt of the state, not unlike the independent agency holding in *Lonegan* 10 years later in New Jersey, fortified dismissal of the lawsuit. But at bottom, the court, in an opinion written by Chief Judge Kaye, relied on the premise that public corporations may give money to each other under the State Constitution whether or not borrowed, citing *Wein II* and *Comeresky*. Judge Jason having retired, there was no dissent in *Schulz III*.

The Way Things Are Today

Looking back over the *Wein* and *Schulz* cases and their progeny,⁴⁰ it is hard to not take away the strong impression that the Court of Appeals has effectively repealed Article VII and Article VIII of the State Constitution.⁴¹ Although there are semantic differences between a loan and a gift for public finance structuring purposes, the truth is, as observed in the cases discussing appropriation-backed debt, when issued for a public purpose, the disconnect from the state and its conduit entities, whether through an independent authority or the technicality of a inter-public corporation gift, is a meaningless illusion. No state or local government would allow its subsidiary conduit entity to default on its debt, not only because the credit markets, observing no distinction in the credit between the state or local government and their controlled conduits, would not stand for it, but also neither would the voters for very long.

This trend toward appropriation-backed conduit debt does not stop at the state level. Although IDAs are largely immune from criticism that their financing activities are camouflaged local government debt, conduits in the form of not-for-profit corporations,⁴² referred to generically as “local development corporations,” often, in fact, provide camouflage. And there is more. In *Summers v. City of Rochester*,⁴³ the Appellate Department held that a limited liability company (LLC) may issue debt for an ostensible public purpose which can be assumed willy-nilly by the local government which formed it. Here is another opportunity for conduit financing to bloom because among the purposes of an LLC under § 202 of the NYS Limited liability Corporation Law is the power to do all things in furtherance of a governmental policy. Ladies and gentlemen, the bar is open.

A Look Around the Corner—Constitutional Reform

Much of the discussion about authority reform in the past few years has focused on the political corruption in appointing board members (nothing new), the lack of state fiscal oversight of their practices (board and staff trips to Bermuda to attend a conference—nothing new), lack of independence of board members (why wouldn't you appoint a major fundraiser who wants to participate in “public service”?), and lack of training for best practices in corporate governance (fundraisers need training for *what* exactly that they don't think they already know?). The effort and resources being invested to legislate morality and good judgment in running state and local government conduit entities is enormous.⁴⁴ In the area of a conduit's financing activities, the legislature occasionally imposes debt limits in bond authorization statutes, then routinely repeals them when the next issue of bonds will exceed the limit. Nothing has stopped New York's numerous conduits from issuing debt, save the expiration of provisions like “civic facility” bonds⁴⁵ or the lack of capital markets support.

However, little legislative reform attention has been given to conduit debt incurring powers. Much as we like to blame the legislature for this condition, it is not their fault. As explained above, any blame for the expansive powers for conduits to issue debt in the face of constitutional restraints should be laid on the steps of the Court of Appeals. The solution to harnessing the debt-incurring power of conduits does not reside in Albany, but rather with the people of the state, maudlin though it may appear. It resides in a substantial overhaul of the State Constitution.

Over 25 years ago, this author explained that a major roadblock in the State Constitution impacting local government finance is the inability to authorize and issue revenue bonds, a power granted local governments in most states within the traditional boundaries of the Special Fund Doctrine.⁴⁶ Likewise, the state has no power to issue revenue bonds. A constitutional amendment to authorize revenue bonds for the state and local governments, as an exception to the constitutional restraints on GOs, would eliminate the need for extensive conduit financing because the state and local governments could issue revenue bonds directly as non-GO debt.⁴⁷ While staff would be needed for the financial administration of revenue bonds, a function perhaps preserved for the conduits, further resort to conduits to bypass and usurp constitutional restraints on government borrowing would be unnecessary.

As this author pointed out to a conference of city and county managers a few months ago,⁴⁸ the very mention of the State Constitution generates abhorrence and anxiety. Most involved in government, policy and politics don't want to discuss it, and certainly not change it, out of fear that any change, especially a major top-to-bottom over-

haul, would disenfranchise important constituencies of certain benefits. But as discussed herein, the State Constitution plays a vital role in public finance.

State constitutions, besides being widely ignored and their more onerous provisions the subject of legislative evasion, are not well understood.⁴⁹ State constitutions do not generally grant rights to people; they restrict actions of the state exercised under the “reserved powers” emanating from the Tenth Amendment of the U.S. Constitution from hurting the people who live there—from excessive state spending, taxation and borrowing. However, the State Constitution of 1938, now in force, far from restricting state government action, expanded state powers in new Article XVI establishing state power to levy taxes, in new Article XVII providing a system of social welfare—jails, mental health facilities, public hospitals, public welfare, and more—and new Article XVIII instituting public housing and nursing homes, housing authorities, and more. Surprisingly, the 1938 Constitution’s mandates for public welfare, medical care and housing assistance invoked no effort to reform the 19th century restrictions on state and local debt retained in whole in the 1938 Constitution from its 1826 and 1894 antecedents.

New York’s debt is somewhere in excess of \$50 billion. The lion’s share of it—conduit debt—is subject to no limit or approval by any constituency other than the legislature and a public authorities review board selected by the governor and the legislature. Nowhere is there a discussion in the 1938 constitutional convention proceedings of granting counties and municipalities power to issue revenue bonds or to create local revenue bond authorities (like New Jersey utility districts)—in fact, the local authority to issue water revenue bonds established in the 1894 Constitution was repealed. Nowhere is there an analysis in the proceedings of the convention of whether it continued to make sense to measure debt and tax limits solely on real property tax values—what about general revenues, household income, GDP, or other modern indicia of an entity’s carrying capacity for debt?

Every organization, public or private, periodically refreshes its organic documents so that they are relevant to the shared existing conditions of its members, whether by-laws, a city code, or a corporate charter. Only works like the Bible, the Torah or the Koran we do not change because they are written by a higher authority and we strive to follow their absolute teachings. But men (and a few women) made and approved the State Constitution. They can change it⁵⁰ to bring government debt-incurring powers back to state and local governments whose elected officials are responsible to the voters.

Endnotes

1. N.Y. CONST., art. VII § 11 (“No debt shall be incurred unless approved by the voters at a general election.”).

2. N.Y. CONST., art. VIII § 2 (“No indebtedness shall be contracted by a county, city, town, village or school district unless the full faith and credit are pledged to the principal and interest thereof.”). In *Flushing Nat’l Bank v. Mun. Assistance Corp.*, 40 N.Y. 2d 731 (1975), the court held that the faith and credit pledge is a prior lien on the revenues of the issuer. See generally Kenneth W. Bond, *Enhancing the Security Behind Municipal Obligations*, 6 FORDHAM URB. L.J. (1977).
3. ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW—THEORY AND PRACTICE, §1.3 (1992 & Supp.).
4. See, e.g., N.Y. PUB. AUTH. LAW § 50 (2009).
5. *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898).
6. See generally *Penn Square Gen. Corp. v. County of Lancaster*, 936 A.2d 158 (Pa. Cmwlth., 2007).
7. N.Y. LOCAL FIN. LAW, §§ 123.00, 124.10 (2009).
8. PANYNJ was established in 1921 through an interstate compact between New York and New Jersey and approved by Congress.
9. For example, Montana provides for special assessment districts which issue bonds to pay for public improvements where the property benefited by the improvements can be identified. The principal and interest payments are made from a special assessment on the identified properties. See MONT. CODE ANN. §§ 7-12-2169, -4201 (2009).
10. Businessdictionary.com, Conduit Finance Definition, <http://www.businessdictionary.com/definition/conduit-finance.html> (last visited Sept. 10, 2009).
11. *Winkler v. State Sch. Bldg. Auth.*, 189 W.Va. 748 (1993).
12. For investment-grade revenue bonds, annual net revenues for debt service should be 2 to 3 times scheduled annual debt service.
13. *Bulman v. McCrane*, 64 N.J. 105 (1973).
14. *Lonegan v. State*, 176 N.J. 2 (2003).
15. *Lance v. McGreevey*, 180 N.J. 590 (2004).
16. ...the losses from which we are paying for through our annual Form 1040 filings to sustain the multi-million dollar compensation and benefits of major bank executives...
17. See generally INTERNAL REVENUE SERV., INTERNAL REVENUE BULLETIN 2006-36 (Sept. 5, 2006).
18. In the late 1970s and early 1980s, during historically high interest rate levels, tax-exempt revenue bonds for economic development purposes under state law proliferated. Congress’ response was to classify revenue bonds benefiting private persons and corporations (non-exempt persons) as “private activity bonds” and generally deny them tax-exempt status.
19. See generally *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853) (stating that it would be “palpably unconstitutional” to use tax dollars for a private purpose).
20. See, e.g., *Village of Moyie Springs v. Aurora Mfg. Co.*, 353 P.2d 767 (Idaho, 1968); *Mitchell v. N. C. Indus. Dev. Fin. Auth.*, 159 S.E.2d 745 (N.C., 1968).
21. See generally RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 540-47 (2004).
22. For example, the New York State Empire State Development Corporation.
23. N.Y. GEN. MUN. LAW Title 18-A.
24. For example, the New Jersey Economic Development Authority, and the Connecticut Economic Development Agency.
25. See OFFICE OF THE STATE COMPTROLLER, DIV. OF LOCAL GOV’T SERVICES & ECON. DEV., INDUSTRIAL DEVELOPMENT AGENCIES IN NEW YORK STATE: BACKGROUND, ISSUES AND RECOMMENDATIONS (2006), available at <http://www.osc.state.ny.us/localgov/pubs/research/idabackground.pdf>.
26. These are non-financing transactions where the project is deed to the IDA for state and local tax incentives.

27. A contractual arrangement whereby the project borrower agrees to pay the taxing jurisdictions a fraction of the real property taxes which would otherwise be entirely abated.
28. See generally CITIZENS BUDGET COMM'N, PUBLIC AUTHORITIES IN NEW YORK STATE (2006), available at http://www.cbcny.org/Authority_Reform_CBC.pdf.
29. See *supra* note 24.
30. Official statements for bond issues of IDA projects disclaim in bold caps that the IDA debt is not that of the state or its political subdivisions.
31. *Local Gov't Assistance Corp. v. Sales Tax Receivables Corp.*, 2 N.Y.3d 524 (2004). The court, after reviewing the constitutionality of an incredibly complex financing structure involving at least two state agencies and one not-for-profit corporation to refund the debt of one authority and provide a large payment to New York City, said "the wisdom of this legislation of not a matter for this court to address." *Id.* at 528.
32. See Public Authorities Accountability Act, ch. 766 L. 2005, 228th Sess. (N.Y. 2005) (codified as amended at N.Y. PUB. AUTH. LAW § 2 *et seq.* (2006)).
33. See A.2209-C, 232nd Sess. (N.Y. 2009); S.1537-C, 232nd Sess. (N.Y. 2009).
34. 308 N.Y. 248 (1955).
35. *Id.* at 254.
36. 36 N.Y.2d 610 (1975).
37. 39 N.Y.2d 136 (1976).
38. *Id.* at 158.
39. 84 N.Y.2d 231 (1994).
40. See, e.g., *Schulz v. N.Y. State Legislature* (hereinafter *Schulz IV*), 676 N.Y.S.2d 237 (1998) (upholding the bonds of the Transitional Finance Authority to fund New York City capital projects which if financed by the City would exceed its constitutional debt limit, citing *Wein II* and *Schulz III*, and *LCAG v. STARC* citing *Wein II*, *Schulz III* and *Schulz IV*).
41. Recent cases in other states have moved away from judicial permissiveness. See, e.g., *State ex rel. Pension Obligation Bond Comm. v. All Persons Interested in Matter*, 152 Cal.App.4th 1386 (2007) (invalidating proposed pension obligation bonds as not being voted for approval and attempting to do indirectly what is prohibited directly); *Strand v. Escambia County*, 32 Fla. L. Weekly S550a (2007) (invalidating proposed tax increment bonds as pledging the county's full faith and credit for GO-type projects without voter approval).
42. N.Y. NOT-FOR-PROFIT CORP. LAW § 1411 permits these corporations to engage in activities in furtherance of assisting a governmental purpose.
43. 875 N.Y.S.2d 658 (4th Dep't 2009).
44. See generally Public Authorities Accountability Act of 2005, *supra* note 32; A.2209-C/S.1537-C (2009), *supra* note 33.
45. N.Y. GEN. MUN. LAW § 854(13) (2009).
46. See Kenneth W. Bond, *Toward Revenue Bonds for N.Y. Municipal Finance*, N.Y. L.J. (Sept. 29, 1983).
47. A constitutional convention held in Albany in 1967 proposed amendments authorizing revenue bonds and relaxing the prohibition on gifts and loans. The proposition was defeated by the voters in November, 1967 (Source: New York State Archives and Records Administration).
48. Kenneth W. Bond, Address at the Annual Training Conference of the New York County and City Managers Association (May 18, 2009).
49. See generally Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907 (2003).
50. N.Y. CONST., art. XIX, § 2 requires that the proposition, "Shall there be a convention to revise the Constitution and amend the same?" be placed on general election ballot every 20 years.

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Getting Past the Prisoners' Dilemma: Transparency and Accountability Reforms to Improve New York's Industrial Development Agencies

By Amy Lavine

I. Introduction: Economic Development Subsidies and IDAs

To promote commercial and industrial development, New York State authorized the creation of local Industrial Development Agencies (IDAs) in 1969.¹ The legislation gave IDAs the power to subsidize business projects through tax exemptions,² tax exempt bond financing,³ straight lease transactions,⁴ and project site acquisitions.⁵ By the time the law was enacted, forty other states had already established their own industrial development agencies, and IDAs were seen as crucial to enhancing New York's business climate and economic competitiveness.⁶



The establishment of IDAs in New York was just one of a broader suite of economic development programs,⁷ all enacted with the goal of luring industry to locate and remain in the state. But other states established these programs as well, leading to competition among states and localities to offer the most enticing incentives—even if subsidies sometimes canceled out the benefits to be obtained by attracting business. Because of this subsidy competition, economic development programs have been criticized for decades as perpetuating an “economic war among the states” and a publicly financed race to the bottom.⁸ Subsidy programs persist, however, because any state or local government that refuses to offer development incentives will likely lose investments and jobs to jurisdictions where such programs exist. The situation presents a classic example of the prisoners' dilemma: state and local governments would be better off if no economic development subsidies were available, but they very reasonably continue to offer subsidies in order to protect their own self interest.⁹

While this prisoners' dilemma may not have an easy solution, the states do have the ability to increase the transparency and accountability of economic development agencies so as to ensure that they use tax dollars in good faith, with due care, and with the public interest in mind. IDA reform has long been a hot topic in New York, and the passage of the Public Authorities Accountability Act of 2005 (PAAA) and related amendments in 2009 (which are currently awaiting gubernatorial approval)¹⁰

may signal growing support for amendments to the IDA Act.¹¹

“Although critics of economic development subsidies are more vocal than supporters, it is important to recognize that IDAs and similar public agencies are intended to serve beneficial functions.”

This article starts from the premise that the public would benefit from the enactment of some IDA reforms. Indeed, there is no real opposition to increasing the transparency and accountability of the IDA system, at least to a certain extent.¹² Other reforms may be desired, but less likely to be enacted—the prisoners' dilemma, after all, is a hard one to break, and it militates against any changes that could damage New York's business climate and thus deter economic growth. The article begins with a short discussion about the public benefits that IDAs provide, followed by a brief description of the agencies' deficiencies. An overview of reforms will then be provided, with a concluding discussion offering some thoughts on how best to accommodate the opposite sides of a very deeply rooted impasse.

II. Why We Need IDAs

Economic development subsidies may have a bad reputation, but it is not clear that they actually cause a race to the bottom. Their positive social benefits are often overlooked or underestimated,¹³ and their aggregate impact may even provide net benefits to the state.¹⁴ Although critics of economic development subsidies are more vocal than supporters, it is important to recognize that IDAs and similar public agencies are intended to serve beneficial functions. The following sections briefly summarize the positive aspects of economic development subsidies.

A. IDAs Improve New York's Business Climate

The most frequently cited support for IDAs is that they serve to mitigate the effects of New York's high tax rates, especially in upstate areas.¹⁵ New York has “the reputation of a tax purgatory” and consistently ranks at the bottom of state business competitiveness indices.¹⁶ Accordingly, economic development incentives may be

especially important in New York, and enacting overly burdensome restrictions on IDAs could push companies to leave the state for more business-friendly jurisdictions.

B. IDAs Produce Public Benefits

IDAs do more than maintain New York's economic competitiveness, however. Importantly, IDAs across the state have worked to bring in new businesses and provide new job opportunities. They have also helped to finance nonprofit projects like libraries and community centers, as well as small business initiatives, alternative energy projects and sustainable development projects.¹⁷ While anecdotal reports of failed and wasteful IDA projects may be cause for concern, it must be remembered that many, and possibly most, IDA projects are successful.

C. IDAs Optimize the Allocation of Public and Private Resources

Economic development subsidies also have strong theoretical support. First, competition for business at the local level should serve to allocate resources most efficiently because "businesses that seek a particular type of environment, work force, or package of goods and services will gravitate to those locations that signal their desire to attract firms with similar preferences."¹⁸ According to this theory, known as the Tiebout model, the competition caused by development subsidies should optimize the coordination of public and private entities.¹⁹

The flexibility of the IDA model also allows agencies to account for the unique characteristics of their communities and to develop strategies and incentives tailored to their needs.²⁰ The local nature of IDAs also makes them "laboratories of innovation" and should encourage inventive responses to different social and economic considerations.²¹

Moreover, as a type of public-private partnership, IDAs help "to determine the most efficient actors for each development function at each stage in the life of a project."²² Private sector entities, whether for-profit businesses or nonprofit organizations, can often act "to improve public services and to provide those services on a cost-effective basis."²³ In the context of IDAs, business subsidies can thus be seen as investments in job creation programs that are better managed by private entities than by government agencies.

Finally, the subsidies offered by IDAs and other government agencies help to mitigate financial risks and should therefore lead to increased private sector investment.²⁴ Over the long run, this can result in government cost savings and increased economic development activity.

III. Why IDAs Are Problematic

IDAs may have the ability to optimize efficiency and resource allocation, but the complex public-private

relationships that they create also offer opportunities for waste and abuse.²⁵ The following subsections summarize the primary criticisms leveled against economic development subsidies.

A. Businesses Get Subsidies When They Do Not Need Them

Waste is frequently cited as one of the most problematic aspects of the IDA model. In their zeal to attract development, agencies may award larger subsidies than necessary to attract or retain businesses; in some cases, subsidies may even be awarded to firms that would have located or remained in New York even without financial incentives.²⁶ Businesses have good reason to seek out such "freebies," as subsidies have become so common that they are virtually guaranteed, especially if the company is large enough to persuade more than one community to compete for its business.²⁷ But these incentive packages are paid for by the public, and critics argue for more safeguards to ensure that subsidies are awarded on an objective basis that takes into account the company's need for the subsidy balanced against the benefits to the locality. Imposing stricter standards, moreover, would improve the predictability of subsidy decisions and help to deter favoritism.

B. Businesses Fail to Produce Promised Benefits

A second problem is posed by projects that fail to meet their job creation or retention goals,²⁸ although it is unclear how common this is.²⁹ Broken job creation promises can be partly attributed to the fact that businesses tend to inflate their economic development potential in order to justify larger subsidies.³⁰ But the problem is also caused by a lack of any real penalty provisions in the IDA Act. Long term tax abatements and favorable lease terms, for example, are not required to be cut off when businesses fail to meet their job creation goals, and a business that packs up and relocates to another state before its subsidies have expired gets to keep the taxpayer dollars it has already received. Nor is there any statutory requirement that agencies assess the reasonableness of job creation goals before awarding subsidies, and IDAs' subsidy eligibility policies are often vague enough to support awards that might not be in the public interest.³¹ Inconsistent reporting, moreover, sometimes makes it difficult to determine whether projects have met their job creation and investment goals.³²

C. IDAs Subsidize Low-Wage Jobs, Hurt Existing Businesses, and Encourage Sprawl

Criticism has also been leveled at the types of developments that IDAs subsidize.³³ Critics argue that public funds should not be used to subsidize "poverty wage" jobs that impose hidden taxpayer costs due to the need for local governments to fund additional social support services.³⁴ And when subsidies are provided to new businesses, especially big box retail outlets, existing busi-

nesses often suffer.³⁵ The result may be a net reduction in jobs and economic development, with corresponding impacts on the local economy, even if job creation goals are met. Subsidizing sprawl and environmental destruction is another problem, as IDA projects are often located in suburban and exurban areas.³⁶ Unlike projects located in urban areas with existing infrastructure and access to transit, sprawl increases local governments' infrastructure maintenance and service delivery costs, leads to higher emissions from vehicle trips generated, and results in the loss of natural habitats and farmland.³⁷

D. IDAs Use Tax Dollars That Could Be Put Toward "More Important Things"

Finally, even though their economic development incentives do not require cash payments or underwriting from local governments, IDA tax exemptions divert a major source of funding—property taxes—from school districts and municipal general funds. The various state tax exemptions offered by IDAs similarly add up to millions of dollars of lost revenues, which could otherwise be used for any number of underfunded state programs.³⁸ In theory, IDA tax exemptions are more than justified by the increased property values and tax revenues that will be produced by projects after their exemptions expire. But in reality, one of the most forceful criticisms of IDAs is that their tax exemptions bleed money away from education, public safety and other government programs—what some people have taken to calling “more important things.”³⁹ The criticism is not just that business interests are being promoted over public interests, however. Better funding for education, infrastructure and public safety could help to grow the kinds of environments that businesses actually seek out, as no amount of economic development subsidies can produce a well-educated workforce or a community with a high quality of life.⁴⁰

IV. Proposed Reforms

Commentators have been unable to agree about the effectiveness of IDAs and other economic development subsidies. Regardless, it can hardly be argued that the IDA Act is perfect. Parts of the Act are outdated, and other sections could be improved by reforms designed to increase transparency, accountability, project quality, and public involvement. IDAs are subject to the state's recently passed public authorities reforms,⁴¹ but legislation is still needed to address specific deficiencies of the IDA Act. The following subsections highlight some of the reforms that have been proposed by legislators and public interest groups.

A. Increase Monitoring and Reporting Requirements

Increased disclosure has been described as one of “the most fundamental” reforms needed for economic development agencies, as accurate data is necessary to understand how IDAs can be improved.⁴² Legislation requiring IDAs to submit annual financial statements to

the Comptroller was passed in 1989,⁴³ and amendments passed in 1993 required IDAs to report additional job creation data.⁴⁴ Nevertheless, some of the job data collected from IDAs is still incomplete, inconsistent or unreliable. Studies based on data from 2005 have determined that IDAs failed to submit complete job data for somewhere between 11% and 48% of all projects.⁴⁵ The Comptroller's most recent report (assessing 2007 data) concluded that nearly 10% of IDAs “reported zero job data across all job categories”⁴⁶ and “IDAs still do not consistently verify employer-reported job information.”⁴⁷ Different organizations (with opposing political agendas) have also reached starkly different conclusions about the effectiveness of IDAs, illustrating how malleable the data is when different metrics are used to decide which IDA reports are complete enough to analyze.⁴⁸

“Better funding for education, infrastructure and public safety could help to grow the kinds of environments that businesses actually seek out, as no amount of economic development subsidies can produce a well-educated workforce or a community with a high quality of life.”

The Comptroller, however, has statutory authority to impose reporting requirements on IDAs,⁴⁹ and over the past several years the Office of the State Comptroller (OSC) has taken a number of steps to facilitate more accurate and consistent reporting. New queries have been added to the list of statutory reporting requirements, such as wage and benefits data.⁵⁰ Other changes, such as prohibiting IDAs from revising job creation goals, have been imposed in order to make it easier to determine whether project goals have been met.⁵¹ OSC has also offered increased training for IDA board members, issued guidance for preparing annual statements, and increased the number of IDAs that it audits.⁵² In 2007, the online Public Authority Reporting Information System (PARIS) was launched to simplify the reporting process and improve consistency.⁵³

While the Comptroller's increased oversight of IDAs has resulted in better reporting, additional reforms have been proposed. One commentator has suggested that annual reports should include more detailed information relating to payments in lieu of taxes as well as “information on all government assistance provided to a project” and not just IDA subsidies.⁵⁴ A 2009 bill sponsored by Assemblyman Sam Hoyt would codify many of the project and job information reporting provisions now required by the Comptroller. It would also require IDAs to develop benchmarks to track how well projects meet their goals.⁵⁵ Another bill, called the Corporate Accountability for Tax

Expenditures Act, would require IDA annual reports to include data on the aggregated amount of diverted state taxes and follow-up information on previous years' agreements. And whereas current law suspends IDAs' subsidy granting powers if they fail to comply with reporting requirements, this bill would go farther and suspend previously awarded benefits if businesses refuse to provide necessary data.⁵⁶

B. Make the Application and Subsidy Award Process More Objective

Several reforms have been suggested to ensure that incentives are awarded to projects that actually need them, and to ensure that subsidies are no larger than necessary. Chief among these proposals is to codify procedures relating to subsidy applications and subsidy awards. Currently, the IDA Act prescribes very few steps for the project application and approval process, presenting opportunities for IDAs to distribute subsidies in an inconsistent and possibly wasteful or biased manner. Making the process more formal, and codifying certain minimum requirements, would give the system more integrity and make subsidy decisions more predictable.

"By improving the consistency of agencies' subsidy decisions, these reforms would help to prevent IDA decisions based on favoritism, exaggerated project goals and poor judgment."

The IDA Act currently includes no content requirements for project applications.⁵⁷ A certain baseline of information is needed, however, for agencies to make informed subsidy decisions, and things like corporate information, detailed project proposals, and cost-benefit analyses should be considered necessary components of any IDA application.⁵⁸ The Hoyt bill would require applications to include this information, among other things, and it would also require companies to explain in their applications why assistance is necessary. IDAs, in reviewing applications, would then have to make findings that the estimated job creation goals are reasonable and that the project "would not be undertaken but for the financial assistance provided by the agency[.]"⁵⁹

Another useful reform would be to require agencies to make subsidy decisions based on objective and uniformly applied criteria.⁶⁰ The 1993 amendments to the IDA Act were intended to address this issue. The legislation required IDAs to adopt uniform tax-exemption policies, which were to take into account such factors as the expected number of jobs to be created, estimated tax revenue increases and the project's negative environmental impacts. Deviations from the uniform policy were to be explained in writing, with notification being made to any

affected taxing jurisdiction.⁶¹ Unfortunately, some IDAs failed to comply with the legislation,⁶² and some uniform policies are so vague as to offer little guidance as to the types of projects eligible for subsidies or the amount of subsidies available.⁶³ According to the 2006 Comptroller report, other IDAs have used "expansive interpretations" to stretch the meaning of project eligibility requirements.⁶⁴

To strengthen the 1993 amendments, the Hoyt bill would require IDAs to adopt specific subsidy criteria and to make an independent analysis of the cost-benefit information contained each application. The amount of assistance available would then be determined based on "a point scoring system to evaluate the job, wage, investment, and community and workforce development attributes of each project[.]" Finally, the bill would require uniform tax exemption policies to be reviewed every year, with input from affecting taxing jurisdictions being presented at public hearings.⁶⁵ By improving the consistency of agencies' subsidy decisions, these reforms would help to prevent IDA decisions based on favoritism, exaggerated project goals and poor judgment.

C. Increase Transparency and Public Participation in the Subsidy Award Process

Across the country, state and local governments have created a slow but steady trend of improving the transparency and accountability of economic development agencies.⁶⁶ Measures have been enacted to make information about subsidies more widely available to the public, and to provide a larger role for public participation in decisions regarding subsidy awards.

The IDA Act would benefit from these sorts of transparency and accountability reforms. First, the statute sets the minimum period of notice for IDA public hearings at a mere 10 days.⁶⁷ Second, public hearings are often held just before agencies make their decisions on incentive applications. Without the benefit of public comment closer to the beginning of the subsidy award process, hearings may serve as more of an afterthought to IDA board members who have already invested substantial amounts of time in negotiations with project applicants.⁶⁸ Finally, public participation could also be fostered by requiring IDAs to make project applications and related documents easily accessible to the public, well in advance of public hearings.⁶⁹

Responding to these procedural concerns, the Corporate Accountability for Tax Expenditures bill proposes to increase the notice period for public hearings to 30 days, and to require a public hearing to be held within 60 days of an application's submission.⁷⁰ The Hoyt bill would additionally require IDA-specific documents to be posted on agencies' Web sites, including PILOT agreements and information about pending projects.⁷¹ These reforms are long overdue.

The Hoyt bill would also establish a Community Impact Review process, which is similar to the economic impact reviews now required in a number of state and local jurisdictions for large-scale project proposals.⁷² Under this review process, agencies would be required to prepare community impact reports (CIRs) and make them available to the public along with project applications. The CIRs would include enough project information for board members and taxpayers to make informed decisions about the costs and benefits of subsidy decisions. Briefly stated, the CIR would contain “an analysis of the economic, social and environmental impact of the project on the community, including its employment, infrastructure and housing[.]” and it would require all potential adverse impacts to be disclosed.⁷³ Before approving any subsidy, agencies would be required to find “that any negative impact from the project...will be avoided or minimized to the maximum extent possible.” Alternative project plans would have to be considered in making this determination, including the no-project alternative.⁷⁴

D. Increase Ethical Standards for IDA Board Members

IDA board members are currently subject to the conflict-of-interest provisions applied to municipal officers.⁷⁵ Additionally, the PAAA required each IDA to adopt a code of ethics and whistleblower protection policies. Board members, moreover, must now make annual financial disclosures and attend mandatory training sessions dealing with governance issues.⁷⁶ Amendments to the PAAA passed in 2009 and currently awaiting gubernatorial approval further emphasize, if there was remaining any doubt, that agency board members have a fiduciary duty to the public.⁷⁷

Even with these increased ethics standards, two bills introduced in 2009 would impose tougher conflict of interest rules, requiring board members to recuse themselves rather than merely disclosing their conflicts.⁷⁸ The Hoyt bill, in addition to requiring recusal, would also prohibit the appointment of any person who, within the previous five years, served as a lobbyist in the local jurisdiction or worked for a consultant or supplier to the IDA.⁷⁹ While these conflict of interest provisions may be unappealing to business interests, there are few grounds on which they can be opposed.⁸⁰

E. Amend the Anti-Piracy Statute

The anti-piracy provision in the IDA Act (sometimes called the anti-poaching or anti-raiding statute) is intended to prohibit agencies from luring companies from one part of the state to another, as this merely shifts jobs, rather than creating new economic growth.⁸¹ The rule contains two exceptions, however, allowing intra-state relocations where the subsidy is necessary either to prevent a business from moving out of the state, or for the business to remain competitive.⁸² Critics allege that these

exceptions have weakened the anti-piracy statute to the point where it is “virtually without effect,”⁸³ but this may be an overstatement, as the courts have found violations of the statute in a number of cases.⁸⁴

A more cogent criticism lies in the windfall remedy that a pirating municipality receives when a violation of the statute is found.⁸⁵ According to case law, the second municipality not only gets to keep the pirated jobs, but is also awarded a refund of the unlawful subsidies. The original host community loses its jobs and gets no compensation for the act of piracy, and the pirating IDA receives no meaningful penalty aside from losing its deal.⁸⁶ IDA reform proponents have proposed to change these outcomes by making subsidy refunds available to the first municipality instead of the second, and by temporarily suspending the pirating IDA’s subsidy granting powers.⁸⁷ A less common suggestion is to give the first municipality the power to veto any subsidies granted by an agency trying to persuade a business to relocate.⁸⁸

Another approach to minimizing instances of job piracy within the state has been to advocate for better coordination among IDAs. With several counties having five or more separate IDAs,⁸⁹ better cooperation could promote regional needs and discourage competition between urban areas and their surrounding suburbs.⁹⁰ Improving regional cooperation would have the additional benefits of streamlining the process for subsidy applicants and making the economic development system (which includes other entities aside from IDAs) easier to navigate and more cost effective.⁹¹ Some IDAs have already taken voluntary measures to increase regional cooperation,⁹² but merging or consolidating IDAs currently requires the passage of state legislation. Proposals have thus been made to amend the IDA Act to allow neighboring agencies to merge without state approval.⁹³

F. Enact Meaningful Penalties for IDAs and Subsidy Recipients

The only real penalty currently authorized by the IDA Act is a provision that suspends agencies’ subsidy powers if they fail to submit an annual report.⁹⁴ There are no repercussions for businesses that refuse to provide IDAs with information necessary for reporting. Nor are there any penalties for companies that fail to create or retain the number of jobs that were promised, even if the business abandons the state completely. With sufficient evidence, local governments and school districts can bring suit against IDAs and subsidy recipients for fraud, breach of the common law fiduciary duty, or even civil RICO.⁹⁵ Such claims are difficult to prove, however, and require costly and time-consuming litigation. They are not very common.

To prevent companies from inflating their job creation goals in order to receive larger subsidies and from being unjustly enriched if they accept subsidies and then

relocate out of state, other states have enacted subsidy termination and recapture (or clawback) provisions.⁹⁶ Both the Hoyt bill and the Corporate Accountability for Tax Expenditures bill include such rules. Essentially, they would discontinue long-term subsidies if a project failed to meet its job creation goals, and they would require a business that leaves the state within five years to repay all of the subsidies it received.⁹⁷ Significantly, the Corporate Accountability for Tax Expenditures bill does not seem to require the repayment of local tax exemptions, making it much weaker than the Hoyt bill. The Hoyt bill contains another notable difference in that it requires subsidies to be discontinued not only for failing to meet project goals, but also if a business is found to be in violation of any labor or environmental laws.

"Subsidy discontinuance and recapture provisions have received broad support from public interest groups and government officials, but business representatives and other politicians have opposed them for fear that they may damage the state's business climate."

Subsidy discontinuance and recapture provisions have received broad support from public interest groups and government officials,⁹⁸ but business representatives and other politicians have opposed them for fear that they may damage the state's business climate. Indeed, businesses might very well be dissuaded from operating in New York State if they feared that their subsidies could be retroactively revoked for good-faith efforts that nevertheless failed to meet their targets.⁹⁹ The Corporate Expenditures for Tax Accountability bill responds to this concern by allowing the state to waive recapture requirements on a case-by-case basis, but the Hoyt bill includes no such parallel safety valve.¹⁰⁰ Waiver provisions or exceptions for *forces majeure* would make clawbacks fairer rules, but they must be crafted carefully to preclude inconsistent or lax application.¹⁰¹ Accordingly, a compromise reform might be to require IDAs to attach subsidy discontinuance and recapture requirements to their assistance agreements, but to allow for good-faith exceptions in specific and limited situations.

G. Make Sure That Local Governments and School Districts Are Involved in the Subsidy Award Process

IDA tax exemptions divert revenue streams that would otherwise go toward local governments, school districts, and the state. In 2007, IDAs granted \$970 million in tax exemptions, the majority of which came from local property tax abatements. These tax exemptions were offset by \$377 million in payments in lieu of taxes,

or PILOTs, bringing the net amount of tax exemptions to \$593 million.¹⁰² The statewide impact of these exemptions on education and local government funding is significant; just half of this amount could pay the annual salaries of more than 5,000 teachers¹⁰³ or 3,000 police officers.¹⁰⁴ Because of these fiscal impacts, many commentators have called for the IDA process to be more accountable to the local governments and school districts that they impact.¹⁰⁵

Some of the reporting and public disclosure reforms discussed in other sections of this article could help to shed light on the impacts of tax exemptions on public finances. They could also help to identify wasteful projects, and subsidy suspension and recapture proposals, if enacted, would return some of these subsidies to their original taxing jurisdictions.

One reform proposal specifically intended to protect affected taxing jurisdictions is to require the inclusion of local government and school district representatives on IDA boards. Several currently pending bills would also reserve board seats for labor and environmental representatives,¹⁰⁶ thus ensuring a more diverse range of decision-makers on boards that have traditionally presented opportunities for nepotism and revolving-door business appointments.¹⁰⁷ In 2007, a bill was proposed that would have required affected school districts and local governments to approve agencies' uniform tax exemption policies.¹⁰⁸ A variation on this rule could give school boards and local governments a veto over the adoption of or deviations from any uniform policy, but this could lead to selfish or misguided actions on the part of affected taxing jurisdictions. A more balanced rule might be to require a public hearing for adopting or deviating from a uniform tax-exemption policy, with special notice being provided to representatives of affected taxing jurisdictions.¹⁰⁹ Another option would be for the state to reimburse school districts directly, but this would result in further losses to state revenues.¹¹⁰

H. Improve the Quality of Subsidized Projects

i. Prevailing and Living Wages¹¹¹

Prevailing and living wage standards are viewed as a priority IDA reform by numerous labor organizations and public interest groups.¹¹² There is a moralistic aspect to this reform, as it suggests that public money, through government decisions, should not be spent on jobs that offer insufficient wages and benefits for employees to achieve a decent quality of life. But economic policy also supports increased wages for a number of reasons, including: decreased costs for public assistance programs necessitated by "poverty wage" jobs; increased worker competence, productivity and reliability, which can actually result in lower costs for developers and employers; and spin off benefits to local economies resulting from larger amounts of discretionary income.¹¹³ Moreover, precedent exists for prevailing wage standards given that the state already

requires increased wages for construction jobs associated with most public works projects.¹¹⁴

A few IDAs have already taken steps to require subsidized projects to create better paying jobs. The Nassau County IDA, for example, has raised the bar for construction jobs by refusing to issue tax exempt bonds for projects costing more than \$5 million unless the applicant and its subcontractors agree to pay prevailing wages and enter into project labor agreements.¹¹⁵ The Ulster County IDA also enacted an increased wage policy in 2007, which applied to both construction and permanent jobs. It has been temporarily suspended, however, so that the IDA can determine its impact (positive or negative) on the county's ability to attract new development.¹¹⁶

At the state level, prevailing wage standards for IDAs have been proposed repeatedly over the last several years,¹¹⁷ and four such bills are currently pending.¹¹⁸ While some of these bills impose prevailing wages for only construction employees, the Hoyt bill mandates increased wages for construction workers, building maintenance employees, and other workers.¹¹⁹ The Hoyt bill has provoked strong opposition, however, with opponents generally framing the wage requirements as "job killers."¹²⁰ They argue that mandatory wage requirements will increase the cost of doing business in New York too much, driving both new and established businesses away. A 2008 study provides support for this view, finding that "extending prevailing wage to IDA projects will increase the total cost of a typical construction project 23% for upstate regions...and 52% for downstate regions[.]"¹²¹

As with the larger question of whether economic development subsidies are good public policy, there is room to debate the effectiveness of prevailing and living wages. What is clear, however, is that wage requirements are the most controversial aspect of IDA reform, and it will be unfortunate if prevailing wage provisions continue to stall the passage of other much needed reforms. A more pragmatic approach might be to set aside increased wage requirements and instead propose additional incentives for projects that offer prevailing and living wages (or disincentives for projects that do not). The data generated from this type of incentive program would also help to answer the question of whether or not prevailing wages would actually damage New York's ability to attract business.

ii. Local Hiring Requirements

The County of Monroe IDA (COMIDA) requires projects to hire construction workers from a nine-county area, with exceptions available only in limited circumstances.¹²² While not raising wages, this provision keeps the benefits of development within the greater Rochester area, supporting the regional economy and all of the businesses that depend on it. Additionally, because the policy

is regional in scope, it may also help to increase regional cooperation among IDAs.

Although no local hiring requirements have been proposed this year,¹²³ the Hoyt bill does direct subsidy recipients to consider, where practical, hiring employees from the metropolitan statistical area if more than 30% of the area's residents live below the poverty line.¹²⁴ A more general local hiring requirement may be warranted, however, as there are few downsides to such provisions aside from the cost of monitoring. Geographical hiring restrictions that cover a large area, like the COMIDA program, should not overly restrict the pool of qualified employees. If they arise, problems of this sort can be resolved by including exceptions, as in COMIDA's policy, for specialized construction contractors and a lack of local workers.¹²⁵ In the alternative, local hiring programs that apply to smaller geographical areas are often structured so as to give local residents priority in applying for jobs. This allows employers to hire any employees they wish, but still creates increased opportunities for local residents.¹²⁶ Another option would be to require individual IDAs to set their own local hiring goals.

"For better or worse, New York's IDAs will likely be in the subsidy game for many years to come."

iii. Increased Environmental and Sustainability Standards

In addition to calls for increased wages and local hiring, reform proposals have also sought to impose energy and environmental standards on IDA projects. These requirements might increase upfront development prices and make communities less "business friendly," but they have engendered much less opposition than wage provisions. This may be due to the fact that many environmental standards decrease long-term costs,¹²⁷ and because businesses have begun to respond to consumer demands for green products.¹²⁸

Several pending bills focus on requiring subsidized projects to meet green building standards and prohibiting them from being built on greenfields.¹²⁹ An alternative approach already being taken by some IDAs would be to increase the incentives available to companies that voluntarily adopt such heightened environmental standards.¹³⁰ This may be a better option, especially for provisions requiring IDA projects to be located on brownfields or greyfields. These prohibitions on greenfield development greatly limit agencies' abilities to find suitable sites for businesses, and they have not received broad support.¹³¹

V. Where to Go With IDA Reform

For better or worse, New York's IDAs will likely be in the subsidy game for many years to come. Many reforms, however, can be enacted now to improve agencies' efficiency, transparency and accountability. Very few criticisms can be made against proposals to augment the Act's reporting requirements, to tighten the uniform tax exemption statute so that agencies' policies must, in fact, be uniform policies, or to make the Act's notice and hearing requirements more amenable to meaningful opportunities for public participation. Additional ethics requirements, provisions giving school districts and local governments more say as to how their diverted tax dollars are used, increased environmental standards, and an anti-piracy statute that does not result in windfall remedies are also improvements that most people can agree on, even if consensus on the details has yet to be reached.

Supporters of IDA reforms should take pragmatic considerations into account and focus on these generally accepted proposals, as many of them are extremely important. Compromise proposals can be developed for more controversial provisions: clawbacks can have exceptions, properly tailored, and wage increases can be incentivized rather than mandated.

Endnotes

1. 1969 Laws of N.Y., ch. 1030, codified at N.Y. GEN. MUN. LAW §§ 850 *et seq.* The IDA Act also authorizes agencies to assist recreation, education and cultural projects. N.Y. GEN. MUN. LAW § 854 (4). A 1986 amendment to the IDA Act also permitted agencies to subsidize "civic" projects, meaning projects developed by nonprofits. 1986 Laws of N.Y., ch. 905, previously codified at N.Y. GEN. MUN. LAW § 854 (13). However, the civic project provision expired in 2008.
2. N.Y. GEN. MUN. LAW § 874. *See also* *Pyramid Co. of Watertown v. Tibbets*, 76 N.Y.2d 148 (1990) (discussing the tax benefits available under the IDA Act).
3. N.Y. GEN. MUN. LAW § 864. *See Wegmans Food Markets, Inc. v. Dep't of Taxation & Fin.*, 126 Misc.2d 144, 145 (Monroe County 1984) (explaining typical bond financing arrangements).
4. N.Y. GEN. MUN. LAW § 868(9); N.Y. GEN. MUN. LAW § 854 (defining "straight lease transaction"). *See also* Brian T. McMahon and Michael O'Shea, Esq., *Industrial Development Agencies and the 504 Loan Program: Great Economic Development Partners*, <http://www.nybdc.com/December2006Newsletter/partnerpageDec2006.htm> (last visited Sept. 10, 2009).
5. N.Y. GEN. MUN. LAW § 858(4). *See also* *Ne. Parent and Child Soc'y v. Schenectady IDA*, 494 N.Y.S.2d 503 (3d Dep't 1985).
6. *See* Memorandum, Office of the Governor of N.Y., In Support of N.Y. Gen. Mun. Law §§ 850 *et seq.* (May 26, 1969) (stating that IDAs were necessary to "help communities in New York State to compete more effectively with communities in over 40 other states where industrial development agencies are now operating.").
7. *See generally* Frank J. Mauro & Glenn Yago, *State Government Targeting in Economic Development: The New York Experience*, 19(2) *PUBLICUS* 63-82 (1989) (discussing the history of economic development programs in New York).
8. *See, e.g.*, Robert L. Birmingham, *Industrial Development Bonds and Economic Policy*, 1 *CREIGHTON L. REV.* 9, 12 (1968); *Congress Should*

End the Economic War Among the States: Hearing Before the Subcomm. on Domestic Policy of the Oversight and Gov't Reform Comm., 98th Cong. (2007) (statement of Arthur J. Rolnick, Senior Vice President, Federal Reserve Bank of Minneapolis), *available at* http://www.minneapolisfed.org/publications_papers/studies/econwar/rolnick_testimony_2007.cfm#n2.

9. The prisoners' dilemma is a classic problem in the economics field of game theory, based on a hypothetical situation in which two criminal suspects must choose between betraying each other or refusing to implicate the other prisoner in the crime. The game assumes that there are three possible results: (1) both prisoners can remain silent, in which case the police, with no evidence, must let them go; (2) both prisoners can take a plea bargain and implicate the other, in which case both prisoners receive sentences but also receive a commutation of several years for their cooperation; or (3) one prisoner can rat out the other, while the second remains silent, in which case the informant (with no evidence offered against him) goes free, and the silent prisoner receives the maximum sentence, as no commutation is offered for cooperation. If the prisoners are barred from communicating with each other, game theory predicts that they will always take a plea bargain, regardless of the fact that remaining silent could achieve the best results for both prisoners (result 1). This is so because taking a plea bargain will protect the informant regardless of the other prisoner's choice (results 2 and 3), while staying silent could result in the longest sentence possible (result 3). *See* Daniel P. Petrov, Note, *Prisoners No More: State Investment Relocation Incentives and the Prisoners' Dilemma*, 33 *CASE W. RES. INT'L L.* 71 (2001); Birmingham, *supra* note 8, at 17-19 (1968).
10. Public Authorities Accountability Act, ch. 766 L. 2005, 228th Sess. (N.Y. 2005) (codified as amended at Pub. Auth. Law §§ 2 *et seq.* (2006)), and amendments passed in A.2209-C, 232nd Sess. (N.Y. 2009) [*hereinafter* S.1537-C/A.2209-C] (currently awaiting gubernatorial approval), together increased reporting requirements for authorities, imposed additional ethics rules, established an Authority Budget Office and an independent Inspector General, enabled the Comptroller to approve certain contracts, and established beyond a doubt that authorities owe a fiduciary duty to the public.
11. Although IDAs are subject to the new provisions of the Public Authorities Law, separate legislation is necessary to address issues specific to the IDA enabling act.
12. For example, the New York State Economic Development Corporation (NYSEDC), which represents economic development and business professionals, has supported a requirement that written reports of IDA hearings be made available to board members. BRIAN McMAHON, TESTIMONY BEFORE THE ASSEMBLY LOCAL GOVERNMENTS COMMITTEE (2005), *available at* <http://www.nysedc.org/legislativenews/Assembly%20testimony.pdf>. The Center for Governmental Research, in a report prepared for NYSEDC, also recommended "clearer communication between the OSC [Office of the State Comptroller] and the IDAs in order to eliminate reporting confusion." CTR. FOR GOVERNMENTAL RESEARCH, JOB CREATION AND NEW YORK STATE IDAS: A RESPONSE TO THE JOBS WITH JUSTICE REPORT (Feb. 2008), *available at* http://www.cgr.org/reports/08_R-1535_Job_Creation_and_NYS_IDAS.pdf. *See also* NYSEDC, IDA RECOMMENDED PRACTICES, *available at* <http://www.nysedc.org/legislativenews/IDA%20Recommended%20Practices%20Report.pdf> (recommending that IDAs establish Websites to provide the public with access to agency information, and that they establish subsidy recapture/suspension policies, among other things also supported by IDA reform proponents); Memorandum In Opposition to S.1241(Thompson)/A.3659(Hoyt), The Bus. Council of N.Y. (Apr. 6, 2009), *available at* <http://www.bcnys.org/inside/Legmemos/2009-10/s1241a3659industrialdevelopmentagencies.htm>.
13. Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 *MINN. L. REV.* 447, 452 (1997).

14. *Id.* at 448 (1997). See also WILLIAM T. BOGART, BROOKINGS INSTITUTION, CIVIC INFRASTRUCTURE AND THE FINANCING OF COMMUNITY DEVELOPMENT 1 (2003), available at http://www.brookings.edu/~media/Files/rc/reports/2003/05metropolitapolicy_bogart/20030527_Bogart.pdf (quoting a developer who explained that the goal of public sector investment is "to set the stage for the private sector to operate effectively at a profit").
15. See, e.g., Brian T. MacMahon, *How will 20 percent tax encourage businesses to invest?*, THE POST STANDARD, Feb. 26, 2008, available at http://blog.syracuse.com/opinion/2008/02/how_will_20_percent_tax_encour.html; PETER A. BAYNES, TESTIMONY BEFORE THE ASSEMBLY STANDING COMMITTEE ON LOCAL GOVERNMENTS (Mar. 4, 2009), available at http://www.nyc.com.org/mn_news/documents/IDATestimonyonLH.doc.
16. ARTHUR B. LAFFER, STEPHEN MOORE & JONATHAN WILLIAMS, AM. LEGIS. EXCHANGE COUNCIL, RICH STATES, POOR STATES: ALEC-LAFFER STATE ECONOMIC COMPETITIVENESS INDEX 9 (2d ed., 2009), available at http://www.alec.org/am/pdf/tax/09RSPS/26969_REPORT_full.pdf. This report ranks New York as the state with the worst business climate. *Id.* at 25, table 6. But see FRANK MAURO, TESTIMONY BEFORE THE NEW YORK STATE ASSEMBLY STANDING COMMITTEE ON LOCAL GOVERNMENTS (Mar. 4, 2009) [hereinafter MAURO TESTIMONY], available at http://www.fiscalspolicy.org/MauroTestimony_IDAs_March2009.pdf at 12 ("How is it that we hear of New York coming up short on measures of business climate? Unfortunately, some of the cruder measures look only at the cost side of production.").
17. See, e.g., JENNY VICKERS, BUS. FACILITIES, NEW YORK STATE OF MIND (Apr. 2009), available at http://www.businessfacilities.com/bf_09_04_special1.php; Kathy Kellogg, *IDA to Review proposed PILOTs for wind farms*, THE BUFFALO NEWS, Jun. 8, 2009; Press Release, Maggie Brooks, Brooks Addresses IDA Reform (Mar. 4, 2009) available at <http://www.growmonroe.org/comida/files/file/Press%20Release/2009/IDA%20Hoyt%20Testimony.pdf>; John Golden, *Assisted Living Projects Get County's Green Light*, WESTCHESTER COUNTY BUS. J., Jul. 16, 2009, available at <http://www.westfaironline.com/westchester-county-business-journal/article/2456-assisted-living-projects-get-countys-green-light.html>.
18. Gillette, *supra* note 13, at 448.
19. *Id.* Gillette notes that "[a]lthough Tiebout models of local government services are usually directed at the market for residence, the same desire for preference satisfaction should apply to the market for firms." *Id.*
20. See Gillette, *supra* note 13, at 449; Richard Briffault, *Localism and Regionalism*, 48 BUFFALO L. REV. 1, 15 (2000).
21. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
22. Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 40 (2007).
23. See THE NAT'L COUNCIL FOR PUB.-PRIVATE P'SHIPS, CRITICAL CHOICES: THE DEBATE OVER PUBLIC-PRIVATE PARTNERSHIPS AND WHAT IT MEANS FOR AMERICA'S FUTURE 6 (2003), available at <http://www.ncppp.org/presskit/2003whitepaper.pdf>.
24. See BOGART, *supra* note 14, executive summary.
25. See Mihaly, *supra* note 22, at 58-59 (explaining that "[a]ll governmental decisions run the risks of contamination by interested parties. Public-private partnerships clearly pose new and special challenges because they involve such intricate interdependencies.").
26. See OFFICE OF THE NEW YORK STATE COMPTROLLER, DIV. OF LOCAL GOV'T & ECON. DEV., INDUSTRIAL DEVELOPMENT AGENCIES IN NEW YORK STATE: BACKGROUND, ISSUES AND RECOMMENDATIONS 14 (May 2006) [hereinafter 2006 COMPTROLLER'S REPORT], available at <http://www.osc.state.ny.us/localgov/pubs/research/idabackground.pdf>; Chris Farrell, *The Economic War Among the States: An Overview, Banking and Policy Issues Mag.* (Jun. 1996), available at http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3659; GOOD JOBS NEW YORK, KNOW WHEN TO FOLD 'EM: TIME TO WALK AWAY FROM NYC'S CORPORATE RETENTION GAME 6 (Feb. 2004), available at http://www.goodjobsfirst.org/pdf/gjny_report_final.pdf; David Robinson, *Fantasy Island To Get Tax Breaks*, BUFFALO NEWS, Feb. 12, 2008.
27. See, e.g., Rolnick, *supra* note 8.
28. A particularly egregious example is J.P. Morgan Chase, which reportedly received more than \$200 million in subsidies since 1989, but eliminated 13,000 jobs between 1995 and 2000. NEW YORK JOBS WITH JUSTICE, GETTING OUR MONEY'S WORTH: THE CASE FOR IDA REFORM IN NEW YORK STATE 7 (May 2007), available at <http://www.nyjwj.org/docs/GOSW.pdf>. That works out to paying J.P. Morgan Chase more than \$15,000 to cut each job.
29. See *infra* pt. IV.a.
30. See Sherry L. Jarrell, Gary Shoesmith & Neal Robbins, *Law and Economics of Regulating Local Economic Development Incentives*, 41 WAKE FOREST L. REV. 805, 823 (2006).
31. See *infra* pt. IV.b.
32. See *infra* pt. IV.a.
33. See, e.g., NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 8.
34. See, e.g., *id.* at 6; Rep. Paul Tonko, Op-Ed., *IDA Reforms Create Good Public Policy*, ALBANY TIMES UNION, Jun. 11, 2009.
35. See generally STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES (2006). See also Albor Ruiz, *Bronx Small Business Owners Fight Big-Box Store Plan for Kingsbridge Armory*, N.Y. DAILY NEWS, Jul. 16, 2009.
36. See, e.g., ALLISON LACK, GOOD JOBS FIRST, SPRAWLING BY THE LAKE: HOW IDA-GRANTED PROPERTY TAX EXEMPTIONS UNDERMINE OLDER PARTS OF THE BUFFALO/NIAGARA METRO AREA (May 2007), available at <http://www.goodjobsfirst.org/pdf/buffalosprawl.pdf>.
37. See NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 10; Greg LeRoy, *TIF, Greenfields, and Sprawl: How an Incentive Created to Alleviate Slums Has Come to Subsidize Upscale Malls and New Urbanist Developments*, 60 PLAN. & ENVT'L. L. 3 (2008), available at <http://www.goodjobsfirst.org/pdf/apa.pdf>; Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources For Future Generations*, 34 WM. & MARY ENVT'L. L. & POL'Y REV. --- (forthcoming 2009).
38. See, e.g., Press Release, State of New York, Div. of Budget, Governor Paterson's Executive Budget Eliminates Largest Deficit in State History, Reins in Spending (Dec. 16, 2008), available at http://www.budget.state.ny.us/pubs/press/2008/press_release08_eBudget0910-1.html.
39. Greg LeRoy, *Will the Stimulus Be Frittered by Job Wars Among States?*, Clawback Blog, <http://clawback.org/2009/06/30/will-the-stimulus-be-frittered-by-job-wars-among-states/> (quoting the Seattle coalition, Citizens for More Important Things, <http://www.citizensformoreimportantthings.org/>) (last visited Sept. 10, 2009).
40. See, e.g., Jarrell, Shoesmith & Robbins, *supra* note 30, at 825.
41. 2005 Laws of N.Y., ch. 766; A.2209-C (currently awaiting gubernatorial approval). IDAs are considered to be local public authorities and are covered by the Public Authorities Law as well as the Industrial Development Agencies Law.
42. PHILIP MATTERA, KARLA WALTER, JULIE FARB BLAIN & MICHELLE LEE, GOOD JOBS FIRST, *THE STATE OF STATE DISCLOSURE: AN EVALUATION OF ONLINE PUBLIC INFORMATION ABOUT ECONOMIC DEVELOPMENT SUBSIDIES, PROCUREMENT CONTRACTS AND LOBBYING ACTIVITIES* 10 (Nov. 2007), available at <http://www.goodjobsfirst.org/pdf/statedisclosure.pdf>.

43. 1989 Laws of N.Y., ch. 692. *See also* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 11.
44. 1993 Laws of N.Y., ch. 356. *See also* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 11. Both the 1989 and 1993 reporting reforms are codified at N.Y. GEN. MUN. LAW § 859.
45. *Compare* NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 3 (finding that 52% of projects submitted sufficient data) and CTR. FOR GOVERNMENTAL RESEARCH, *supra* note 12, at 11 (finding that 89% of projects submitted sufficient data). *See also* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 15.
46. OFFICE OF THE NEW YORK STATE COMPTROLLER, DIV. OF LOCAL GOV'T AND SCH. ACCOUNTABILITY, ANNUAL PERFORMANCE REPORT ON NEW YORK STATE'S INDUSTRIAL DEVELOPMENT AGENCIES: FISCAL YEAR ENDING 2007 10 (Feb. 2009) [hereinafter 2009 COMPTROLLER'S REPORT], *available at* <http://www.osc.state.ny.us/localgov/pubs/research/idaperformreport.pdf>. Reporting blanks for job data queries may indicate that IDAs have failed to obtain the required information. "However, the OSC also advises the IDAs to leave data blank if there are projects at the same location for multiple years. And, sometimes, a blank means that OSC has made a clerical error." CTR. FOR GOVERNMENTAL RESEARCH, *supra* note 12, at 20.
47. 2009 COMPTROLLER'S REPORT, *supra* note 46, at 13.
48. New York Jobs With Justice (NYJWJ), which is a progressive organization strongly supported by labor and social justice groups, found widespread failures to meet job creation goals in a report assessing data submitted by IDAs in 2005. A counter-report commissioned by the New York State Economic Development Council (NYSED), which represents leaders of the state's economic development programs as well as private businesses, predictably refuted the claims made by NYJWJ and concluded that IDAs easily surpassed job creation goals. *Compare* NEW YORK JOBS WITH JUSTICE REPORT, *supra* note 28, with CTR. FOR GOVERNMENTAL RESEARCH, *supra* note 12 (the report was prepared for the NYSED). *Also compare* INITIATIVE FOR DEV. ACCOUNTABILITY, COMIDA ISN'T SPANISH FOR FREE LUNCH (Apr. 2006), *available at* <http://www.fiscalpolicy.org/ida%20reform.pdf>, with Brooks, *supra* note 17 (providing different conclusions about the effectiveness of the County of Monroe IDA).
49. N.Y. GEN. MUN. LAW § 859.
50. 2009 COMPTROLLER'S REPORT, *supra* note 46, at 14.
51. *Id.*
52. 2006 COMPTROLLER'S REPORT, *supra* note 26, at 12.
53. 2009 COMPTROLLER'S REPORT, *supra* note 46, at 2. *See also* N.Y. AUTH. BUDGET OFFICE, INFORMATION ABOUT THE PUBLIC AUTHORITIES REPORTING INFORMATION SYSTEM (PARIS), *available at* <http://www.abo.state.ny.us/paris/parisnotification.pdf>.
54. MAURO TESTIMONY, *supra* note 16, at 3.
55. A.3659, §§ 5-6 (2009). The corresponding Senate bill (S.1241 (2009)) is sponsored by Sen. Ruth Hassell-Thompson.
56. A.557 (2009).
57. The only application requirements included in the Act apply only to continuing care retirement communities. Prospective developers of these projects must "present the financial feasibility study, including a financial forecast and market study, and the analysis of economic costs and benefits required by...the public health law." N.Y. GEN. MUN. LAW § 859-b.
58. *See* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 17-18.
59. A.3659, § 7 (2009).
60. *See* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 17-18.
61. 1993 Laws of N.Y., ch. 356, *codified at* N.Y. GEN. MUN. LAW § 874.
62. *See* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 4.
63. *See, e.g.*, Resolution of the Nassau County Industrial Development Agency Adopting the Agency's Uniform Tax Exemption Policy and Guidelines (1994), *available at* <http://www.nassauida.org/files/Uniform%20Tax%20Exemption%20Policy.pdf>; Cortland County Industrial Development Agency Uniform Tax Exemption Policy, *available at* <http://www.ccida.org/pdf/tax-exemption-policy.pdf> (listing factors that may be taken into account when awarding subsidies, but providing no indication of how those factors should be weighted). An example of a more objective uniform policy is the Clinton County uniform tax exemption policy, which provides a scoring formula to determine the tax exemption amount and duration. The uniform policy is *available at* <http://www.clintoncountyyida.com/Clinton-IDA/CCIDA/99utep.pdf>.
64. 2006 COMPTROLLER'S REPORT, *supra* note 26, at 10.
65. A.3659, § 6 (2009). The New York State Economic Development Council has similarly recommended that IDAs be required to review their uniform tax exemption policies on a regular basis, and with input received at public hearings. NYSED, *supra* note 12, at 8.
66. *See generally* MATTERA, WALTER, BLAIN & LEE, *supra* note 42, at 10-16.
67. N.Y. GEN. MUN. LAW § 859-a (3). Amendments passed in 1997 increased the notice period to 30 days, but the provision expired in 2008 and reverted to the shorter time period. Law of N.Y. 1997, ch. 444 (amended several times thereafter to extend the sunset provision).
68. *See* NEW YORK JOBS WITH JUSTICE, *supra* note 27, at 19; MAURO TESTIMONY, *supra* note 15, at 2.
69. *See generally* MAURO TESTIMONY, *supra* note 16, at 2-3. The PAAA requires IDAs to make annual reports, minutes, public hearing notices and financial statements available on their Web sites. 2005 Laws of N.Y., ch. 766, *codified at* N.Y. PUB. AUTH. LAW § 2800 (2) (b). However, other important IDA documents, like uniform tax exemption policies and cost-benefit analyses, do have to be posted.
70. A.557 (2009). An alternative suggested by one commentator is to establish additional notice and hearing requirements similar to those required by the State Environmental Quality Review Act. MAURO TESTIMONY, *supra* note 16, at 2.
71. A.3659, §§ 3, 5-7, 11-13, 15 (2009). The Hoyt bill would also require board members to actually attend a minimum number of IDA hearings, and to ensure that at least two board members attend public meetings (§§ 2, 6). These provisions are quite important considering that IDA hearings "are frequently devoid of the IDA board members who will vote on a project." MAURO TESTIMONY, *supra* note 16, at 2.
72. *See* THE NEW RULES PROJECT, ECON. IMPACT REVIEW, <http://www.newrules.org/retail/rules/economic-impact-review> (recommending a similar type of review for proposals to build big box stores) (last visited Sept. 10, 2009). *See also* 10 VT. STAT. ANN. §§ 6001-6093 (requiring projects with a regional impact to undergo review for impacts relating to pollution, traffic and congestion, municipal services, aesthetics, historic sites, natural areas and wildlife, regional and municipal growth, energy conservation and patterns of sprawl, among other things). A 2007 bill also proposed community impact review for IDA subsidies. S.2413 (2007).
73. Some of the more specific information included in the CIR would be: the number of permanent jobs to be created or retained, the total estimated value of tax exemptions, the impact of proposed projects on existing businesses, the extent of private investments to be generated by the project, the likelihood of delays, environmental impacts, and the extent to which a project may require increased educational, public safety and transportation services. A.3659, § 7 (2009).
74. A.3659, §§ 6-7 (2009).
75. N.Y. GEN. MUN. LAW § 883.
76. 2005 Laws of N.Y., ch. 766, §§ 18, 19. *See also* 2006 COMPTROLLER'S REPORT, *supra* note 26, at 16.
77. A.2209-C, § 1 (currently awaiting gubernatorial approval).

78. A.2383 (2009); A.553 (2009). N.Y. GEN. MUN. LAW § 803, which applies to IDAs through the operation of Section 883, requires disclosure of conflicts but not recusal. These bills would prohibit conflicted board members from participating in any vote or board discussions about the matter.
79. A.3659, § 2 (2009).
80. The revolving door restriction might be criticized for reducing the number of qualified persons available to serve on agency boards. However, the restriction is limited both temporally and geographically, mitigating its negative impacts.
81. N.Y. GEN. MUN. LAW § 862.
82. See N.Y. GEN. MUN. LAW § 862.
83. 2006 COMPTROLLER'S REPORT, *supra* note 26, at 5. See also NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 15; SARAH STECKER & DAN STEINBERG, GOOD JOBS NEW YORK, PAY, OR WE (MIGHT) GO: HOW CITICORP GAMES THE STATES AND CITIES 3-5 (June 2007), available at <http://www.goodjobsny.org/NJPP%20Pay%206-07.pdf>.
84. See, e.g., *Main Seneca Corp., et al. v. Town of Amherst Indus. Dev. Agency*, 100 N.Y.2d 246 (2003) (holding that the Amherst IDA violated the statute by offering incentives to the business, previously located in the City of Buffalo, solely because the new location would be more convenient to its customers; neither the out-of-state nor the competitiveness exceptions applied); *Marine Buffalo Assocs., L.P. v. Town of Amherst Indus. Dev. Agency*, 773 N.Y.S.2d 667 (4th Dep't 2004) (holding that a conclusory statement that the relocation was necessary for the business to remain competitive was insufficient); *Mohawk Group, L.P. v. Town of Amherst Indus. Dev. Agency*, 765 N.Y.S.2d 717 (4th Dep't 2003) (affirming violation of the statute).
85. See MAURO TESTIMONY, *supra* note 16, at 5.
86. *Main Seneca Corp., et al. v. Town of Amherst Indus. Dev. Agency*, 100 N.Y.2d 246 (2003).
87. See, e.g., A.3659 (2009); NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 15; MAURO TESTIMONY, *supra* note 16, at 5; RON DEUTSCH, TESTIMONY ON TAXES AND ECON. DEV. POLICY IN THE 2008-2009 N.Y. STATE BUDGET PROPOSAL 7 (Nov. 27, 2007), available at <http://www.budget.state.ny.us/pubs/press/2007/townHallMeetings/Syracuse/NewYorkersforFiscalFairness.pdf>.
88. See, e.g., S.2413 (2007).
89. See 2006 COMPTROLLER'S REPORT, *supra* note 26, at 22 (listing IDAs by county). Note that the Village of Walden IDA has been dissolved since this list was prepared. 2009 COMPTROLLER'S REPORT, *supra* note 46, at 2.
90. See, e.g., N.Y. STATE COMM'N ON LOCAL GOV'T EFFICIENCY & COMPETITIVENESS, LOCAL ECON. DEV. 5, available at http://www.nyslocalgov.org/pdf/Local_Economic_Development.pdf; OFFICE OF THE N.Y. STATE COMPTROLLER, DIV. OF LOCAL GOV'T AND SCH. ACCOUNTABILITY, PERFORMANCE OF INDUS. DEV. AGENCIES 13 (Feb. 2008), available at <http://www.osc.state.ny.us/localgov/pubs/research/idareport08.pdf>.
91. See, e.g., Matt Glynn, *County IDA seeks merger; goal is to join with Amherst agency*, THE BUFFALO NEWS, Mar. 13, 2007.
92. The six agencies located in Erie County, for example, agreed in 2001 that relocations from the City of Buffalo to outlying suburbs must be approved by the County IDA. LACK, *supra* note 36, at 21.
93. A.3659 (2009), § 17; S.7133 (2007).
94. N.Y. GEN. MUN. LAW § 859(1)(e).
95. See, e.g., *County of Washington v. Counties of Warren & Washington Indus. Dev. Agency*, 2 Fed. App'x. 71 (2d Cir. 2001) (dismissing the county's claims (1) under Civil RICO, (2) for breach of the implied covenant of good faith, and (3) for breach of the common law fiduciary duty); *Barker Central Sch. Dist. v. Niagara County Indus. Dev. Agency*, 62 A.D.3d 1239 (4th Dep't 2009) (annulling an IDA subsidy agreement when the agency had failed to consider any evidence relating to the business' need for the subsidy and there was no evidence sufficient to justify a deviation from the agency's uniform tax exemption policy). In limited circumstances, other parties will be able to state a claim against an IDA and/or subsidized business. See, e.g., *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102 (2d Cir. 1993) (holding that members of the Raceway Association had standing to bring RICO claims against the owners of a racetrack for injuries arising out of a "colossal fraud" to obtain IDA funding). An IDA can, of course, bring an action to recover debt owed on a defaulted loan. See, e.g., *City of Albany Indus. Dev. Agency v. Garg*, 250 A.D.2d 991 (3d Dep't 1998). And, at least theoretically, an agency could bring fraud charges against a company that unlawfully obtained its approval of a subsidy application. As far as I can tell, however, this has never occurred.
96. See, e.g., ARIZ. REV. STAT. § 41-1505.07(H) (allowing the state (but not mandating it) to recapture or readjust subsidies for noncompliance with the assistance agreement); CONN. GEN. STAT. § 32-9t (requiring pro rata recapture if the project's certificate of eligibility is revoked); 20 ILL. COMP. STAT. 715/25 (providing for subsidy discontinuance and recapture, with the possibility of having the requirements waived); N.J. ADMIN. CODE § 19:31-2.1 (C) (requiring pro rata recapture of sales tax exemptions).
97. A.557 (2009); A.3659 (2009). Another current bill, A.1513 (2009), would impose clawbacks for job abandonment, but no penalties for failing to meet project goals. See also S.2413 (2007) (requiring clawbacks).
98. See, e.g., NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 12; INITIATIVE FOR DEV. ACCOUNTABILITY, *supra* note 48, at 10-11; Good Jobs First, Reform #2: Clawbacks, Or Money-Back Guarantees, http://www.goodjobsfirst.org/accountable_development/reform2.cfm (last visited Sept. 10, 2009); 2006 COMPTROLLER'S REPORT, *supra* note 27, at 6; S.7133 (2007). The Hoyt bill is cosponsored by 39 other Assembly members, and it has received support from Congressman Paul Tonko. Tonko, *supra* note 34. Additionally, some IDAs have already adopted their own clawback policies.
99. See IDA RECOMMENDED PRACTICES, *supra* note 12, at 6; Business Facilities, Point/Counterpoint: Are Clawback Clauses Really a Necessary Evil?, http://www.businessfacilities.com/bf_03_04_cover5.asp (last visited Sept. 10, 2009).
100. Compare A.557 (2009) with A.3659 (2009).
101. See 2006 COMPTROLLER'S REPORT, *supra* note 26, at 5. Another suggested approach to clawbacks is to require IDAs to develop their own subsidy suspension and recapture policies. NYSED, *supra* note 12, at 6. This type of reform, however, would also be subject to lax enforcement.
102. 2009 COMPTROLLER'S REPORT, *supra* note 46.
103. See N.Y. State Educ. Dep't, Office of Teaching Initiatives, What New York State Has to Offer, http://www.highered.nysed.gov/tcert/career/nyteachers_opporteachers.htm (last visited Sept. 10, 2009) (quoting the average teacher salary in 2004 as \$53,663, which would allow 5,525 teachers to be paid for \$296.5 million).
104. See Corey Kilgannon, *Crime May Not Pay, but in This Town, Fighting It Sure Does*, N.Y. TIMES, May 2, 2009 (quoting \$90,829 as the average salary for a New York City police officer with five years experience, which works out to 3,264 police officers for \$296.5 million).
105. See, e.g., NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 14; MAURO TESTIMONY, *supra* note 16, at 4.
106. A.2384 (2009); A.3659, § 2 (2009). Similar bills have been proposed in the past. See A.370 (2005); S.226 (2005); S.2413 (2007). Some IDAs have already adopted policies of including diverse representatives on their boards. See, e.g., Brooks, *supra* note 17, at 3.
107. See 2006 COMPTROLLER'S REPORT, *supra* note 26, at 14; Bruce Lambert & Shelley Feuer Domash, *Nassau Aid Went to Campaign Donors*, N.Y.

- TIMES, Oct. 24, 2004; INITIATIVE FOR DEV. ACCOUNTABILITY, *supra* note 48, at 11; NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 14.
108. S.2413 (2007).
 109. The Hoyt bill would require a hearing for the adoption of a uniform tax exemption policy, with special notice being given to the local government chief executive and the governing boards of any affected taxing jurisdictions. A.3659, § 15 (2009).
 110. See LeRoy, *supra* note 37, at 5.
 111. A prevailing wage reflects the average pay for particular jobs within a given area, and is often used in conjunction with construction projects. Living wages, on the other hand, are intended to provide workers with the minimum pay necessary to maintain a decent standard of living. While similar concepts, prevailing wages are often much higher than living wages because they are based on union pay scales. See George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 848 (2006).
 112. See, e.g., NEW YORK JOBS WITH JUSTICE, *supra* note 28, at 6; INITIATIVE FOR DEVELOPMENT ACCOUNTABILITY, *supra* note 48, at 10; FISCAL POLICY INST., GETTING BANG FOR OUR BUCK: ECONOMIC DEVELOPMENT IN NEW YORK STATE (Feb. 2008), available at http://www.fiscalspolicy.org/publications2008/FPI_EconDevBrief_Feb2008.pdf.
 113. See, e.g., FISCAL POLICY INST., THE ECONOMIC DEVELOPMENT BENEFITS OF PREVAILING WAGE (May 2006), available at http://www.faircontracting.org/pdf/FPIbrief_May06.pdf; ANNA PURINTON, GOOD JOBS FIRST, THE POLICY SHIFT TO GOOD JOBS: CITIES, STATES AND COUNTIES ATTACHING JOB QUALITY STANDARDS TO DEVELOPMENT SUBSIDIES 10-11 (Nov. 2003), available at <http://www.goodjobsfirst.org/pdf/jobquality.pdf>; LAURA WOLF-POWERS, PRATT CTR. FOR CMTY. DEV., BUILDING IN GOOD JOBS: LINKING ECONOMIC AND WORKFORCE DEVELOPMENT WITH REAL ESTATE-LED ECONOMIC DEVELOPMENT 25-29 (Dec. 2006), available at http://legacy.prattcenter.net/pubs/PrattCenter-Building_in_Good_Jobs_Report.pdf; ROBERT POLLIN, THE LIVING WAGE: BUILDING A FAIR ECONOMY (2000).
 114. N.Y. LABOR LAW § 220.
 115. Memorandum, Nassau County Indus. Dev. Agency, Prevailing Wage Policy, available at <http://www.nassauida.org/files/Prevailing%20Wage.pdf>.
 116. Memorandum, Ulster County Ind. Dev. Agency, Labor Policy (May 16, 2007), available at http://www.ulstercountyida.com/images/pdfs/laborpolicy_51607_%235a00b5.pdf. The UCIDA policy required prevailing wages for construction jobs and self-sufficiency wages for other jobs. The policy was suspended for a year in 2009. See Jeremiah Horrigan, *Ulster County IDA suspends prevailing wage policy for one year*, THE TIMES-HERALD RECORD, Jan. 28, 2009, available at <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20090128/NEWS/90128076>.
 117. See, e.g., S.7784 (2007); S.2413 (2007); A.336 (2005).
 118. A.1789 (2009); A.3705 (2009); A.3659 (2009); A.3847 (2009).
 119. A.3659, § 9 (2009).
 120. Jim Fink, *Collins Wants End To Prevailing-Wage Bill*, BUFFALO BUS. FIRST, May 1, 2009, available at <http://www.bizjournals.com/buffalo/stories/2009/05/04/newscolumn1.html>.
 121. CTR. FOR GOVERNMENTAL RESEARCH, PREVAILING WAGE IN NEW YORK STATE: THE IMPACT ON PROJECT COST AND COMPETITIVENESS 2 (Jan. 2008), available at http://www.nysedc.org/CGR%20Prevailing%20Wage%20Report_Jan%2028_FINAL.pdf. See also George W. Walker, *IDA Wage 'Reform' Undermines Region's Prospects*, THE BUFFALO NEWS, Apr. 15, 2009; *Industrial Development Agencies: Pub. Hearing Before the Assembly Standing Comm. on Local Gov'ts* (2009) (statement by Buffalo Niagara Partnership President & CEO Andrew J. Rudnick), available at <http://www.thepartnership.org/Home/Advocacy/wherewestand/IDAHearing030409>; Stephen Williams, *IDA reform bill passes in state Senate*, THE DAILY GAZETTE, Apr. 9, 2009, available at http://www.dailygazette.com/news/2009/apr/09/0409_ida/.
 122. Memorandum, County of Monroe Ind. Dev. Agency, Local Labor Verified Exemption Policy, available at <http://www.growmonroe.org/comida/files/file/Local%20Labor/Local%20Labor%20Verified%20Exemption%20Policy.pdf>. See also Brooks, *supra* note 18, at 2. Similar requirements are currently being studied by the Niagara County IDA. See Mark Scheer, *Niagara County: IDA To Study Local Hiring, Prevailing Wage*, TONAWANDA NEWS, Mar. 11, 2009, available at http://www.tonawanda-news.com/archivesearch/local_story_070235114.html.
 123. They have been proposed in the past. See, e.g., S.2413 (2007).
 124. A.3659, § 4 (2009).
 125. Memorandum, County of Monroe Ind. Dev. Agency, Local Labor Verified Exemption Policy, available at <http://www.growmonroe.org/comida/files/file/Local%20Labor/Local%20Labor%20Verified%20Exemption%20Policy.pdf>.
 126. See, e.g., STAPLES CTR. CMTY. BENEFITS AGREEMENT A-14 to A-18, available at <http://www.communitybenefits.org/downloads/Los%20Angeles%20Sports%20and%20Entertainment%20District%20Project.pdf>.
 127. While the higher upfront costs associated with green buildings may ward off potential businesses, studies have found that the long-term energy and productivity benefits of green buildings make them more cost effective than conventional buildings. See, e.g., GREGORY H. KATS, MASS. TECH. COLLABORATIVE, GREEN BUILDING COSTS AND BENEFITS (2003), available at <http://www.cap-e.com/ewebeditpro/items/O59F3481.pdf>.
 128. Even capitalist behemoths like Wal-Mart have committed to going green. See Greenbiz.com, *Wal-Mart CEO Says Sustainability Drive Will Continue at Full Speed*, <http://www.greenbiz.com/news/2009/02/02/new-wal-mart-ceo> (last visited Sept. 10, 2009).
 129. A.3659 (2009) (providing green building and sustainable site location requirements); A.4425 (2009) (prohibiting subsidies for greenfield projects). See also S.2413 (2007) (prohibiting subsidies for greenfield projects).
 130. See, e.g., Memorandum, Onondaga County Ind. Dev. Agency, Uniform Tax Exemption Policy 2-3, available at <http://www.syracusecentral.com/green/pdf/FinalUTEP.pdf>; Brooks, *supra* note 17.
 131. See, e.g., The Bus. Council of N.Y., *supra* note 12.

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How Public Authorities Have Complied With the Public Authorities Accountability Act of 2005 (PAAA)

By Janis Fallon

Introduction

Under the Public Authorities Accountability Act of 2005 ("the PAAA") board members have the ultimate duty to oversee the authority's management and to review "financial and management controls and operational decisions of the authority."¹ This paper looks at the various compliance mechanisms required by the PAAA and how authorities are complying.



public accounting firm. The audit must assess the state and local authority's books and accounts in accordance with generally accepted government auditing standards and prepare a report. The report and management letter and any other external examination of books and accounts must be submitted to the entities listed above that receive the annual reports. Authorities must submit this information within thirty days after receipt by the authority of the report.⁶ To the extent practicable, the annual independent audit must be posted on the authority's Web site along with other operational and financial information.⁷

Internal Compliance Review Mechanisms Required by the Act

The PAAA requires local and state authorities to have various internal mechanisms in place to determine how an authority is complying with the PAAA. These mechanisms include (i) required reports, (ii) committees, and (iii) audits.

Required Reports of Internal Reviews

Section 2800 of the PAAA requires submission of annual reports describing the status and the activities of the authority. For state authorities, these reports are submitted "to the governor, the chairman and ranking minority member of the senate finance committee, the chairman and ranking minority member of the assembly ways and means committee and the state comptroller, within ninety days after the end of [the authority's] fiscal year."² Reports must include fiscal and operational information and also an assessment by the authority of the effectiveness of its internal control structures and procedures.³ Local authorities reports must include similar information and these reports must be submitted "to the chief executive officer, the chief fiscal officer, the chairperson of the legislative body of the local government or local governments and the entity established pursuant to § 27 of the chapter of the laws of [2005]...within ninety days after the end of [the authority's] fiscal year."⁴

The Audit Committee and the Annual Independent Audit

Authorities must establish an "audit committee to be comprised of independent members."⁵ The committee recommends the board hire an independent accounting firm that will conduct an annual audit and provide direct oversight of the performance of the audit by a certified

"The committee recommends the board hire an independent accounting firm that will conduct an annual audit and provide direct oversight of the performance of the audit by a certified public accounting firm."

The public accounting firm performing this audit must also report to the authority's audit committee information relating to the policies and practices to be used, alternative treatment of financial information that has been discussed with management officials and the ramifications and the auditing firm's preferred treatment, and other material written communications between the auditing firm and authority management including the management letter with management's response or plan of corrective action, material corrections identified or schedule of unadjusted differences.

Many authorities, especially larger state authorities, also have internal auditing functions and/or departments that conduct reviews, including compliance with the PAAA.

The Governance Committee

The board must also establish a governance committee comprised of independent members whose responsibility is "to keep the board informed of current best governance practices; to review corporate governance trends; to update the authority's corporate governance principles; and advise...on the skills and experiences required of potential board members."⁸

Procedures

The PAAA has various required policies and procedures that the board must establish including (i) a code

of ethics, (ii) whistleblowing to protect employees from retaliation for disclosing information, (iii) investments, (iv) travel, (v) the acquisition of real property, (vi) the disposition of real and personal property, (vii) the procurement of goods and services and (viii) an indemnification policy.⁹ Some policies such as the real property disposal policy must be reviewed by the board at least annually.¹⁰

Procedures, both required by the PAAA and others developed by an authority, provide an invaluable method to assist in clearly laying out the legal and other requirements, as well as providing a means by which an authority can easily assess its compliance against the procedures with simple checklists, self audits, and reviews.

"The Authority Budget Office (ABO) was established under the PAAA to provide the Governor, Legislature, and public with information, analysis, and opinions on the financial practices and operations of public authorities."

In developing procedures, many agencies follow standards used in environmental and other management systems. A cross-functional team is beneficial to prepare procedures initially to ensure that the various affected sections and processes of the authority are included in the procedures. Procedures should be short and to the point and clearly lay out the steps in the process, who is responsible for each step, and the time frame. A short, clear procedure is easier to read and more likely to be understood and followed by staff than a long one.

Following is an example of useful sections to include in a procedure:

1. **Headings:** The heading should include the title, an approval by upper management, and the date and revision number for the procedure. Every time a procedure is updated a new index with a list of procedures and the issue date and revision number and date should be sent out to affected personnel to make it easy to keep track of the latest version of procedures.
2. **Authority:** This section would list the laws, regulations or applicable authority guidance or policy that requires this procedure or sets requirements that are contained in the procedure.
3. **Procedure:** The procedure body should lay out each step in the process—what happens, when it happens and who does that step.
4. **Responsible Person(s):** A summary section by title and their responsibilities in the procedure provides

an easy reference point for affected personnel to see their duties.

5. **Training:** All affected personnel should be trained initially and periodically on the procedure. This section would note who needs training and the frequency of training. Training should be documented.
6. **Review Period:** Procedures should note when they will be reviewed and updated if needed and who will conduct the review. As noted above, the PAAA requires that the board review and approve many of the required procedures annually.
7. **Glossary:** Technical or complex terms should be defined in a glossary.
8. **Forms/Attachments:** If there are required forms related to the procedure, these should be included in the procedure with instructions. Other attachments may include flow diagrams or other useful information.

Outside Agency Reviews

Authority Budget Office (ABO)

The Authority Budget Office (ABO) was established under the PAAA to provide the Governor, Legislature, and public with information, analysis, and opinions on the financial practices and operations of public authorities. The ABO may conduct reviews and analysis of authorities to assess compliance as well as identify who is covered under the act, receive reports, provide guidance to authorities and the Governor, Legislature, and/or State Comptroller and issue annual reports.¹¹

Inspector General

The PAAA establishes an office of the state inspector general in the executive department with an inspector general appointed by the governor.¹² The state inspector general "will review and examine periodically the policies and procedures of covered agencies with regard to the prevention and detection of corruption, fraud, criminal activity, conflicts of interest or abuse" and investigate complaints in these areas.¹³ The inspector general will determine whether disciplinary action, civil or criminal prosecution, or further investigation is warranted. The inspector general also may recommend remedial actions and monitor implementation of any recommendations made.¹⁴

Authorities must also report to the "inspector general any information concerning corruption, fraud, criminal activity, conflicts of interest or abuse by another state officer or employee relating to his or her office or employment, or by a person having business dealings with a covered agency relating to these dealings" or face "removal from office or employment or other...penalty."¹⁵

How Public Authorities Are Complying

ABO Report Submittal

One indication of how public authorities are complying with the PAAA is in the annual reports prepared by July 1 by the ABO.¹⁶ The last report available at the time this section was written was July 1, 2009. In these reports, the ABO discusses compliance by authorities with the PAAA. A summary of compliance findings follows for those authorities determined to date by the ABO to be subject to the PAAA.¹⁷

1. 70% of the public authorities submitted the required annual budget report (91% of State authorities, 43% of local authorities, and 90% of industrial development agencies (“IDA”). Of the 68 outstanding local budget reports, 70% are due from urban renewal agencies and parking authorities;¹⁸
2. 63% filed required annual reports (88% of State authorities, 40% of local authorities—down from 2008, and 77% of IDA). Of the 72 outstanding local budget reports, 68% are due from urban renewal agencies and parking authorities.¹⁹

While compliance is improving from the initial 2007 report, the data indicates that local authorities are having the greatest issues in complying with the PAAA. Implementation of electronic reporting system, called The Public Authorities Reporting Information System (“PARIS”), begun in late 2007, provided for consistent reporting formats and is also intended to increase reporting compliance.²⁰ In the February 11, 2009 ABO report of those filing through PARIS for fiscal year 2009, almost 65% of the public authorities (84% of the state authorities, 38% of the local authorities, and 85% of the IDA) filed the required budget report. Of the 98 authorities that failed to submit a report, the highest rate of non-compliance was with urban renewal/community development agencies.²¹

The ABO required resubmission of 114 reports in 2009 due to lack of compliance with reporting requirements or data errors. These included: (i) the failure to report all contracts including those for professional services, (ii) incomplete reporting of outstanding debt, (iii) inaccurate personal services schedules that do not properly account for all staff working at the authority, (iv) underreporting of bonuses, compensation, or other benefits, and (v) missing industrial development agency projects. The ABO noted that these errors raised concerns about how those in positions of responsibility and the board are reviewing and approving these reports as required by the PAAA and the reports are certified by executive management prior to submissions.²²

To encourage compliance, the ABO lists in its annual report and also on its Web site (www.abo.state.ny.us) those public authorities that have failed to comply with the law within the statutory time frames.²³

Board Member Training

The ABO also tracks required training for all public authority board members. Of the 301 authorities that the ABO has identified as covered by the PAAA to date, over 2,200 board members and staff have been trained.²⁴ In the ABO’s 2009 annual report, it identifies that no board members attended training from two state Authorities (the Empire State Performing Arts Center Corporation and the Westchester Health Care Corporation), as well as 52 local authorities (9 IDAs, 29 urban renewal/community development agencies, and 10 parking authorities).

ABO Compliance Reviews

The ABO, in 2008, began governance and operational reviews of public authorities. Reviews analyze the operations, practices, and reports of public authorities to assess compliance with provisions of the PAAA and other applicable state laws. In its reports, the ABO identified both compliance issues and provided recommendations for good governance practices. Reviews focus on compliance with the PAAA as well as the authority’s operating practices and adherence to its mission.²⁵

Full reports are available at the ABO’s Web site and a summary follows for the facilities completed to date²⁶:

1. The Environmental Facilities Corporation was found to have overall done an effective job of complying, was making progress with revising and adopting additional policies, and had a model-type process for assessing its internal controls. Areas that needed improvement included accountability and transparency of operations by refining bylaws and the board committee charters, formalizing additional practices in policies, and disclosing more information on its Web site.²⁷
2. The Albany County Airport Authority also had done an effective job and was making progress on revising and adopting policies. Improvements related to annually reviewing and making necessary revisions to its policies and procedures.²⁸
3. The Seneca County Industrial Development Agency review identified other areas needing improvements including the need to adopt and revise additional policies, compliance with the Open Meetings Law, adherence to its bylaws and resolutions, reliance on incomplete or inaccurate documents, not making all relevant materials available to the public, and not documenting the basis for actions.²⁹
4. The Colonie Industrial Development Agency review noted the following areas for improvement: more board involvement in the operational and fiscal oversight of the authority, limited compliance with the PAAA especially reporting requirements,

development of policies and guidelines, records management, and retention practices.³⁰

5. The Olympic Regional Development Authority's review indicated the need for greater board oversight and review of supporting financial operations including additional long-term capital and financial planning; transparency of the audit and governance committees, including better oversight of the independent auditor; improvements in financial management reporting, especially in inventory controls for personal property and in-kind contributions, and improved reporting of contracts and control processes.³¹

"As local development corporations are identified, it is likely that non-compliance will remain high in the smaller authorities until board members are trained, required reports begin to be submitted, and further ABO audits are completed which identify gaps in compliance."

6. The Westchester County Industrial Development Agency overall had complied with the PAAA. Suggested improvements were to improve accountability and transparency by formally recording committee meetings; obtaining required training for board members, conducting an internal control assessment; documentation of procurement quotes, qualifications and requests for proposals were needed for several professional services contracts as required by the authority's policy; revision of the investment guideline, and annually reviewing policies and procedures.³² Other recommendations included adopting objective criteria to evaluate requests for financial assistance, developing procedures to monitor projects and recapture benefits, providing better documentation for executive sessions under the Open Meetings Law, and revising specific policies and documentation.
7. The Nassau County Bridge Authority's compliance review identified issues with inconsistent contractual agreements that do not assure that competitive prices and best value for professional services are being obtained.³³ Policies and procedures were needed. Weaknesses with the internal control structure were addressed, including the need to use automated systems to monitor toll collections, inadequate separation of the board and management and lack of a formal staff training program, and lack of internal assessments.

Conclusion

Based on ABO annual reports and audits, compliance is improving by public authorities. The smaller urban development and parking authorities appear to be having the most difficult time in complying with the PAAA. Common areas of non-compliance include lack of procedures, training, and oversight by the board. As local development corporations are identified, it is likely that non-compliance will remain high in the smaller authorities until board members are trained, required reports begin to be submitted, and further ABO audits are completed which identify gaps in compliance.

Endnotes

1. N.Y. PUB. AUTH LAW § 2824 (2009).
2. *Id.* § 2800(1)(a).
3. *Id.* (establishing that reports must contain a detailed report on the authority's "(1) operations and accomplishments; (2) its receipts and disbursements, or revenues and expenses...; (3) its assets and liabilities...; (4) a schedule of its bonds and notes outstanding at the end of its fiscal year, together with a statement of the amounts redeemed and incurred during such fiscal year as part of a schedule of debt issuance" and debt incurred; (5) compensation schedule for officers, directors, and decision-making or managerial employees with a "salary in excess of one hundred thousand dollars"; "(6) projects undertaken..."; (7) real property information including property held and disposed of; "(8) such authority's code of ethics"; and (9) an assessment of its effectiveness of its internal control structure and procedures. Annual budget reports must also be submitted to the same entities under § 2801. State authorities must submit the information not less than ninety days before commencement of its fiscal year and local authorities not less than sixty days before the commencement of its fiscal year.).
4. *Id.* § 2800(2)(a) (Reports must include "(1) operations and accomplishments; (2) its receipts and disbursements or revenues and expenses...; (3) assets and liabilities...; (4) a schedule of bonds and notes outstanding..." and debt information; (5) a compensation schedule for officers, directors, and decision-making or managerial employees with a "salary in excess of one hundred thousand dollars"; (6) "the projects undertaken..."; (7) real property information including property held and disposed of, "(8) such authority's code of ethics; and (9) an assessment of its effectiveness of its internal control structure and procedures.").
5. *Id.* § 2824(4); *see generally id.* § 2825(2) ("[A]n independent member is one who (a) is not, and in the past two years has not been, employed by the public authority or an affiliate in an executive capacity; (b) is not, and in the past two years has not been, employed by an entity that received remuneration valued at more than [\$15,000] for goods and services provided to the public authority or received any other form of financial assistance valued at more than [\$15,000] from the public authority; (c) is not a relative of an executive officer or employee in an executive position of the public authority or an affiliate; and (d) is not, and in the past two years has not been, a lobbyist registered under a state or local law and paid by a client to influence the management decisions, contract awards, rate determinations or any other similar actions of the public authority or an affiliate.").
6. *Id.* § 2802.
7. *Id.* § 2800(1)(b) & § 2800(2)(b) (Other information that must be posted includes information "pertaining to [the authority's] mission, current activities, the most recent annual financial reports, current year budget and the most recent independent audit report.").

8. *Id.* § 2824(7).
9. *Id.* § 2824(1).
10. *Id.* § 2896(1).
11. AUTH. BUDGET OFFICE, ANNUAL REPORT ON PUBLIC AUTHORITIES IN NEW YORK STATE 1 (2008), *available at* <http://www.abo.state.ny.us/reports/annualreports/ABO2008AnnualReport.pdf>.
12. N.Y. EXEC. LAW § 52 (2009) (Covered agencies include all executive branch agencies, departments, divisions, officers, boards and commissions, public authorities [other than multi-state or multi-national authorities], and public benefit corporations, the heads of which are appointed by the governor and which do not have their own inspector general by statute.).
13. *Id.* § 53(5); *id.* § 53(1).
14. *Id.* § 53.
15. *Id.* § 55(1).
16. *See, e.g.*, ABO ANNUAL REPORT 2008, *supra* note 11.
17. The ABO is in the process of identifying local development corporations which fall under the PAAA.
18. AUTH. BUDGET OFFICE, ANNUAL REPORT ON PUBLIC AUTHORITIES IN NEW YORK STATE 6 (2009), *available at* <http://www.abo.state.ny.us/reports/annualreports/ABO2009AnnualReport.pdf>.
19. *Id.* at 7.
20. *Id.* at 4–5.
21. AUTH. BUDGET OFFICE, BUDGET REPORT SUBMISSION IN THE PUBLIC AUTHORITIES REPORTING INFORMATION SYSTEM (PARIS) 2 (2009), *available at* http://www.abo.state.ny.us/reports/BudgetComplianceReportFYE_2009.pdf.
22. ABO ANNUAL REPORT 2009, *supra* note 18, at 8.
23. *Id.* at 6.
24. *Id.* at 5.
25. *Id.* at 3.
26. The Dormitory Authority was also reviewed; however, a report was not yet issued at the time this section was written.
27. ABO ANNUAL REPORT 2008, *supra* note 11, at 7.
28. *Id.*
29. *Id.* In its annual report, the ABO notes that the IDA does not believe the PAAA applies to them, though the ABO disagrees.
30. *Id.* at 8.
31. *Id.*
32. AUTH. BUDGET OFFICE, GOVERNANCE REVIEW; WESTCHESTER COUNTY INDUSTRIAL DEVELOPMENT AGENCY 17 (2008), *available at* <http://www.abo.state.ny.us/reports/compliancereviews/WCIDAGovernanceReviewReport.pdf>.
33. AUTH. BUDGET OFFICE, OPERATIONAL REVIEW; NASSAU COUNTY BRIDGE AUTHORITY at *3 (2008), *available at* <http://www.abo.state.ny.us/reports/compliancereviews/NCBAOperationalReviewReport.pdf>.

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Ethics Laws and the Public Authorities of New York State

By Karl J. Sleight and Joan P. Sullivan

Public Authorities perform an important, quasi-governmental function and play a vital role in the lives of New Yorkers. They finance, construct and operate revenue-producing facilities for public benefit, assist the public sector with projects to encourage economic development and provide financial support for non-profit sector projects. While the usefulness of Public Authorities lies in their ability to deal with the public in the same manner as a private enterprise, they have come under increasing criticism by the political class and the media for allegedly operating in a secretive manner.



The first significant Public Authority was created in 1921 to coordinate operations of the Port of New York and New Jersey. It was created under a clause of the Constitution permitting compacts between states.¹ Public Authorities have since proliferated and are now financing, constructing, and managing public housing, bridges, tunnels, roads, mass transit systems, university dormitories, sewer systems, sports stadiums, parks, convention centers, bus stations, landfills and power plants. In addition, hundreds of local industrial development authorities have been created to promote economic development.²

Among the major Public Authorities in New York State, the Port Authority of New York and New Jersey, noted above, and the Metropolitan Transportation Authority ("MTA"), which manages most of the public transportation to, in, and around New York City, may be the most well-known. New York has hundreds of lesser-known public benefit corporations. In the wake of the September 11, 2001, terrorist attacks, the Lower Manhattan Development Corporation, a public benefit corporation, was created to coordinate the government's response and plan for the future of the site and the surrounding area.³

Public Authorities are unique. They are neither traditional state agencies nor private companies, both of which have mechanisms in place to ensure accountability. Created in response to constitutional restrictions on debt issuance, Public Authorities' debt is not considered state debt, giving them freedom from these restrictions.

Public Authorities are corporate entities created in statute by state or local government, are governed by appointed boards of directors and have no centralized monitor, providing a level of autonomy not afforded state agencies, who are monitored by the Division of Budget. With their ability to issue bonds and avoid regulation and

budget oversight, they have been criticized as "borrowing machines" and "shadow governments."⁴ Public Authorities are also not subject to many laws governing private corporations and are not subject to municipal regulation.



Public Authorities are, however, covered under the New York State ethics law. A Public Authority is considered a "state agency" for purposes of Public Officers Law ("POL") Sections 73, 73-a, and 74.⁵ A "state agency" is defined as "any state department, or division, board, commission, or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor...."⁶ Appointed board members and Authority employees are also specifically covered by the state ethics law. A "state officer or employee" includes "members or directors of public authorities, other than multi-state authorities, public benefit corporations and commissions at least one of whose members is appointed by the governor, who receive compensation other than on a per diem basis, and employees of such authorities, corporations and commissions."⁷

"Public Authorities are corporate entities created in statute by state or local government, are governed by appointed boards of directors and have no centralized monitor, providing a level of autonomy not afforded state agencies, who are monitored by the Division of Budget."

Unpaid or "per diem" board members are not covered by POL section 73 for general business or professional activities, which means that they are not covered by some of the more onerous provisions of the ethics law, such as the post-employment restrictions, which prohibit former employees from appearing before their former agency for two years, or the gift ban.

Unpaid or "per diem" members of Public Authorities are covered under the general Code of Ethics found at POL § 74. In 1954, Governor Dewey urged the Legislature to enact a state Code of Ethics, saying: "The mantle of leadership carries with it the responsibility to forge and maintain ever higher standards of conduct to enhance the dignity of public office and the faith of free men and

women in their government.”⁸ The Code found at Public Officers Law § 74(2) states the rule with respect to conflicts of interest:

No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.⁹

Despite recent amendments to the ethics law, the Code remains largely unchanged from its original language and has consistently been applied to Public Authorities.

Public Officers Law § 73-a of the state ethics laws, which contains the financial disclosure component, covers unpaid board members as well as employees of Public Authorities, if they have been designated as “policymakers” by the authority or are paid more than the “filing rate,”¹⁰ which is the job rate of a civil servant at State Grade 24.¹¹ For those unpaid or “per diem” board members who are required to file an annual disclosure form, § 73(3)(a) applies to them as well.¹² This provision precludes their appearance or rendition of services or the transaction of other business for compensation before the Court of Claims.

Because the executive branch governor has appointing authority to virtually all Authorities, many aspects of the state ethics law are applicable to the Authorities. Occasionally there is a debate on the applicability of the state ethics laws to per diem (unpaid) *legislative* appointees to authorities that are covered by virtue of “at least one” gubernatorial appointment. Traditionally, the legislative appointees have acquiesced to coverage under the Public Officers Law, although the issue has never been definitively addressed by the courts.

Public Authorities are not the only target for self-proclaimed reformers seeking action in the area of governance. The effectiveness of the ethics law has been targeted in equal measure primarily from elected and appointed officials inside state government. As a result, significant changes to the law have been enacted.

In 2007, the Legislature passed the Public Employee Ethics Reform Act (PEERA) which extinguished its predecessor agencies, the State Ethics Commission and the Temporary State Commission on Lobbying and created the Commission on Public Integrity to interpret and enforce the law. Among other things, PEERA now bans gifts of “more than a nominal value” instead of the \$75 limit, bans nepotism and political considerations in hiring, and has significantly increased the penalties for violations.¹³

And in 2005, the Legislature passed the Public Authorities Accountability Act, a comprehensive reform measure intended to help ensure that Public Authorities in New York State follow the highest ethical standards of accountability, transparency and professionalism. It requires Public Authorities to submit annual reports, budget reports, and the results of independent financial audits to government monitors. Public Authorities must adopt codes of conduct, have written operating procedures and personnel policies, follow established internal control practices, adopt investment guidelines, and attend training seminars.¹⁴

“Many Public Authorities have voluntarily adopted stricter Codes of Ethics than the law requires. Public Authorities that pursue implementation of a robust ethics and compliance program as a proactive measure, in the current atmosphere, stand to reap the benefits of doing so.”

While the debate continues to flourish on the benefits and drawbacks of Authorities—particularly as it relates to delivery of services, effectiveness, accountability and flexibility of Public Authorities and public benefit corporations—one constant is that Authorities are governed by the same state ethics laws that cover traditional state executive branch agencies. Due to the massive expansion of Authorities and their control in some cases of billions of taxpayer dollars, combined with ever increasing scrutiny from the media and politicians, the trend in Authorities has been to become more restrictive than is required by the state ethics laws. Commission regulations contained in 19 N.Y.C.R.R. Part 932 specifically address that an agency may impose stricter rules than those of the Commission and have generally been treated as an agency issue. It provides as follows: “Nothing contained in this Part shall prohibit any State agency from adopting or implementing its own rules, regulations or procedures with regard to outside employment which are more restrictive than the requirements of this Part.”¹⁵

Thus, many Public Authorities have voluntarily adopted stricter Codes of Ethics than the law requires. Public Authorities that pursue implementation of a robust ethics and compliance program as a proactive measure, in the current atmosphere, stand to reap the benefits of doing so.

By way of illustration, several years ago, in an effort to address concerns over issues of lax ethics and integrity principles, the MTA overhauled its internal Code of Ethics and instituted a zero gift-giving policy for all employees.¹⁶ These changes positioned the MTA to weather future criticism of its commitment to ethics and allowed the Author-

ity to take decisive action against MTA employees who violated the new policy. Benjamin Franklin once aptly noted that “an ounce of prevention is worth a pound of cure.”¹⁷ Such is certainly true in dealing with issues in the field of government ethics. Many other Public Authorities have followed suit, imposing strict Codes of Ethics for their boards that incorporate restrictions on gifts, post-employment appearances before their former agency and prohibiting compensated appearances before state agencies, as well as guidelines with respect to disclosure and recusal when confronted with potential conflicts of interest.

In developing ethics policies, however, in our view Authorities need to maintain a sense of balance to ensure that the ethics policies do not unnecessarily restrict entities with critical missions that include transportation and energy. Development of tailored “best practices” can identify agency-specific concerns and develop guidance with respect to disclosure and integrity programs to deal with sector-specific issues, as opposed to overly broad rule changes that fail to identify and address reoccurring issues. Proposed reactive measures dictated by a hypersensitive atmosphere in the name of “reform” need to be carefully vetted to avoid adoption of rules that value form over substance.

Endnotes

1. The Port Authority of N.Y. and N.J., History of the Port Authority, <http://www.panynj.gov/AboutthePortAuthority/HistoryofthePortAuthority> (last visited Sept. 10, 2009).
2. See OFFICE OF THE STATE COMPTROLLER, NEW YORK'S PUBLIC AUTHORITIES, <http://www.osc.state.ny.us/pubauth/index.htm> (last visited Sept. 10, 2009).
3. See Lower Manhattan Dev. Corp., About Us, <http://www.renewnyc.com/overlay/AboutUs/> (last visited Sept. 10, 2009).
4. See Danny Hakim, *Paterson Prepared to Reject Overhaul of Public Authorities*, N.Y. TIMES, Aug. 15, 2009, at A14; Jonathan Rosenbloom, *Can a Private Corporate Analysis of Public Authority Administration Lead to Democracy?*, 50 N.Y.L. SCH. L. REV. 851, 864 (2005–2006); OFFICE OF THE STATE COMPTROLLER, PUBLIC AUTHORITY REFORM: REIGNING IN NEW YORK'S SECRET GOVERNMENT (Feb. 2004), available at <http://www.osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf>.
5. See N.Y. STATE ETHICS COMM'N, ADVISORY OPINION No. 02-2 (June 19, 2002), available at http://www.nyintegrity.org/advisory/ethc/02_02.html (applying Public Officers Law to the Urban Development Corporation, a public benefit corporation); N.Y. STATE ETHICS COMM'N, ADVISORY OPINION No. 06-07 (Sept. 21, 2006), available at <http://www.nyintegrity.org/advisory/ethc/06-07>.

htm (applying section 74 to Niagara Frontier Transportation Authority (“NFTA”) employees who wished to engage in outside employment on NFTA property); N.Y. STATE ETHICS COMM'N, ADVISORY OPINION No. 95-4 (Jan. 17, 1995), available at <http://www.nyintegrity.org/advisory/ethc/95-04.htm> (discussing public/private joint venture with a public authority).

6. N.Y. PUB. OFF. LAW § 73(1)(g) (2008) (emphasis added).
7. § 73(1)(i)(iv) (emphasis added).
8. Governor Thomas E. Dewey, Message to the Legislature (Jan. 6, 1954), *quoted in* Karl Sleight, *Unending Quest for Ethical Government*, ALBANY TIMES UNION, May 31, 2009, at B1.
9. N.Y. PUB. OFF. LAW § 74(2) (2008).
10. § 73-a(1)(l) (“The term ‘filing rate’ shall mean the job rate of SG-24 as set forth in paragraph a of subdivision one of section one hundred thirty of the civil service law as of April first of the year in which an annual financial disclosure statement shall be filed.”).
11. § 74(1).
12. § 73(3)(b); *see also* NEW YORK STATE ETHICS COMM'N, ADVISORY OPINION No. 93-17 (Oct. 13, 1993), available at <http://www.nyintegrity.org/advisory/ethc/93-17.htm>.
13. N.Y. PUB. OFF. LAW § 73 (2008).
14. N.Y. PUB. AUTH. LAW § 2824 (2002).
15. 19 N.Y. Comp. Codes R. & Regs. § 932.4 (e).
16. Metropolitan Transportation Authority, Code of Ethics (2007), <http://www.mta.info/mta/compliance/pdf/codeofethics.pdf> (last visited Sept. 10, 2009).
17. The Electric Ben Franklin, <http://www.ushistory.org/franklin/quotable/quote67.htm> (last visited Sept. 10, 2009).

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Topic Papers

Prepared on Behalf of The Public Authority Project
Government Law Center of Albany Law School
By Scott Fein
Director, Public Authority Project

Introduction

The Public Authorities Accountability Act of 2005 (“PAAA”) requires that public authority board members participate in training concerning the provisions of the PAAA, board governance and fiduciary obligations. The Government Law Center (“GLC”) of Albany Law School, at the request of the City University of New York, provides, together with other entities, training to State and local authority board members.

Over the past two years, more than 340 board members have attended training programs provided by the GLC and received the required certification. During these

programs, board members discussed their concerns and questions about the fiduciary and operational issues confronting the boards of public authorities.

The GLC realized that some board observations were repeated so often, or were otherwise so fundamental, that it would be worthwhile to prepare topic papers, each focusing on a single issue.

The topic papers have been limited to four (4) pages. At some future date, these papers may serve as the basis for a more scholarly analysis. However, the more immediate purpose is to highlight the issues raised for public officials and policy-makers.

* * *

Selection of Public Authority Board Members

It is estimated that New York State public authorities are responsible for more than ninety percent of the State’s current debt and eighty percent of its capital infrastructure. Public authorities are the fastest growing component of government. Authority board members appear to have done commendably in guiding authority operations. However, with the growth of authorities and their increase in sophisticated operations, a question has arisen concerning the wisdom of selecting future board members based upon their experience.

Observation

In New York State, board members of State public authorities are appointed for fixed terms and, by design, not directly accountable to elected officials or responsive to political cycles. Board members are not subject during their service to removal by the electorate or, absent cause, by the appointing authority. The board members are expected to (i) have greater independence from their appointing officials than are commissioners or heads of agencies, (ii) strike a balance between political independence and political accountability, and (iii) be sufficiently independent to make difficult and sometimes unpopular decisions outside the arena of elected politics. Boards of public authorities are held accountable to both elected officials and the public through their measure of service and financial performance.

The Public Authorities Accountability Act of 2005 (“PAAA”) acknowledged the importance of relevant experience for candidate members by requiring that each

authority board governance committee “advise appointing authorities on the skills and experiences required of potential board members.” (Chapter 766 of the Laws of 2005 § 18). The importance of board members possessing relevant knowledge and experience has been discussed by the Citizens Budget Commission, Office of the State Comptroller, and most recently, by the Commission on Metropolitan Transportation Authority Financing.

When, in the course of PAAA training, there was discussion concerning the requirement that the governance committee transmit candidate qualifications to the appointing authority, attending board members expressed some skepticism. Board members suggested that, notwithstanding the PAAA requirement, they did not believe their opinions concerning qualifications for candidate board members would be meaningfully considered by the appointing authority. Board members noted that typically new board members were appointed without any solicitation of opinion from the board or board governance committee, and often without subject matter experience of particular relevance to the authority.

Board members are appointed for fixed terms and theoretically insulated from political and electoral influences. The circumstances of their appointment parallels, in some degree, the circumstances of appointed judges. Absent wrongdoing, appointed judges cannot be removed during the course of their term. The only entity that as a practical matter oversees judicial conduct is the State Commission on Judicial Conduct.

Given the limited nature of direct judicial accountability to the public, it has been deemed important to ensure that potential judicial appointees are highly qualified. In most instances, the appointing official is statutorily required to rely upon recommendations of a judicial selection committee or have otherwise volunteered to use a merit selection process.

- Appointments to the State Court of Appeals are required by statute to be the product of a merit selection process. The Commission on Judicial Selection examines each candidate's qualifications and provides a written report and recommendations to the governor. Only those candidates deemed "well qualified based upon their temperament, character and experience" are recommended for appointment to the governor.
- When not required by statute, governors have nonetheless chosen to use Judicial Screening Committees to ensure that appointees "are of the highest quality." Thus, for example, continuing this tradition of merit selection, Governor Paterson promulgated Executive Order Number 8, continuing the State Judicial Screening Committee, Screening Committees in each judicial department and the County Judicial Screening Committees.

Consideration

It may be appropriate to consider expanding the existing appointment process used for public authority board members to include some of the aspects of the process

used to evaluate qualified judicial applicants. The following approach may merit consideration:

- Request that each public authority board governance committee, as required by the Public Authority Accountability Act, identify the relevant skills and experience it would deem desirable for new board members to possess. The appointing authority would develop a position description based upon the description provided by the governance committee as well as qualifications suggested by other knowledgeable people.
- The existence of each board vacancy and the qualifications for the position would then be publicly noticed.
- A public authority recommendation commission would then review candidate information, interview the candidates and identify those well-qualified, taking into account a variety of factors including independence, experience, diversity (please see Public Authority Project Topic Paper No. 1). Since the governor typically makes board appointments, it would be appropriate for the governor to appoint the majority of the members of the commission.
- The commission's recommendations would inform the governor's decision, although the governor presumably need not select from those recommended.

It bears note that with respect to most authorities, nationwide subject matter criteria does not typically exist for candidate board members. A merit selection process would appear without precedent.

* * *

Screening Ethical Conflict for Board Members of Public Authorities

The New York State Public Officers Law prohibits State employees and members of State public authority boards from engaging in any outside activity which would conflict with their service to the Authority.

The issue raised by State public authority board members and authority senior staff is the absence of a simple mechanism which would allow board members and staff to identify, prior to a board or committee meeting, a conflict or the appearance of a conflict.

Board members note that:

- Unlike State employees, the vast majority of authority board members are not compensated, and, with the exception of *ex officio* appointees, typically have careers separate from their board obligations, thus increasing the potential for a conflict or appearance of a conflict.
- Given the number and complexity of items addressed at monthly authority board meetings, par-

ticularly with respect to the larger authorities, it has become increasingly difficult for authority board members and authority ethics officers to determine if a conflict or the appearance of a conflict exists prior to the board meeting. Although board members are provided an agenda prior to the board meeting, it typically contains a summary of information for each item under consideration. Summaries alone may not be sufficient to identify potential conflicts.

- Board members who run afoul of the prohibition on conflicts may be subject to a civil penalty not to exceed \$40,000 and referral of the matter for criminal prosecution.
- In discussions with authority board members, two potential safeguards were identified. The first places responsibility on State authority staff to identify a potential conflict. The second shifts the obligation to each board member. Taken together, they would appear to provide a reasonable approach to

identifying potential conflicts in advance of a board meeting.

Consideration

Financial Disclosure Statements

Financial Disclosure Statements are required of all State policy-makers, including board members of State authorities. The Financial Disclosure Statement provides detailed information concerning outside professional committees and positions, major assets, major debts, sources of income, contracts with state agencies, liabilities, sources of gifts, real property, officer/director level involvement in a political party and retirement plans, and trust and estates among other information. Similar information is provided by the filer for a spouse and unemancipated children.

The Financial Disclosure Statements are designed to prevent conflict between the personal interests and official duties of State officers and personnel, including State public authority board members.

Financial Disclosure Statements are filed with the New York State Commission on Public Integrity (“Commission”), and are not provided by the filer concurrently to the ethics officer of the State agency or public authority with which the individual is employed or serves as a board member. If the ethics officer or general counsel of an authority (or State agency) wishes to use the Financial Disclosure Statement to develop a conflicts screening mechanism, a request, pursuant to the State Executive Law, must be submitted to the Commission. The Disclosure Statements are then redacted in accordance with Executive Law § 94 (17)(9)(1). Personnel from the public authority or State agency (as well as the public) may then personally review and copy the (redacted) Statement.

As currently structured, Financial Disclosure Statements are not easily accessed in a timely manner by the agency and authority ethics officers and general counsel.

It has been suggested that the content of the completed Financial Disclosure Statement be submitted concurrently by the filer to the Commission and to the ethics officer or general counsel of the authority or agency, or

that the Commission transmit a copy of the Financial Disclosure Statement upon receipt to the agency or authority. The ethics officer or general counsel of the authority or agency could then develop a procedure using the information in the Financial Disclosure Statements to identify a conflict or appearance of a conflict in connection with upcoming matters.

Board Member Certification

The second suggestion shifts the obligation for identifying conflicts or potential conflicts to each State authority board member, but ensures that adequate information is available to allow board members to discharge that responsibility.

For each contract, proposal or other item upon which board authorization is sought, the Authority ethics officer or general counsel would develop a list of identifying information.

The list would identify (a) all individuals and entities involved in the proposed transaction and (b) all parties likely to benefit (for example, landowners whose property may be acquired).

The list would serve as the face page of the monthly information packet provided to the board members prior to any meeting.

Each State public authority board member would be required to review the list and certify, by signing the document prior to the board meeting, that the board member has no relationship with the individuals or entities mentioned and neither the board member nor any family member would enjoy a benefit from any matter under consideration.

If a board member cannot certify and notes that a relationship or benefit exists or appears to exist, the authority ethics officer or general counsel would then determine whether the relationship, in light of the provisions of the Public Officers Law and Opinions of the Commission on Public Integrity, merits recusal. It has been proposed that even if recusal is deemed unnecessary, the existence of the relationship should be disclosed in the minutes of the board meeting.

* * *

Ethics Training for Public Authority Personnel

In the course of authority board training, a question was raised concerning the absence of training for authority personnel. Specifically, it was asked why ethics training is (i) mandated for public authority board members but not for public authority personnel, and (ii) not currently available to State public authorities by the Commission on Public Integrity and the Office of Employee Relations (“OER”)?

New York State has a long history of providing ethics training for State employees. At least since the creation of the State Ethics Commission (“Commission”) in 1987, training has been widely available to State personnel. In 2007, responsibility for ethics training was transferred to the newly created Commission on Public Integrity.

In 2007, training sessions were conducted, by both State agency ethics officers and Commission personnel,

for approximately 8,653 employees. Additionally, the OER provided a training Web site available to all employees and post-employment ethics training for approximately 450 former employees. By any standard, the Commission and OER's training efforts are comprehensive.

It is anomalous that ethics training is readily available for State agency personnel, but less available for management and line personnel of public authorities. More specifically:

- (i) Ethics and governance training is mandated by the Public Authority Accountability Act of 2005 for board members of New York State and local public authorities. Ethics training is not required for State authority management personnel.

- (ii) Ethics training for authority personnel is discretionary. Some authorities provide training using internal personnel; most do not.
- (iii) The Commission on Public Integrity is not currently authorized to provide training to State public authorities.

Consideration

Consideration should be given to (i) mandating ethics training to State public authority management personnel, and (ii) authorizing the Commission on Public Integrity or other entities to provide such training.

* * *

Increasing Racial/Gender Diversity on the Boards of Public Authorities

During the past two years of board training, among the several hundred board members who attended PAAA training, there appeared to be disproportionately few women, racial and ethnic minority board members.

We believed this impression to be sufficiently noteworthy that statistical data was examined concerning gender, racial and ethnic diversity of the boards of selected State public authorities.

We chose as a subset 14 of the State's public authorities that, in the aggregate, are accountable for approximately 90% of the State's outstanding debt burden, and/or a significant percentage of the State's infrastructure. The authorities chosen were: the Dormitory Authority, the Metropolitan Transportation Authority, the State Thruway Authority, the Long Island Power Authority, the Urban Development Corporation, the Environmental Facilities Corporation, the NYS Energy and Research Development Authority, the NYS Mortgage Agency, the NYS Housing Finance Agency, the NYS Power Authority, the Housing Finance Authority, the Battery Park City Authority, the Niagara Frontier Transportation Authority and the Lower Manhattan Development Corporation.

We reviewed the information available on the authorities' Web sites. When that proved insufficient or incomplete, we contacted personnel at the authorities. Available data indicates that (i) women occupy approximately 19% of the board positions, including on an *ex officio* basis and (ii) racial and ethnic minorities approximately 9% of the current board positions, including on an *ex officio* basis. It appears that, based upon a less detailed review, women and ethnic and racial minorities may occupy even fewer positions by aggregate percentage in the remaining 28 State public authorities.

Observations and Consideration

- (i) The merits of gender, racial, and ethnic diversity on the boards of State public authorities are beyond the scope of this topic paper. However, it bears note that, in the course of preparing this overview and examining current research on diversity on the boards of publicly held companies, it appeared that there is a growing view among commentators that board diversity introduces new perspectives and considerations into the decision making process.
- (ii) State public authorities are intended to finance and direct the operation of certain key aspects of the State's infrastructure, including transportation, power, construction and economic development. Over the past 30 years, as public authorities have expanded in number and scope, their boards have become custodians of more than 90% of the State's debt and decision-makers on numerous issues central to public welfare.
- (iii) To the extent that the State legislature and executive branches have, in some measure, ceded authority for matters of public policy and debt to the boards of State public authorities, it may be appropriate for these boards to reflect, to some degree, the gender, racial and ethnic composition of the legislature or the State at large. Currently, this does not appear to be the case. The State legislature is comprised of 210 members. Fifty members, or 23.5%, are women and forty-six members, or 21.7%, self-identify as non-Caucasian. These percentages are materially less than the corresponding presence of women and non-Caucasians in the State

population; women constitute 51.5% and non-Caucasians 39.5% of the State's population.

- (iv) The criteria used to select members of the boards of the State authorities are not set forth in either statute or regulation (please see GLC Topic Paper Number 1).

- (v) There are, reportedly, more than 100 State public authority board positions that are either vacant or will statutorily become vacant during the next several years. This circumstance may provide an opportunity to promote greater diversity.

* * *

The Big Ten: The Most Frequently Asked Questions by Public Authorities About Open Meetings Issues

The Issue

The Department of State's Committee on Open Government has developed thoughtful policies and advisory opinions which provide guidance to State and local governments with respect to the Open Meetings Law and Freedom of Information Law.

Authority Board members attending the training programs frequently raised similar questions concerning the application of the State's Open Meetings Law and Freedom of Information Law. When, in response, the authorities were pointed to the Open Governments Committee's advisory opinions or to provisions of the Public Officers Law, it became clear that the authorities, particularly the smaller local authorities, did not have the time, resources, or perhaps inclination to research the advisory opinions. We thought it may be worthwhile to discuss the Big Ten, the public authorities' ten most frequently asked questions.

1. *What does the Open Meetings Law require?*

The law requires that notice of the time and place of all meetings be given prior to every meeting. If a meeting is scheduled at least a week in advance, notice must be provided to the public and news media not less than 72 hours prior to the meeting. When the meeting is scheduled less than a week in advance, notice must be provided to the public as soon as practicable and a meeting notice must be posted in one or more predetermined public locations.

2. *Who does the Open Meetings Law pertain to?*

Every public body for which a quorum of two or more members is required to conduct public business or perform a governmental function, where a quorum is present.

3. *Are informal casual meetings during which business is discussed subject to the Open Meetings Law?*

Yes. Informal conferences and meetings, work sessions, whether in person or by telephone, at which

a quorum is present and business is discussed are subject to the Open Meetings Law. Not every social assemblage is intended to trigger the law, but board members should be mindful in such social situations to avoid discussing public business.

If, by intention or design, board members gather in less than a quorum to discuss business (even without transacting business) in order to circumvent the Open Meetings Law, it constitutes a violation of the Open Meetings Law (OML-AO 3348, August 7, 2001).

4. *Does the Open Meetings Law apply to committees and subcommittees of the board?*

Yes, if a quorum of the committee or subcommittee is present.

5. *Who counts toward a quorum?*

A quorum is a majority of the total membership of the board notwithstanding absences, vacancies, and recusals. An abstention is deemed to be a negative vote and counts toward both the quorum and vote.

6. *May a board member be counted toward a quorum if participation is by telephone or videoconference?*

The Open Meetings Law is intended to provide the public with the right to observe the performance of public officials in their deliberations. Videoconferencing is acceptable. Participation by telephone, mail, or e-mail may not count toward a quorum. However, the requirements of the Open Meetings Law cannot be circumvented by discussing public business via telephone.

7. *When must minutes be made available?*

Minutes of open meetings must be made available within two weeks of the meeting; minutes of executive sessions must be made available within one week of the executive session (see below). If the minutes have not been approved, they may be

marked “Draft,” “Unapproved,” or “Non-Final” when disclosed.

8. *When may a board go into executive session?*

A majority of the board may vote in public to go into executive session in only eight specific circumstances. An executive session may not be scheduled in advance of a board meeting. The decision to proceed into executive session requires board approval in a public meeting. Members of the public or consultants can be invited into executive sessions.

9. *Do minutes need to be taken if the board goes into executive session?*

Yes, if a decision is made. Since the board acting in executive session has the capacity to take formal action on a number of topics, care must be given as to whether the conduct in executive session constitutes advice to the full board on which a vote in full session will be taken or will be construed as a determination or formal action.

If a board acting in executive session makes a determination or takes formal action, minutes need only refer generally to the topic addressed and summarize the action taken, but need not reveal anything that would run counter to the exemptions in the Freedom of Information Law.

Hint: It would appear prudent to take minutes at all executive sessions, however brief the minutes, as a safeguard in the event someone in the future alleges impropriety in the use of executive session. If no action is taken, the minutes should reflect this.

10. *If a board obtains legal advice from an attorney, is it subject to the Open Meetings Law?*

If the board seeks legal advice from an attorney, the communications are outside the scope of the Open Meetings Law, even if there is no basis for the board to go into executive session (CPLR 503; Public Officers Law § 108(3)). However, the courts have construed the scope of the attorney-client exemption in this context narrowly. See *People v. Belge*, 59 A.D. 2d 307 (4th Dep’t 1977). Once legal advice is offered or the conversation with counsel concludes, the exception is extinguished and the discussion must continue in public session.

One unresolved issue pertaining to the attorney-client issue is, if in a public meeting the lawyer conveys thoughts or guidance on an issue, may this constitute a waiver of the privilege precluding any non-public legal discussion of the issue? A nuisance, but nonetheless merits care.

* * *

Application of Gubernatorial Executive Orders to Public Authorities

The Issue

Board members have asked whether State public authority board members and personnel are subject to gubernatorial executive orders.

The application of executive orders draws into question the relationship between public authorities and the Office of the Governor, and the issue of authority independence. This topic appeared to merit further examination.

Discussion

Public authorities are public benefit corporations, “devised by the Legislature to separate their administrative and fiscal functions from those of the State in order to protect the State from liability and enable public projects to be carried out with a measure of freedom and flexibility.” *New York State Chapter, Inc., Associated General Contractors of America v. New York State Thruway Authority*, 88 N.Y.2d 56, 74 (1996), citing, *Schulz v. State of New York*, 84 N.Y.2d 231, 244 (1994). “Although created by the State and subject to dissolution by the State, these public corporations are independent and autonomous, deliberately designed

to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission.” *Plumbing, Heating Piping and Air Conditioning Contractors Assoc., Inc. v. New York State Thruway Auth.*, 5 N.Y.2d 420, 423 (1959).

The Legislature may define the extent to which a particular public authority is deemed a State agency, and where the Legislature does not resolve that issue for a particular purpose, the courts endeavor to ascertain legislative intent. See, e.g., Public Officers Law §§ 73-a(b) and 74(1) (defining public authorities with at least one member appointed by the Governor as State agencies for purposes of those statutes); *Plumbing, Heating, Piping and Air Conditioning Contractors Assoc., Inc.*, 5 N.Y.2d at 423-425 (holding that NYSTA is not a “board” or “department” of the State for purposes of State Finance Law § 135).

There appear to be two legal doctrines which, read together, inform the analysis.

The first appears to allow for the application of an executive order on public authorities, when consistent with the intent of the Legislature.

“The constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government...requires that the Legislature make the crucial policy decisions, while the executive branch’s responsibility is to implement those policies.” *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995) (internal quotation marks and citations omitted). It is significant to note that “there need not be a specific and detailed legislative expression authorizing a particular executive act as long as the basic policy decisions underlying the regulations have been made and articulated by the Legislature.... [i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated.” *Id.* at 785. Critically, “the executive branch’s mere creation of a new procedural, administrative mechanism,... to better implement a legislative policy does not offend the Constitution.” *Id.* at 787.

The second consideration appears to constrain gubernatorial ability to impose executive orders on public authorities. In *Rapp v. Carey* (44 N.Y.2d 157 (1978)), a divided Court struck down the Governor’s Executive Order No. 10.1 (9 N.Y.C.R.R. 3.10), which sought to require employees of various State departments and public authorities to file financial statements with the Board of Public Disclosure and abstain from various political and business activities. The majority found that although benevolent in purpose, the order constituted a nullification of legislative policy because it imposed blanket prohibitions on a legislative design that intended ethical conflicts to be determined on a case-by-case basis. *Id.* at 165. The majority also found the restriction on political activities “particularly troublesome” because it involved “a broad question of policy, hardly resolvable by other than the representatively elected lawmaking branch of government, the Legislature.” *Id.*

Rapp also notes that the Governor may require appointees who serve at his will to abstain from transactions

or business associations that potentially conflict with State duties, because he is free to regulate the business activities of employees who serve at his pleasure. *Id.* at 165. However, the Court pointed out that the same authority does not extend over employees with civil service tenure or appointees who serve for fixed terms because they are not subject to summary dismissal by the Governor. The majority found that Executive Order 10.1 “exceeds the Governor’s power of appointment and reaches employees who could be neither directly appointed nor summarily dismissed by the Governor. As to these employees, the Governor is without power to impose the strictures contained in the executive order.” *Id.*

Observations and Considerations

Case law is not clear concerning the validity of imposing executive orders on public authorities. The Governor’s authority to issue executive orders binding public authorities may exist, but is qualified. Executive orders which seek to implement general State policy established by the Legislature are authorized by Article IV, Sec. 3 of the State Constitution, which provides that the Governor shall “take care that the laws are faithfully executed.” Consequently, an executive order must implement and not contradict the will of the Legislature, nor tread on the Legislature’s exclusive authority to set State policy. See generally *Rapp v. Carey*, 44 N.Y.2d 157 (1978).

If, for example, the legislation that the executive order purports to implement excludes public authorities from the entities intended to be covered by the legislation, an executive order should not seek to apply the legislative mandate to public authorities. Similarly, when the legislation is silent on whether it was intended to apply to public authorities, the prudent approach would be to refrain from imposing the obligations by executive order. It appears that an executive order founded on legislation which refers, for example, to all State entities, could, arguably, appropriately impose procedures intended to implement the legislation on public authorities.

It may be prudent for the Legislature to clarify, in future proposals, the public entities intended to be governed by the legislation.

The Public Authorities Reform Act of 2009

By Scott Fein

Efforts to reform public authorities in New York have, until relatively recently, been sporadic. In some measure, this may reflect the conflicting sentiments that legislators and others have about public authorities. Most would consider public authorities relatively effective in the maintenance and delivery of services. However, there is an overarching concern about their transparency, accountability and debt management. Those interested in reform have suggested that three areas of public authority operations merit reform: (i) transparency and governance, (ii) oversight, and (iii) the issuance of debt. The first two of these areas of concern appear well on the way to being addressed.

The enactment of the Public Authority Accountability Act of 2005 ("PAAA") provided an important step toward increasing public awareness of authority operations. With the establishment of the State Authority Budget Office, an entity was available to obtain and make available on a web site comprehensive data about the fiscal and programmatic operation of hundreds of authorities Statewide. Additionally, the PAAA made comprehensive changes to governance, reporting, and auditing standards and property transactions.

With the operational and budgetary information now available, the legislature and Governor were ready to tackle the next stage of reform, enhancing authority operations and oversight. The Public Authorities Reform Act of 2009 ("PARA") has recently been developed by the Legislature and Governor's Office in consultation with the State Comptroller. The Act takes a significant step toward authority reform by enhancing governance, oversight, capacity to enforce reporting requirements, and approval of contracts by the State Comptroller. The PARA has been passed by the Legislature and is likely to be signed by the Governor within the next two weeks. A summary of the provisions of PARA and text of the legislation follow this introduction.

The prospect of a third phase of reform, debt management, has been discussed by commentators over the years. With the enactment of the PARA, the Legislature may now be prepared to consider clarifying important fiscal issues, including the definition of debt, a meaningful debt cap, limitations on conduit and back door borrowing, and coordination of debt issuance.

Public Authorities Reform Act (PARA) of 2009

Definition of Authority

Current Law

Public Authorities include state and local authorities, public benefit corporations and their subsidiaries, and not-for-profits sponsored by or created by a county, city, town, or village government.

PARA of 2009

No changes to existing law.

Authority Budget Office

Current Law:

1. Reviews authority operations, practices, and assesses compliance with law.
2. Maintain a comprehensive inventory of authority documents
3. Improves management practices

PARA 2009 adds the following powers and responsibilities:

1. Verify existence of all authorities in state law
2. Issue recommendations on debt
3. Comply or explain
4. Warn and censure
5. Receive and act upon complaints from the public
6. Formal investigations in response to complaints
7. Power to issue Subpoenas
8. Report criminal activities
9. Develop and issue, after consultation with the Attorney General, a written acknowledgement that board members understand their fiduciary duty.
10. Develop best practices for screening proposed directors
11. Promulgate rules and regulations

12. Develop comprehensive definition of public authorities
13. Review potential consolidation renaming of authorities
14. Standardize content and format of reports
15. Recommend a compensation plan for board members
16. Recommend changes in the terms of office of directors
17. Enter into cooperative agreements
18. Assess individual authorities and set date to make changes pursuant to this article
19. Suspension or removal of directors.

November 2009 Modifications:

1. Slight technical changes regarding the power to issue subpoenas
2. Develop and issue a process for board members to acknowledge understanding of his/her role and fiduciary responsibilities
3. Slight technical change regarding the promulgation of rules and regulations
4. The ABO will recommend a compensation or no compensation plan for board members

Documents Required to be Reported to the ABO

Current Law:

1. Report on debt issuance
2. Compensation schedules for employees
3. Projects undertaken by the authorities in the last year
4. A listing of real property held or disposed of
5. The fair market value of such property
6. The authority's code of ethics
7. An assessment of its internal control structure

PARA 2009 Adds the Following Documents to the Requirements of Public Reporting to the ABO:

1. Financial Reports and mission statement
2. Biographical information for all directors, officers, employees
3. Copy of legislation that creates the authority
4. Description of the authority and board structure
5. Charter (if applicable) By-Laws

6. Names of committees' committee members
7. Listing of operational changes from previous year
8. A minimum 4 year financial plan
9. Capital budget
10. Board performance evaluations
11. Description of assets / services bought and sold
12. Description of litigation an authority is involved in

Board Governance and Fiduciary Duty

Current Law:

1. Audit Committee required
2. Bans board members from serving as CEO, Executive Director, CFO, or Comptroller
3. Authority board members would now be required to (i) execute direct oversight of senior management relating to ethics; (ii) understand and monitor the implementation of financial and operational decisions of the authority; (iii) establish compensation and time and attendance policies; (iv) adopt a code of ethics; (v) establish policies that protect employees who disclose wrongdoing; and (vi) adopt a defense and indemnification policy
4. Requires board members to attend state approved training programs

PARA 2009 Adds the Following Governance Provisions:

1. Board members have an explicit fiduciary duty to the authority and not to the appointing entity
2. Governance committee must: (i) examine ethical and conflict of interest issues; (ii) perform board self-evaluations; (iii) investigate term limits; and (iv) develop by-laws which include rules and procedures for conducting board business
3. Audit Committee members must be familiar with corporate financial and accounting practices
4. Finance Committee created

November 2009 Modifications:

1. Repeals existing law and permits a board member to serve as both the CEO and Chair, and prohibits the Chair of an authority who is also the CEO from participating in determining compensation for the CEO
2. Breach of fiduciary duty would be cause for removal of a board member by the appointing entity

Contracts

Current Law:

Current Law is silent on this issue

PARA 2009 Requires Comptroller Approval of Contracts:

Prior to publication of bids each authority must submit to the Comptroller contracts over \$1 million. Comptroller must notify them that it wants to review contract within 45 days. Contracts must be approved within 90 days. If no action is taken it is automatically approved. All other contracts under \$1 million are subject to review at the Comptroller's request.

November 2009 Modifications:

1. Comptroller to review no bid contracts and those funded with State dollars. Comptroller not to review competitively bid contracts.
2. Comptroller NOT to review contracts of Roswell Park, Nassau, Erie, Westchester, and Clifton-Fine Public Benefit Corporation Hospitals that are:
 - Subject to the DOH Certification of Need process
 - For services, affiliations or joint ventures for the provision or administration of health care services or scientific research;
 - For direct health care services or goods used in the provision of health care services; or
 - For participation in group purchasing arrangements.
3. Comptroller NOT to review contracts for unforeseen emergencies
4. Comptroller NOT to review contracts for the purchase or sale of energy, electricity, or ancillary services on the spot market; contracts for the purchase or sale of energy/power, fuel, costs and ancillary services with a term of less than 5 years; or contracts for the sale of energy/power for economic development purposes

Disposition of Property

Current Law:

Requires a property disposal policy and a contracting officer. Publication of all real property owned. A loophole allows certain property to be sold below fair-market value.

PARA 2009:

Authority property must be sold at fair market value.

November 2009 Modifications:

1. Below fair market value sales permitted if it is within the mission of the Public Authority, as defined by their authorizing statute.
2. Complete disclosure of all below fair-market value transactions
3. Below fair market value transactions subject to denial by the Governor (by certification) and either house of the legislature (by resolution) within 60 days of receiving notification
4. For local authorities, approval by the local government for below fair market value transactions would be sufficient to permit the transfer if such approval is provided for in the authority's governing statute and the transfer is for property originally possessed by the authority

Debt Reform

Current Law:

Current Law is silent on this issue.

PARA 2009 Creates Stronger Debt Oversight Measures:

Authorities must submit debt reform measure to the ABO and statement of intent to guide issuance and overall amount of debt issued.

Limitations on the Creation of Subsidiaries

Current Law:

No limitations on the creation of subsidiaries by public authorities

PARA 2009 Requires Subsidiaries Can Only be Created by State Law Unless:

1. It is for a specific project that the state authority has the power to pursue whose primary purpose is to limit liability, which may not issue debt in excess of \$1 million
2. Subsidiaries must be reported 60 days prior to the formation and must report annually to the ABO

November 2009 Modifications:

Roswell Park, Erie, Westchester, Clinton-Fine, and Nassau public Benefit Corporation Hospitals receive substantially greater leeway with regard to subsidiary creation; such corporations are exempt from limitation on debt issuance, and are not subject to the qualifying criteria for the creation of a subsidiary without legislative approval that requires subsidiary to be for the purpose of limiting liability.

Audits of Authorities

Current Law:

Each authority must undergo an annual independent audit.

PARA 2009:

Audits must be performed as required by Sec. 2 of State Finance law and requires the audit to be sent to the ABO.

MWBE

Current Law:

1. MWBE law currently applies to 35 authorities
2. MWBE law applies to state contracts for “labor, services, supplies, equipment, materials.”

PARA 2009:

1. Requires all state authorities to abide by MWBE standards
2. Clarifies that MWBE law applies to state contracts for services to include, “legal, financial, and other professional services.”

Lobbying Contacts

Current Law:

Current law is silent on this issue

PARA 2009:

Requires every member, officer, or employee to make a record of any lobbyist contract and the adoption of policies implementing these requirements.

November 2009 Modifications:

State authorities required to maintain a record of lobbying contacts made in an attempt to influence any rule, regulation, or ratemaking procedure of such authority.

Whistleblower

Current Law:

The board to establish written policies and procedures that protect employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance or other inappropriate behavior.

PARA 2009 Strengthens Whistleblower Provisions:

1. Requires a Whistleblower Access and Assistance Program in consultation with the Attorney General that (i) establishes toll-free phone lines available to employees, and (ii) offers advice and consultation on state and federal laws

2. An authority may not fire, discharge, demote, suspend, threaten, harass, or discriminate against any employee for their whistleblower actions

CEO Confirmation

Current Law:

Confirmation of MTA CEO

PARA 2009:

Confirmation of all Public Authority CEOs

November 2009 Modifications:

Confirmation of CEO Executive Director of specified Public Authorities

- Dormitory Authority (Executive Director)
- Thruway Authority (Executive Director)
- Power Authority (CEO)
- Long Island Power Authority (CEO)

Labor Agreement

PARA 2009:

Silent on this.

November 2009 Modifications:

1. State authorities prohibited from entering into any contract for the development of a hotel or convention center in which the authority has a substantial proprietary interest unless such contract includes a labor peace agreement with a labor organization that represents hotel employees in the state, for at least 5 years.
2. Contracts may be entered into *without* a labor peace agreement upon a written determination by the authority that a labor peace agreement would prevent the project from going forward, or would substantially increase the cost of the project. Basis for the determination would include prior experience, earlier RFPs for the same project, or detailed evaluation of potential bidders.
3. Provision would expire June 30, 2012.

Effective Date

This act will take effect on March 1, 2010.

STATE OF NEW YORK

S. 12 A. 12

Twentieth Extraordinary Session

SENATE ASSEMBLY

November 18, 2009

IN SENATE—Introduced by Sens. PERKINS, SAMPSON, SMITH, BRESLIN, FLANAGAN, FOLEY, HASSELL-THOMPSON, HUNTLEY, KRUEGER, KRUGER, MONSERRATE, SCHNEIDERMAN, SERRANO, SQUADRON, STEWART-COUSINS, THOMPSON—(at request of the Governor)—read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of M. of A. Brodsky, Silver, Farrell, Titone, Scarborough, Gibson, Abbate, Alessi, Arroyo, Barron, Benedetto, Benjamin, Bradley, Brook-Krasny, Cahill, Camara, Carrozza, Christensen, Clark, Colton, Cook, Crespo, Cymbrowitz, DelMonte, DenDekker, Destito, Dinowitz, Eddington, Englebright, Espallat, Gabryszak, Galef, Gianaris, Glick, Gordon, Gottfried, Gunther, Heastie, Hevesi, Hooper, Hoyt, Jaffee, Jeffries, John, Kavanagh, Kellner, Lancman, Latimer, Lavine, Lentol, Lifton, Lupardo, Magee, Magnarelli, Maisel, Mayersohn, McEneny, Meng, M. Miller, Millman, O'Donnell, Ortiz, Peoples-Stokes, Peralta, Perry, Pheffer, Powell, Pretlow, Reilly, P. Rivera, Rosenthal, Schimel, Schroeder, Skartados, Spano, Stirpe, Sweeney, Thiele, Towns, Weinstein, Zebrowski)—(at request of the Governor)—read once and referred to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the public authorities law and the executive law, in relation to creating the authorities budget office, to repeal certain provisions of the public authorities law relating thereto; to repeal section 27 of chapter 766 of the laws of 2005 constituting the public authorities accountability act relating thereto; to repeal a chapter of the laws of 2009, amending the public authorities law and the executive law, relating to the creation of an authorities budget office, as proposed in legislative bills numbers S.1537-C and A.2209-C; and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

EXPLANATION—Matter in ***italics*** (underscored) is new; matter in brackets

[] is old law to be omitted.

LBD12150-06-9

Section 1. Legislative findings. The legislature finds that chapter 766 of the laws of 2005 was the beginning of the process to reform the way public authorities conduct business in New York state. However, the fundamental problems of transparency, accountability, the responsibilities and functions of board members and oversight have not been addressed, leading to a lack of public trust in these institutions. The creation of an independent authorities budget office is necessary to provide oversight of the operations and finances of public authorities in real time and to inform the legislature and executive on issues relating to debt, compensation of board members, the role minority and women-owned businesses play in the procurement process, the disposition of property and the governance of authorities. Public authorities should be required to publish, in real time, their finances, policies, plans and decisions. Real-time review by the public, the legislature, the executive and the authorities budget office will facilitate the prevention of problems, not just their explanation after they have arisen.

§ 2. Section 2 of the public authorities law is amended by adding a new subdivision 6 to read as follows:

6. “authorities budget office” shall mean the entity established pursuant to section four of this article.

§ 3. Subdivision 5 of section 2 of the public authorities law, as added by chapter 766 of the laws of 2005, is amended to read as follows:

5. “subsidiary” shall not include, for the purposes of this chapter, corporations that have been certified by the parent corporation to the ~~[entity created pursuant to section twenty-seven of the chapter of the laws of two thousand five which added this section]~~ **authorities budget office** as being inactive for the past twelve months, having an identical

board of its parent corporation, or not having separate and independent operational control. Provided, however, the parent corporation, in response to any request, shall address any provision or provisions of this chapter.

§ 4. Sections 1 and 2 of article 1 of the public authorities law are designated title 1 and a new title heading is added to read as follows:

SHORT TITLE; DEFINITIONS

§ 5. Article 1 of the public authorities law is amended by adding a new title 2 to read as follows:

TITLE 2 **AUTHORITIES BUDGET OFFICE**

Section 4. Establishment of the independent authorities budget office.

5. Director of the authorities budget office.

6. Powers and duties of the authorities budget office.

7. Reports of the authorities budget office.

§ 4. Establishment of the independent authorities budget office. There is hereby established the independent authorities budget office as an independent entity within the department of state, which shall have and exercise the powers and duties provided by this title.

§ 5. Director of the authorities budget office. The director of the authorities budget office shall be appointed by the governor, upon the advice and consent of the senate. The director shall hold office for a term of four years beginning on the date of confirmation. The salary of the director shall be established by the governor within the limit of funds available therefor; provided, however, such salary shall be no less than the salaries of certain state officers holding the positions indicated in paragraph (d) of subdivision one of section one hundred sixty-nine of the executive law. The director may be removed by the governor only after notice and opportunity to be heard, and only for:

1. permanent disability;

2. inefficiency;

3. neglect of duty;

4. malfeasance;

5. a felony or conduct involving moral turpitude; or

6. breach of fiduciary duty. § 6. Powers and duties of the authorities budget office. 1. The authorities budget office shall:

(a) conduct reviews and analysis of the operations, practices and reports of state and local authorities to assess compliance with the provisions of this chapter and other applicable provisions of law;

(b) maintain a comprehensive inventory of state and local authorities and subsidiaries and the annual reports of such state and local authorities as defined in section twenty-eight hundred of this chapter;

(c) verify the existence of all authorities listed in state law;

(d) review the potential for consolidation or name change of certain authorities;

(e) assist state and local authorities in improving management practices and the procedures by which the activities and financial practices of state and local authorities are disclosed to the public;

(f) make recommendations to the governor, the temporary president of the senate, the speaker of the assembly and the chairs and ranking minority members of the following committees: the senate finance committee, the assembly ways and means committee, the senate committee on corporations, authorities and commissions and the assembly committee on corporations, authorities and commissions and authority board members concerning opportunities to improve the performance, reporting, reformation, structure and oversight of state and local authorities;

(g) provide such additional information and analysis as may be reasonably requested by the legislature and state comptroller;

(h) promulgate regulations to effectuate the purposes of this title and title one of this article, and article nine of this chapter, relating to the statutory responsibilities of the authorities budget office;

(i) develop and issue, after consultation with the office of the attorney general, a written acknowledgement that a board member must execute at the time that the member takes and subscribes their oath of office, or within sixty days after the effective date of this paragraph if the member has already taken and subscribed his or her oath of office, in accordance with subdivision one of section twenty-eight hundred twenty-four of this chapter;

(j) develop a comprehensive definition of public authorities including a consolidated listing by class and name;

(k) standardize content and format of state and local authority annual reports;

(l) assess individual authorities and based upon their ability and resources, set a date by which changes made pursuant to this title shall be implemented;

(m) issue recommendations to the legislature and governor on setting debt limitations for authorities without statutorily required debt limits;

(n) make recommendations to the legislature and governor with respect to options for, and whether there should be, compensation for boards of directors; and

(o) review the potential for and make recommendations to the legislature and governor regarding change in the terms of office of public authorities board members.

2. The authorities budget office shall have the authority to:

(a) request and receive from any state or local authority, agency, department or division of the state or political subdivision such assistance, personnel, information, books, records, other documentation and cooperation as may be necessary to perform its duties;

(b) enter into cooperative agreements with other government offices to efficiently carry out its work and not duplicate resources;

(c) receive and act upon complaints or recommendations from the public or other persons or entities regarding any authority covered by this title;

(d) initiate formal investigations in response to complaints or appearances of non-compliance by an authority;

(e) issue subpoenas pertaining to investigations which such office is authorized to conduct under this title, for the purposes of effectuating the powers and duties of this title;

(f) publicly warn and censure authorities for non-compliance with this title, and to establish guidelines for such actions;

(g) recommend to the entity that appointed the officer or director suspension or dismissal of officers or directors, based on information that is, or is made, available to the public under law;

(h) report suspected criminal activities to the attorney general and other prosecutorial agencies;

(i) compel any authority which is deemed to be in non-compliance with this title and title one of this article or article nine of this chapter to submit to the authorities budget office a detailed explanation of such failure to comply; and

(j) commence a special proceeding in supreme court, when it does not receive from a state or local authority upon request information, books, records or other documentation necessary to perform its duties, seeking an order directing the production of the same.

3. The reports and non-proprietary information received by and prepared by the authorities budget office shall be made available to the public, to the extent practicable, through the internet.

§ 7. Reports of the authorities budget office. On July first, two thousand ten and annually thereafter the authorities budget office shall issue reports on its findings and analyses to the governor, the chair and ranking minority member of the senate finance committee, the chair and ranking minority member of the assembly ways and means committee, the chair and ranking minority member of the senate standing committee on corporations, authorities and commissions, the chair and ranking minority member of the assembly standing committee on corporations, authorities and commissions, the state comptroller and the attorney general, with conclusions and opinions concerning the performance of public authorities and to study, review and report on the operations, practices and finances of state and local authorities as defined by section two of this article.

§ 5-a. Section 27 of chapter 766 of the laws of 2005, constituting the public authorities accountability act of 2005, is REPEALED.

§ 6. Subdivisions 1 and 2 of section 2800 of the public authorities law, subdivision 1 as amended and subdivision 2 as added by chapter 766 of the laws of 2005, are amended to read as follows:

1. State authorities. (a) For the purpose of furnishing the state with systematic information regarding the status and the activities of public authorities, every state authority continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the governor, the chairman and ranking minority member of the senate finance committee, the chairman and ranking minority member of the assembly ways and means committee ~~[and]~~, the state comptroller, and the authorities budget office, within ninety days after the end of its fiscal year, a complete and detailed report or reports setting forth:

(1) ~~its operations and accomplishments; (2) its [receipts and disbursements, or revenues and expenses, during such fiscal year in accordance with the categories or classifications established by such authority for its own operating and capital outlay purposes]~~ financial reports, including (i) audited financials in accordance with all applicable regulations and following generally accepted accounting principles as defined in subdivision ten of section two of the state finance law, (ii) grant and subsidy programs, (iii) operating and financial risks, (iv) current ratings, if any, of its bonds issued by recognized municipal bond rating agencies and notice of changes in such ratings, and (v) long-term liabilities, including leases and employee benefit plans; (3) ~~[its assets and liabilities at the end of its fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds]~~ its mission statement and measurements including its most recent measurement report; (4) a schedule of its bonds and notes outstanding at the end of its fiscal year, together with a statement of the amounts redeemed and incurred during such fiscal year as part of a schedule of debt issuance that includes the date of issuance, term, amount, interest rate and means of repayment. Additionally, the debt schedule shall also include all refinancings, calls, refundings, defeasements and interest rate exchange or other such agreements, and for any debt issued during the reporting year, the schedule shall also include a detailed list of costs of issuance for such debt; (5) a compensation schedule, in addition to the report described in section twenty-eight hundred six of this title, that shall include, by position, title and name of the person holding such position or title, the salary, compensation, allowance and/or benefits provided to any officer, director or employee in a decision making or managerial position of such authority whose salary is in excess of one hundred thousand dollars; (5-a) biographical information, not including confidential personal information, for all directors and officers and employees for whom salary reporting is required under subparagraph five of this paragraph; (6) the projects undertaken by such authority during the past year; (7) a listing and description, in addition to the report required by paragraph a of subdivision three of section twenty-eight hundred ninety-six of this article of ~~[(t)]~~ all real property of such authority having an estimated fair market value in excess of fifteen thousand dollars that the authority ~~[intends to dispose of; (ii) all such property held by the authority at the end of the period covered by the report; and (iii) all such property disposed]~~ acquires or disposes of during such period. The report shall contain ~~[an estimate of fair market value for all such property held by the authority at the end of the period and]~~ the price received or paid by the authority and the name of the purchaser or seller for all such property sold or bought by the authority during such period; (8) such authority's code of ethics; ~~[and]~~ (9) an assessment of the effectiveness of its internal control structure and procedures; (10) a copy of the legislation that forms the statutory basis of the authority; (11) a description of the authority and its board structure, including (i) names of committees and committee members, (ii) lists of board meetings and attendance, (iii) descriptions of major authority units, subsidiaries, and (iv) number of employees; (12) its charter, if any, and by-laws; (13) a listing of material changes in operations and programs during the reporting year; (14) at a minimum a four-year financial plan, including (i) a current and projected capital budget, and (ii) an operating budget report, including an actual versus estimated budget, with an analysis and measurement of financial

and operating performance; (15) its board performance evaluations; provided, however, that such evaluations shall not be subject to disclosure under article six of the public officers law; (16) a description of the total amounts of assets, services or both assets and services bought or sold without competitive bidding, including (i) the nature of those assets and services, (ii) the names of the counterparties, and (iii) where the contract price for assets purchased exceeds fair market value, or where the contract price for assets sold is less than fair market value, a detailed explanation of the justification for making the purchase or sale without competitive bidding, and a certification by the chief executive officer and chief financial officer of the public authority that they have reviewed the terms of such purchase or sale and determined that it complies with applicable law and procurement guidelines; and (17) a description of any material pending litigation in which the authority is involved as a party during the reporting year, except that no hospital need disclose information about pending malpractice claims beyond the existence of such claims.

(b) ~~[To the extent practicable, each]~~ Each state authority shall make accessible to the public, via its official or shared internet web site, documentation pertaining to its mission, current activities, most recent annual financial reports, current year budget and its most recent independent audit report unless such information is covered by subdivision two of section eighty-seven of the public officers law.

(c) The authorities budget office shall make accessible to the public, via its official or shared internet web site, documentation pertaining to each authority's mission, current activities, most recent annual financial reports, current year budget and its most recent independent audit report unless such information is covered by subdivision two of section eighty-seven of the public officers law.

2. Local authorities. (a) Every local authority, continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the chief executive officer, the chief fiscal officer, the chairperson of the legislative body of the local government or local governments and the ~~[entity established pursuant to section twenty-seven of the chapter of the laws of two thousand five which added this subdivision]~~ authorities budget office, within ninety days after the end of its fiscal year, a complete and detailed report or reports setting forth: (1) its operations and accomplishments; (2) ~~[its receipts and disbursements, or revenues and expenses, during such fiscal year in accordance with the categories or classifications established by such authority for its own operating and capital outlay purposes]~~ its financial reports, including (i) audited financials in accordance with all applicable regulations and following generally accepted accounting principles as defined in subdivision ten of section two of the state finance law, (ii) grants and subsidy programs, (iii) operating and financial risks, (iv) current ratings if any, of its bonds issued by recognized municipal bond rating agencies and notice of changes in such ratings, and (v) long-term liabilities, including leases and employee benefit plans; (3) [its assets and liabilities at the end of its fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds] its mission statement and measurements including its most recent measurement report;

(4) a schedule of its bonds and notes outstanding at the end of its fiscal year, together with a statement of the amounts redeemed and incurred during such fiscal year as part of a schedule of debt issuance that includes the date of issuance, term, amount, interest rate and means of repayment. Additionally, the debt schedule shall also include all refinancings, calls, refundings, defeasements and interest rate exchange or other such agreements, and for any debt issued during the reporting year, the schedule shall also include a detailed list of costs of issuance for such debt; (5) a compensation schedule in addition to the report described in section twenty-eight hundred six of this title that shall include, by position, title and name of the person holding such position or title, the salary, compensation, allowance and/or benefits provided to any officer, director or employee in a decision making or managerial position of such authority whose salary is in excess of one hundred thousand dollars; ~~(5-a) biographical information, not including confidential personal information, for all directors and officers and employees for whom salary reporting is required under subparagraph five of this paragraph;~~ (6) the projects undertaken by such authority during the past year; (7) a listing and description, in addition to the report required by paragraph a of subdivision three of section twenty-eight hundred ninety-six of this article of ~~[(i)] all real property of such authority having an estimated fair market value in excess of fifteen thousand dollars that the authority [intends to dispose of; (ii) all such property held by the authority at the end of the period covered by the report; and (iii) all such property disposed]~~ acquires or disposes of during such period. The report shall contain ~~[an estimate of fair market value for all such property held by the authority at the end of the period and]~~ the price received or paid by the authority and the name of the purchaser or seller for all such property sold or bought by the authority during such period; (8) such authority's code of ethics; ~~[and]~~ (9) an assessment of the effectiveness of its internal control structure and procedures; ~~(10) a copy of the legislation that forms the statutory basis of the authority;~~

(11) a description of the authority and its board structure, including (i) names of committees and committee members, (ii) lists of board meetings and attendance, (iii) descriptions of major authority units, subsidiaries, (iv) number of employees, and (v) organizational chart; (12) its charter, if any, and by-laws; (13) a listing of material changes in operations and programs during the reporting year; (14) at a minimum a four-year financial plan, including (i) a current and projected capital budget, and (ii) an operating budget report, including an actual versus estimated budget, with an analysis and measurement of financial and operating performance; (15) its board performance evaluations provided, however, that such evaluations shall not be subject to disclosure under article six of the public officers law; (16) a description of the total amounts of assets, services or both assets and services bought or sold without competitive bidding, including (i) the nature of those assets and services, (ii) the names of the counterparties, and (iii) where the contract price for assets purchased exceeds fair market value, or where the contract price for assets sold is less than fair market value, a detailed explanation of the justification for making the purchase or sale without competitive bidding, and a certification by the chief executive officer and chief financial officer of the public authority that they have reviewed the terms of such purchase or sale and determined that it complies with applicable law and procurement guidelines; and (17) a description of any material pending litigation in which the authority is involved as a party during the reporting year, except that no provider of medical services need disclose information about pending malpractice claims beyond the existence of such claims.

(b) ~~[To the extent practicable, each]~~ Each local authority shall make accessible to the public, via its official or shared internet web site, documentation pertaining to its mission, current activities, most recent annual financial reports, current year budget and its most recent independent audit report unless such information is covered by subdivision two of section eighty-seven of the public officers law.

§ 6-a. Section 2800 of the public authorities law is amended by adding a new subdivision 4 to read as follows:

4. The authorities budget office may, upon application of any authority, waive any requirements of this section upon a showing that the authority meets the criteria for such a waiver established by regulations of the authorities budget office. Such regulations shall provide for consideration of: (a) the number of employees of the authority; (b) the annual budget of the authority; (c) the ability of the authority to prepare the required reports using existing staff; and (d) such other factors as the authorities budget office deems to reflect the relevance of the required disclosures to evaluation of an authority's effective operation, and the burden such disclosures place on an authority. Each waiver granted pursuant to this subdivision shall be disclosed in the reports of such office issued pursuant to section seven of this chapter.

§ 7. Section 2801 of the public authorities law, as amended by chapter 766 of the laws of 2005, is amended to read as follows:

§ 2801. Budget reports by authorities. 1. State authorities. Every state authority or commission heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the governor, ~~[chairman]~~ the chair and ranking minority member of the senate finance committee, ~~[and chairman]~~ the chair and ranking minority member of the assembly ways and means committee and the authorities budget office, for their information, annually not more than one hundred twenty days and not less than ninety days before the commencement of its fiscal year, in the form submitted to its members or trustees, budget information on operations and capital construction setting forth the estimated receipts and expenditures for the next fiscal year and the current fiscal year, and the actual receipts and expenditures for the last completed fiscal year.

2. Local authorities. For the local authority fiscal year ending on or after December thirty-first, two thousand seven and annually thereafter, every local authority heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the chief executive officer, the chief fiscal officer, the chairperson of the legislative body of the local government or governments and the ~~[entity established pursuant to section twenty-seven of the chapter of the laws of two thousand five which added this subdivision;]~~ authorities budget office for their information, annually not more than ninety days and not less than sixty days before the commencement of its fiscal year, in the form submitted to its members or trustees, budget information on operations and capital construction setting forth the estimated receipts and expenditures for the next fiscal year and the current fiscal year, and the actual receipts and expenditures for the last completed fiscal year.

3. If any state or local authority has provided the information required by this section as part of the annual report required by section twenty-eight hundred of this title, such authority may comply with the provisions of this section by reference to such information with any necessary updates.

§ 8. Subdivisions 1 and 2 of section 2802 of the public authorities law, subdivision 1 as amended and subdivision 2 as added by chapter 766 of the laws of 2005, are amended to read as follows:

1. State authorities. Every state authority or commission heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the governor, chairman and ranking minority member of the senate finance committee, chairman and ranking minority member of the assembly ways and means committee ~~and~~, **each chair and ranking member of the senate and assembly committees on corporations, authorities and commissions**, the state comptroller, ~~[within thirty days after receipt thereof by such authority;]~~ **and the authorities budget office, together with the report described in section twenty-eight hundred of this title**, a copy of the annual independent audit report, performed by a certified public accounting firm in accordance with generally accepted ~~[government]~~ **auditing standards as defined in subdivision eleven of section two of the state finance law**, and management letter and any other external examination of the books and accounts of such authority other than copies of the reports of any examinations made by the state comptroller.

2. Local authorities. For the local authority fiscal year ending on or after December thirty-first, two thousand seven and annually thereafter, every local authority heretofore or hereafter continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the chief executive officer, the chief fiscal officer, the chairperson of the legislative body of the local government or local governments ~~[and to the entity established pursuant to section twentyseven of the chapter of the laws of two thousand five which added this subdivision, within thirty days after receipt thereof by such authority;]~~ **and the authorities budget office, together with the report described in section twenty-eight hundred of this title**, a copy of the annual independent audit report, performed by a certified public accounting firm in accordance with generally accepted ~~[government]~~ **auditing standards as defined in subdivision eleven of section two of the state finance law**, and management letter and any other external examination of the books and accounts of such authority other than copies of the reports of ~~any~~ examinations made by the state comptroller.

§ 9. Section 2806 of the public authorities law, as added by chapter 149 of the laws of 1993, is amended to read as follows:

§ 2806. Personnel reports by ~~[public]~~ **state and local** authorities and public benefit corporations. **1.** Every ~~[public]~~ **state and local** authority and public benefit corporation shall submit to the comptroller, the director of the budget ~~and~~, the chairpersons of the legislative fiscal committees **and the authorities budget office**, for their information, annually, on or before the fifteenth day of January of each calendar year, personnel information setting forth personal service schedules by subsidiary, division and unit which indicate position, grade, salary and title for each employee and in summary form.

2. If any state or local authority has provided the information required by this section in the annual report required under section twenty-eight hundred of this title, such authority may comply with the provisions of this section by references to such information with any necessary updates.

§ 10. Subdivisions 1, 4, 6 and 7 of section 2824 of the public authorities law, as added by chapter 766 of the laws of 2005, are amended to read as follows:

1. Board members of state and local authorities shall (a) execute direct oversight of the authority's chief executive and other ~~[senior]~~ management in the effective and ethical management of the authority; (b) understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority; (c) establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for the time and attendance of, the chief executive and ~~[senior]~~ management; (d) adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in section seventy-four of the public officers law; (e) establish written policies and procedures on personnel including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance, or other inappropriate behavior by an employee or board member of the authority, investments, travel, the acquisition of real property and the disposition of real and personal property and the procurement of goods and services; ~~and~~ (f) adopt a defense and indemnification policy and disclose such plan to any and all prospective board members; **(g) perform each of their duties as board members, including but not limited to those imposed by this section, in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances.**

and may take into consideration the views and policies of any elected official or body, or other person and ultimately apply independent judgment in the best interest of the authority, its mission and the public; (h) at the time that each member takes and subscribes his or her oath of office, or within sixty days after the effective date of this paragraph if the member has already taken and subscribed his or her oath of office, execute an acknowledgment, in the form prescribed by the authorities budget office after consultation with the attorney general, in which the board member acknowledges that he or she understands his or her role, and fiduciary responsibilities as set forth in paragraph (g) of this subdivision, and acknowledges that he or she understands his or her duty of loyalty and care to the organization and commitment to the authority's mission and the public interest.

4. Board members of each state and local authority, or subsidiary thereof, shall establish an audit committee to be comprised of not less than three independent members, who shall constitute a majority on the committee, and who shall possess the necessary skills to understand the duties and functions of the audit committee; provided, however, that in the event that a board has less than three independent members, the board may appoint non-independent members to the audit committee, provided that the independent members must constitute a majority of the members of the audit committee. The committee shall recommend to the board the hiring of a certified independent accounting firm for such authority, establish the compensation to be paid to the accounting firm and provide direct oversight of the performance of the independent audit performed by the accounting firm hired for such purposes.

6. ~~[To the extent practicable, members]~~ Members of the audit committee ~~[should]~~ shall be familiar with corporate financial and accounting practices.

7. Board members of each state and local authority, or subsidiary thereof, shall establish a governance committee to be comprised of not less than three independent members, who shall constitute a majority on the committee, and who shall possess the necessary skills to understand the duties and functions of the governance committee; provided, however, that in the event that a board has less than three independent members, the board may appoint non-independent members to the governance committee, provided that the independent members must constitute a majority of the members of the governance committee. It shall be the responsibility of the members of the governance committee to keep the board informed of current best governance practices; to review corporate governance trends; to ~~[update]~~ recommend updates to the authority's corporate governance principles; ~~[and]~~ to advise appointing authorities on the skills and experiences required of potential board members; to examine ethical and conflict of interest issues; to perform board self-evaluations; and to recommend by-laws which include rules and procedures for conduct of board business.

§ 11. Section 2824 of the public authorities law is amended by adding a new subdivision 8 to read as follows:

8. Board members of each state and local authority, or subsidiary thereof which issues debt, shall establish a finance committee to be comprised of not less than three independent members, who shall constitute a majority on the committee, and who shall possess the necessary skills to understand the duties and functions of the committee; provided, however, that in the event that a board has less than three independent members, the board may appoint non-independent members to the finance committee, provided that the independent members must constitute a majority of the members of the finance committee. It shall be the responsibility of the members of the finance committee to review proposals for the issuance of debt by the authority and its subsidiaries and make recommendations.

§ 11-a. Section 2827 of the public authorities law, as added by chapter 613 of the laws of 1961 and as renumbered by chapter 838 of the laws of 1983, is amended to read as follows:

§ 2827. Removal of authority members. Except as otherwise provided in this chapter, every member of every authority or commission heretofore or hereafter continued or created by this chapter, except ex-officio members, that is, members whose membership results by virtue of their incumbency of a public office, shall be removable by the public officer or public body which is empowered by this chapter to appoint such authority or commission member, for inefficiency, breach of fiduciary duty, neglect of duty or misconduct in office, provided, however, that such member shall be given a copy of the charges against him and an opportunity of being heard in person, or by counsel, in his or her defense upon not less than ten days' notice.

§ 11-b. Subdivision 5 of section 1678 of the public authorities law, as added by chapter 524 of the laws of 1944 and such section as renumbered by chapter 914 of the laws of 1957, is amended to read as follows:

5. To appoint officers, agents and employees and fix their compensation, **provided, however, that the appointment of the executive director shall be subject to confirmation by the senate in accordance with section twenty-eight hundred fifty-two of this chapter**;

§ 11-c. Subdivision 6 of section 354 of the public authorities law, as amended by chapter 766 of the laws of 1992, is amended to read as follows:

6. To appoint officers, agents and employees and fix their compensation, **provided, however, that the appointment of the executive director shall be subject to confirmation by the senate in accordance with section twenty-eight hundred fifty-two of this chapter**; subject however to the provisions of the civil service law, which shall apply to the authority and to the subsidiary corporation thereof as a municipal corporation other than a city;

§ 11-d. Section 1004 of the public authorities law, as amended by chapter 766 of the laws of 2005, is amended to read as follows:

§ 1004. Officers and employees; expenses. The trustees shall choose from among their own number a chairman and vice-chairman. They shall ~~[from time to time]~~ select such officers and employees, including a chief executive officer **whose appointment shall be subject to confirmation by the senate in accordance with section twenty-eight hundred fifty-two of this chapter**, and such engineering, marketing and legal officers and employees, as they may require for the performance of their duties and shall prescribe the duties and compensation of each officer and employee. They shall adopt by-laws and rules and regulations suitable to the purposes of this title. As long as and to the extent that the authority is dependent upon appropriations for the payment of its expenses, it shall incur no obligations for salary, office or other expenses prior to the making of appropriations adequate to meet the same.

§ 11-e. Subdivision 3 of section 2824 of the public authorities law is REPEALED and a new subdivision 3 is added to read as follows:

3. No chair who is also the chief executive officer shall participate in determining the level of compensation or reimbursement, or time and attendance rules for the position of chief executive officer.

§ 11-f. Subdivision (c) of section 1020-f of the public authorities law, as added by chapter 517 of the laws of 1986, is amended to read as follows:

(c) To appoint officers, agents and employees, without regard to any personnel or civil service law, rule or regulation of the state and in accordance with guidelines adopted by the authority, prescribe their duties and qualifications and fix and pay their compensation, **provided, however, that the appointment of the chief executive officer shall be subject to confirmation by the senate in accordance with section twenty-eight hundred fifty-two of this chapter**;

§ 11-g. The public authorities law is amended by adding a new section 2852 to read as follows:

§ 2852. Senate confirmation of certain chief executive officers. Where the appointment of any chief executive officer is subject to confirmation by the senate pursuant to subdivision five of section sixteen hundred seventy-eight of this chapter, subdivision six of section three hundred fifty-four of this chapter, section one thousand four of this chapter, or subdivision (c) of section one thousand twenty-f of this chapter the senate shall vote to confirm any such appointment within sixty days of its submission to the senate during session, or if such submission is made when the senate is not in session, within seven days of the convening for session. If the senate fails to vote to confirm any such appointment within the time prescribed in this section, such appointment shall be deemed confirmed without any further action by the senate.

§ 12. The public authorities law is amended by adding a new section 2824-a to read as follows:

§ 2824-a. Mission statement and measurement report. Each state authority shall submit to the authorities budget office on or before March thirty-first, two thousand ten, and each local authority shall submit to the authorities budget office on or before March thirty-first, two thousand eleven, a proposed authority mission statement and proposed measurements which the authorities budget office shall post on its website. The proposed authority mission statement and proposed measurements shall have the following components: a brief mission statement expressing the purpose and goals of the authority, a description of the stakeholders of the authority and their reasonable expectations from the authority, and a list of measurements by which performance of the authority and the achievement of its goals may be evaluated. Each authority shall reexamine its mission statement and measurements on an annual basis, and

publish a self-evaluation based on the stated measurements; provided, however, such reexamination may be waived pursuant to a determination by the director of the authorities budget office that such undertaking is unnecessary for an individual authority.

§ 13. The opening paragraph of subdivision 2 of section 2825 of the public authorities law, as added by chapter 766 of the laws of 2005, is amended to read as follows:

Except for members who serve as members by virtue of holding a civil office of the state, the majority of the remaining members of the governing body of every state or local authority shall be independent members; provided, however, that this provision shall apply to appointments made on or after the effective date of [the] chapter ~~seven hundred sixty-six~~ of the laws of two thousand five which added this subdivision. The official or officials having the authority to appoint or remove such remaining members shall take such actions as may be necessary to satisfy this requirement. For the purposes of this section, an independent member is one who:

§ 14. The public authorities law is amended by adding a new section 2879-a to read as follows:

§ 2879-a. Comptroller approval of contracts. 1. Except as set forth in subdivision three of this section, where the comptroller determines pursuant to his or her authority to supervise the accounts of public corporations, that contracts or categories of contracts in excess of one million dollars (a) to be awarded by a state authority to a single source, a sole source or pursuant to any other method of procurement that is not competitive, or (b) which are to be paid in whole or in part from monies appropriated by the state to a state authority for such contractual expenditure, require supervision in the form of prior review and approval of such contracts, and the comptroller so notifies such authority of such determination, then any such contract entered into subsequent to such notification shall be submitted to the comptroller for his or her approval and shall not be a valid enforceable contract unless it shall first have been approved by the comptroller. Such notification shall identify the process for submission, the categories of contracts at issue and the time period for which such submission is to take place. The comptroller shall promulgate such rules and regulations as may be necessary to carry out his or her responsibilities under this section, including but not limited to the standards for determining which contracts will be subject to his or her review and for approving such contracts.

2. Where the comptroller, pursuant to subdivision one of this section, has notified a state authority that any contract or category of contracts shall be subject to his or her approval, such authority shall include or cause to be included in each such contract a provision informing the other party that such contract is subject to the comptroller's approval pursuant to the comptroller's authority to supervise the accounts of public corporations. If the comptroller has not approved or disapproved any contract subject to his or her approval within ninety days of submission to his or her office, such contract shall become valid and enforceable without such approval.

3. This section shall not apply to: (a) contracts entered into for the issuance of commercial paper or bonded indebtedness, other than contracts with the state providing for the payment of debt service subject to an appropriation; (b) contracts entered into by an entity established under article ten-c of the public authorities law that are for: (i) projects approved by the department of health or the public health council in accordance with articles twenty-eight, thirty-six or forty of the public health law or article seven of the social services law; (ii) projects approved by the office of mental health, the office of mental retardation and developmental disabilities, or the office of alcoholism and substance abuse services in accordance with articles sixteen, thirty-one, or thirty-two of the mental hygiene law; (iii) services, affiliations or joint ventures for the provision or administration of health care services or scientific research; (iv) payment for direct health care services or goods used in the provision of health care services; or (v) participation in group purchasing arrangements; (c) contracts entered into for the procurement of goods, services or both goods and services made to meet emergencies arising from unforeseen causes or to effect repairs to critical infrastructure that are necessary to avoid a delay in the delivery of critical services that could compromise the public welfare; (d) contracts of purchase or sale of energy, electricity or ancillary services made by an authority on a recognized market for goods, services, or commodities in question in accordance with standard terms and conditions of purchase or sale at a market price; (e) contracts for the purchase, sale or delivery of power or energy, fuel, costs and services ancillary thereto, or financial products related thereto, with a term of less than five years; and (f) contracts for the sale or delivery of power or energy and costs and services ancillary thereto for economic development purposes pursuant to title one of article five of this chapter or article six of the economic development law, provided, however, that the authority shall file copies of any such contract with the comptroller within sixty days after the execution of such contract.

4. The provisions of this section do not grant or diminish any power or right to review contracts beyond or from that which the comptroller may have pursuant to his or her authority to supervise the accounts of public authorities. If any provisions of this section or its application to any person or circumstance is held invalid by a court of last resort, then this section shall be deemed to be invalid in its entirety.

§ 14-a. The public authorities law is amended by adding a new section 2879-b to read as follows:

§ 2879-b. Labor peace. 1. As used in this section:

(a) “Contractor” means a company undertaking a covered project, or the operator of a hotel or convention center that is part of a covered project.

(b) “Substantial proprietary interest” means the authority: (i) owns fee title or a leasehold interest in the project of at least forty years; or (ii) provides financing for the project, whether by direct loan or indirectly by a guarantee, subsidy, deposit, credit enhancement or similar method.

(c) “Covered project” means any project in which an authority enters into an agreement for a development after the effective date of this section, where: (i) a hotel is one of the principal functions of the project; (ii) the recipient of authority financing or its contractor or subcontractor contracts for the development of such hotel or convention center; (iii) the authority has a substantial proprietary interest in the project, or in the hotel or convention center; and (iv) the hotel or convention center will have more than fifteen employees.

(d) “Labor peace agreement” means an agreement between the contractor and a labor organization that represents a substantial number of hotel or convention center employees in the state, which requires that the labor organization and its members refrain from engaging in labor activity that will disrupt the hotel’s operations, including strikes, boycotts, work stoppages, corporate campaigns, picketing or other economic action against the covered project.

(e) “Public authority” shall mean a state public authority.

2. No public authority shall enter into any agreement or contract under which the public authority has a substantial proprietary interest in a covered project unless the agreement or contract requires as a material condition that the contractor or a subcontractor thereof enter into a labor peace agreement with a labor organization that represents hotel employees in the state, for a period of at least five years.

3. Any contractor or subcontractor covered by subdivision two of this section shall incorporate the terms of the labor peace agreement in any contract, subcontract, lease, sublease, operating agreement, concessionaire agreement, franchise agreement or other agreement or instrument giving a right to any person or entity to own or operate a hotel or convention center.

4. Notwithstanding any provision of this section, a public authority may enter into an agreement or contract wherein the public authority has a substantial proprietary interest in a covered project without a contractor entering into a labor peace agreement, if the authority determines that the project would not be able to go forward if a labor peace agreement was required, or the costs of the project to the public authority would be substantially increased by such requirement. Such a determination shall be supported by a written finding by the public authority setting forth the specific basis for such determination, which may include experience with similar projects, earlier requests for proposal for the same project, or a detailed evaluation of potential bidders. Such written determination shall be included in any public materials provided to any board or agency official in connection with the project and shall be maintained by the authority.

§ 15. Subdivision 3 of section 2896 of the public authorities law, as added by chapter 766 of the laws of 2005, is amended to read as follows:

3. a. Each public authority shall publish, not less frequently than annually, a report listing all real property of the public authority. Such report shall ~~[consist of]~~ **include** a list and full description of all real and personal property disposed of during such period. The report shall contain the price received by the public authority and the name of the purchaser for all such property sold by the public authority during such period.

b. The public authority shall deliver copies of such report to the comptroller, the director of the budget, the commissioner of general services, ~~[and]~~ the legislature **and the authorities budget office.**

§ 16. Section 2975 of the public authorities law is amended by adding a new subdivision 3-a to read as follows:

3-a. A direct portion of these funds shall be allocated to fund the authorities budget office established by section four of this chapter.

§ 17. The public authorities law is amended by adding a new section 2827-a to read as follows:

§ 2827-a. Subsidiaries of public authorities. 1. Notwithstanding any law to the contrary, no state authority shall hereafter have the power to organize any subsidiary corporation unless the legislature shall have enacted a law granting such state authority such power for the organization of a specific corporation, provided, however, that a state authority may organize a subsidiary corporation pursuant to the following requirements:

a. the purpose for which the subsidiary corporation shall be organized shall be for a project or projects which the state authority has the power to pursue pursuant to its corporate purposes;

b. the primary reason for which the subsidiary corporation shall be organized shall be to limit the potential liability impact of the subsidiary's project or projects on the authority or because state or federal law requires that the purpose of a subsidiary be undertaken through a specific corporate structure; and

c. the subsidiary corporation shall make the reports and other disclosures as are required of state authorities, unless the subsidiary corporation's operations and finances are consolidated with those of the authority of which it is a subsidiary.

2. In such cases where a state authority has the power to organize a subsidiary corporation pursuant to subdivision one of this section, the state authority shall file, no less than sixty days prior to the formation of such subsidiary, notice to the authorities budget office, the governor, the comptroller, and the legislature that it will be creating a subsidiary.

3. Subsidiary corporations formed under subdivision one of this section shall not have the authority to issue bonds, notes or other debts, provided, however, that such subsidiary corporations may issue notes or other debt to the public authority of which it is a subsidiary. No such debt issued by the subsidiary to its parent authority shall in total exceed, at any time, a principal amount of five hundred thousand dollars or, during the nine months after the formation of the subsidiary, one million dollars.

4. The certificate of incorporation or other document filed to organize a subsidiary corporation under this section shall state that the state authority is the person organizing the corporation.

5. Provided, however, that nothing in this section shall be construed to grant an authority the power to create a subsidiary where the authority does not otherwise have the power to do so.

6. On or before the first day of January, two thousand eleven, and annually on such day thereafter, any subsidiary public benefit corporation, in cooperation with its parent public benefit corporation, shall provide to the chair and ranking minority member of the senate finance committee, the chair and ranking minority member of the assembly ways and means committee, and each chair and ranking member of the assembly and senate committees on corporations, authorities and commissions a report on the subsidiary public benefit corporation. Such report shall include for each subsidiary:

a. The complete legal name, address and contact information of the subsidiary;

b. The structure of the organization of the subsidiary, including the names and titles of each of its members, directors and officers, as well as a chart of its organizational structure;

c. The complete bylaws and legal organization papers of the subsidiary;

d. A complete report of the purpose, operations, mission and projects of the subsidiary, including a statement of justification as to why the subsidiary is necessary to continue its operations for the public benefit for the people of the state of New York; and

e. Any other information the subsidiary public benefit corporation deems important to include in such report.

7. Notwithstanding any inconsistent provision of this section, paragraph b of subdivision one and subdivision three of this section shall not apply to an entity established in article ten-c of this chapter; provided, however, that no such public benefit corporation shall have the power to organize a subsidiary for the purpose of:

a. evading the requirements of an existing collective bargaining agreement; or

b. replacing or removing a certified employee organization.

§ 18. The public authorities law is amended by adding a new section 2856 to read as follows:

§ 2856. Consideration of public authority debt. On or before a date fixed by the authorities budget office, every authority not subject to a statutory limit on bonds, notes, or other debt obligations it may issue, shall submit to the authorities budget office a statement of intent to guide the authority's issuance and overall amount of bonds, notes, or other debt obligations it may issue.

§ 19. Subdivision 3 of section 2897 of the public authorities law, as added by chapter 766 of the laws of 2005, is amended to read as follows:

3. Method of disposition. Subject to section twenty-eight hundred ninety-six of this title, any public authority may dispose of property for not less than the fair market value of such property by sale, exchange, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the contracting officer deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this section. Provided, however, that no disposition of real property, or any interest in real property, [or any other property which because of its unique nature is not subject to fair market pricing] shall be made unless an appraisal of the value of such property has been made by an independent appraiser and included in the record of the transaction, and, provided further, that no disposition of any other property, which because of its unique nature or the unique circumstances of the proposed transaction is not readily valued by reference to an active market for similar property, shall be made without a similar appraisal.

§ 20. Paragraphs c and d of subdivision 6 of section 2897 of the public authorities law, as added by chapter 766 of the laws of 2005, are amended to read as follows:

c. Disposals and contracts for disposal of property may be negotiated or made by public auction without regard to paragraphs a and b of this subdivision but subject to obtaining such competition as is feasible under the circumstances, if:

(i) the personal property involved [is of a nature and quantity which, if] has qualities separate from the utilitarian purpose of such property, such as artistic quality, antiquity, historical significance, rarity, or other quality of similar effect, that would tend to increase its value, or if the personal property is to be sold in such quantity that, if it were disposed of under paragraphs a and b of this subdivision, would [aversely] adversely affect the state or local market for such property, and the estimated fair market value of such property and other satisfactory terms of disposal can be obtained by negotiation;

(ii) the fair market value of the property does not exceed fifteen thousand dollars;

(iii) bid prices after advertising therefor are not reasonable, either as to all or some part of the property, or have not been independently arrived at in open competition;

(iv) the disposal will be to the state or any political subdivision, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation; or

(v) [the disposal is for an amount less than the estimated fair market value of the property, the terms of such disposal are obtained by public auction or negotiation, the disposal of the property is intended to further the public health, safety or welfare or an economic development interest of the state or a political subdivision (to include but not limited to, the prevention or remediation of a substantial threat to public health or safety, the creation or retention of a substantial number of job opportunities, or the creation or retention of a substantial source of revenues, or where the authority's enabling legislation permits), the purpose and the terms of such disposal are documented in writing and approved by resolution of the board of the public authority;] under those circumstances permitted by subdivision seven of this section; or

(vi) such action is otherwise authorized by law.

d. (i) An explanatory statement shall be prepared of the circumstances of each disposal by negotiation of:

(A) any personal property which has an estimated fair market value in excess of fifteen thousand dollars;

(B) any real property that has an estimated fair market value in excess of one hundred thousand dollars, except that any real property disposed of by lease or exchange shall only be subject to clauses

(C) ~~[through (E)]~~ and (D) of this subparagraph; (C) any real property disposed of by lease ~~[for a term of five years or less]~~, if the estimated ~~[fair]~~ annual rent over the term of the lease is in excess of ~~[one hundred thousand dollars for any of such years]~~ fifteen thousand dollars;

(D) ~~[any real property disposed of by lease for a term of more than five years, if the total estimated rent over the term of the lease is in excess of one hundred thousand dollars; or~~

~~(E)]~~ any real property or real and related personal property disposed of by exchange, regardless of value, or any property any part of the consideration for which is real property.

(ii) Each such statement shall be transmitted to the persons entitled to receive copies of the report required under section twenty-eight hundred ninety-six of this title not less than ninety days in advance of such disposal, and a copy thereof shall be preserved in the files of the public authority making such disposal.

§ 20-a. Section 2897 of the public authorities law is amended by adding a new subdivision 7 to read as follows:

7. Disposal of property for less than fair market value. a. No asset owned, leased or otherwise in the control of a public authority may be sold, leased, or otherwise alienated for less than its fair market value except if:

(i) the transferee is a government or other public entity, and the terms and conditions of the transfer require that the ownership and use of the asset will remain with the government or any other public entity;

(ii) the purpose of the transfer is within the purpose, mission or governing statute of the public authority; or

(iii) in the event a public authority seeks to transfer an asset for less than its fair market value to other than a governmental entity, which disposal would not be consistent with the authority's mission, purpose or governing statutes, such authority shall provide written notification thereof to the governor, the speaker of the assembly, and the temporary president of the senate, and such proposed transfer shall be subject to denial by the governor, the senate, or the assembly. Denial by the governor shall take the form of a signed certification by the governor. Denial by either house of the legislature shall take the form of a resolution by such house. The governor and each house of the legislature shall take any such action within sixty days of receiving notification of such proposed transfer during the months of January through June, provided that if the legislature receives notification of a proposed transfer during the months of July through December, the legislature may take any such action within sixty days of January first of the following year. If no such resolution or certification is performed within sixty days of such notification of the proposed transfer to the governor, senate, and assembly, the public authority may effectuate such transfer. Provided, however, that with respect to a below market transfer by a local authority that is not within the purpose, mission or governing statute of the local authority, if the governing statute provides for the approval of such transfer by the executive and legislative branches of the political subdivision in which such local authority resides, and the transfer is of property obtained by the authority from that political subdivision, then such approval shall be sufficient to permit the transfer.

b. In the event a below fair market value asset transfer is proposed, the following information must be provided to the authority board and the public:

(i) a full description of the asset;

(ii) an appraisal of the fair market value of the asset and any other information establishing the fair market value sought by the board;

(iii) a description of the purpose of the transfer, and a reasonable statement of the kind and amount of the benefit to the public resulting from the transfer, including but not limited to the kind, number, location, wages or salaries of jobs created or preserved as required by the transfer, the benefits, if any, to the communities in which the asset is situated as are required by the transfer;

(iv) a statement of the value to be received compared to the fair market value;

(v) the names of any private parties participating in the transfer, and if different than the statement required by subparagraph (iv) of this paragraph, a statement of the value to the private party; and

(vi) the names of other private parties who have made an offer for such asset, the value offered, and the purpose for which the asset was sought to be used.

c. Before approving the disposal of any property for less than fair market value, the board of an authority shall consider the information described in paragraph b of this subdivision and make a written determination that there is no reasonable alternative to the proposed belowmarket transfer that would achieve the same purpose of such transfer.

§ 21. Paragraph (b) of subdivision 11 of section 310 of the executive law, as amended by chapter 628 of the laws of 2003, is amended to read as follows:

(b) a **“state authority,” as defined in subdivision one of section two of the public authorities law, and** the following:

Albany County Airport Authority;
Albany Port District Commission;
Alfred, Almond, Hornellsville Sewer Authority;
Battery Park City Authority;
Cayuga County Water and Sewer Authority;
(Nelson A. Rockefeller) Empire State Plaza Performing Arts Center Corporation;
Industrial Exhibit Authority;
Livingston County Water and Sewer Authority;
Long Island Power Authority;
Long Island Rail Road;
Long Island Market Authority;
Manhattan and Bronx Surface Transit Operating Authority;
Metro-North Commuter Railroad;
Metropolitan Suburban Bus Authority;
Metropolitan Transportation Authority;
Natural Heritage Trust;
New York City Transit Authority;
New York Convention Center Operating Corporation;
New York State Bridge Authority;
New York State Olympic Regional Development Authority;
New York State Thruway Authority;
Niagara Falls Public Water Authority;
Niagara Falls Water Board;
Port of Oswego Authority;
Power Authority of the State of New York;
Roosevelt Island Operating Corporation;
Schenectady Metroplex Development Authority;
State Insurance Fund;
Staten Island Rapid Transit Operating Authority;
State University Construction Fund;
Triborough Bridge and Tunnel Authority.
Upper Mohawk valley regional water board.
Upper Mohawk valley regional water finance authority.
Upper Mohawk valley memorial auditorium authority.
Urban Development Corporation and its subsidiary corporations.

§ 21-a. Subdivision 13 of section 310 of the executive law, as added by chapter 261 of the laws of 1988, is amended to read as follows:

13. "State contract" shall mean: (a) a written agreement or purchase order instrument, providing for a total expenditure in excess of twenty-five thousand dollars, whereby a contracting agency is committed to expend or does expend funds in return for labor, services **including but not limited to legal, financial and other professional services**, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; (b) a written agreement in excess of one hundred thousand dollars whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; and (c) a written agreement in excess of one hundred thousand dollars whereby the owner of a state assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project. ~~[For the purposes of this article the term "services" shall not include banking relationships, the issuance of insurance policies or contracts, or contracts with a contracting agency for the sale of bonds, notes or other securities.]~~

§ 22. Article 9 of the public authorities law is amended by adding a new title 12 to read as follows:

TITLE 12
WHISTLEBLOWER ACCESS AND ASSISTANCE PROGRAM

Section 2986. Whistleblower access and assistance program.

§ 2986. Whistleblower access and assistance program. 1. Definitions.

a. "Employees of state and local authorities" means those persons employed at state and local authorities, including but not limited to: full-time and part-time employees, those employees on probation, and temporary employees.

b. "Attorney general" shall mean the attorney general of the state of New York.

c. "Whistleblower" shall mean any employee of a state or local authority who discloses information concerning acts of wrongdoing, misconduct, malfeasance, or other inappropriate behavior by an employee or board member of the authority, concerning the authority's investments, travel, acquisition of real or personal property, the disposition of real or personal property and the procurement of goods and services.

2. The director of the authorities budget office, after consultation with the attorney general, shall develop and recommend to the legislature a whistleblower access and assistance program which shall include, but not be limited to:

a. evaluating and commenting on whistleblower programs and policies by state and local authorities pursuant to paragraph (e) of subdivision one of section twenty-eight hundred twenty-four of this article;

b. establishing toll-free telephone and facsimile lines available to employees at state and local authorities;

c. offering advice regarding employee rights under applicable state and federal laws and advice and options available to all persons; and

d. offering an opportunity for employees of state and local authorities to identify concerns regarding any issue at a state or local authority.

3. Any communications between an employee and the authorities budget office pursuant to this section shall be held strictly confidential by the authorities budget office, unless the employee specifically waives in writing the right to confidentiality, except that such confidentiality shall not exempt the authorities budget office from disclosing such information, where appropriate, to the state inspector general in accordance with section fifty-five of the executive law, or prevent disclosure to any law enforcement authority.

§ 23. The public authorities law is amended by adding a new section 2857 to read as follows:

§ 2857. Actions by an authority. No state or local authority shall fire, discharge, demote, suspend, threaten, harass or discriminate against an employee because of the employee's role as a whistleblower, insofar as the actions taken by the employee are legal.

§ 24. Article 9 of the public authorities law is amended by adding a new title 12-A to read as follows:

TITLE 12-A
PUBLIC AUTHORITIES LOBBYING CONTACTS

Section 2987. Lobbying contacts.

§ 2987. Lobbying contacts. 1. Definitions. As used in this title:

a. “lobbyist” shall have the same meaning as defined in section one-c of the legislative law.

b. “lobbying” shall mean and include any attempt to influence:

(i) the adoption or rejection of any rule or regulation having the force and effect of law by a public authority, and

(ii) the outcome of any rate making proceeding by a public authority.

c. “contact” shall mean any conversation, in person or by telephonic or other remote means, or correspondence between any lobbyist engaged in the act of lobbying and any person within a state authority who can make or influence a decision on the subject of the lobbying on behalf of the authority, and shall include, at a minimum, all members of the governing board and all officers of the state authority.

2. Every state authority shall maintain a record of all lobbying contacts made with such authority.

3. Every member, officer or employee of a state authority who is contacted by a lobbyist shall make a contemporaneous record of such contact containing the day and time of the contact, the identity of the lobbyist and a general summary of the substance of the contact.

4. Each state authority shall adopt a policy implementing the requirements of this section. Such policy shall appoint an officer to whom all such records shall be delivered. Such officer shall maintain such records for not less than seven years in a filing system designed to organize such records in a manner so as to make such records useful to determine whether the decisions of the authority were influenced by lobbying contacts.

§ 25. Subdivision 1 of section 552 of the public authorities law, as amended by section 7 of part H of chapter 25 of the laws of 2009, is amended to read as follows:

1. A board, to be known as “Triborough bridge and tunnel authority” is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation. It shall consist of seventeen members, all serving ex officio. Those members shall be the persons who from time to time shall hold the offices of chairman and members of metropolitan transportation authority. The chairman of such board shall be the chairman of metropolitan transportation authority, serving ex officio, and, provided that there is an executive director of the metropolitan transportation authority, the executive director of the authority shall be the executive director of the metropolitan transportation authority, serving ex officio. Notwithstanding ~~[subdivision three of section twenty-eight hundred twenty-four of this chapter or]~~ any ~~[other]~~ provision of law to the contrary, the chairman shall be the chief executive officer of the authority and shall be responsible for the discharge of the executive and administrative functions and powers of the authority. The chairman and executive director, if any, each shall be empowered to delegate his or her functions and powers to the executive officer of the Triborough bridge and tunnel authority or to such person as may succeed to the powers and duties of said executive officer. The chairman and other members of the board hereby created, and the executive director, if any, shall not be entitled to compensation for their services hereunder but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties.

§ 26. Subdivision 2 of section 1201 of the public authorities law, as amended by section 6 of part H of chapter 25 of the laws of 2009, is amended to read as follows:

2. The chairman of such board shall be the chairman of metropolitan transportation authority, serving ex officio, and, provided that there is an executive director of the metropolitan transportation authority, the executive director of the authority shall be the executive director of the metropolitan transportation authority, serving ex officio. Notwithstanding ~~[subdivision three of section twenty-eight hundred twenty-four of this chapter or]~~ any ~~[other]~~ provision of law to the contrary, the chairman shall be the chief executive officer of the authority and shall be responsible for the discharge of the executive and administrative functions and powers of the authority. The chairman and executive director, if any, each shall be empowered to delegate his or her functions and powers to one or more officers or employees designated by him or her.

§ 27. Paragraph (a) of subdivision 4 of section 1263 of the public authorities law, as amended by section 5 of part H of chapter 25 of the laws of 2009, is amended to read as follows:

(a) Notwithstanding [~~subdivision three of section twenty-eight hundred twenty-four of this chapter or~~] any [~~other~~] provision of law to the contrary, the chairman shall be the chief executive officer of the authority and shall be responsible for the discharge of the executive and administrative functions and powers of the authority. The chairman may appoint an executive director and such other officials and employees as shall in his or her ~~[judgement]~~ judgment be needed to discharge the executive and administrative functions and powers of the authority.

§ 28. The opening paragraph of subdivision 5 of section 1266 of the public authorities law, as amended by section 8 of part H of chapter 25 of the laws of 2009, is amended to read as follows:

The authority may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any transportation facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority, or by New York city transit authority or any of its subsidiary corporations in the case of transit facilities and may transfer to or from any such corporations any moneys, real property or other property for any of the purposes of this title upon such terms and conditions as shall be agreed to and subject to such payment or repayment obligations as are required by law or by any agreement to which any of the affected entities is subject. The directors or members of each such subsidiary corporation of the authority corporation shall be the same persons holding the offices of members of the authority. The chairman of the board of each such subsidiary shall be the chairman of the authority, serving ex officio and, provided that there is an executive director of the metropolitan transportation authority, the executive director of such subsidiary shall be the executive director of the metropolitan transportation authority, serving ex officio. Notwithstanding [~~subdivision three of section twenty-eight hundred twenty-four of this chapter or~~] any [~~other~~] provision of law to the contrary, the chairman shall be the chief executive officer of each such subsidiary and shall be responsible for the discharge of the executive and administrative functions and powers of each such subsidiary. The chairman and executive director, if any, shall be empowered to delegate his or her functions and powers to one or more officers or employees of each such subsidiary designated by him or her. Each such subsidiary corporation of the authority and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Each such subsidiary corporation of the authority shall be subject to suit in accordance with section twelve hundred seventy-six of this title. The employees of any such subsidiary corporation, except those who are also employees of the authority, shall not be deemed employees of the authority.

§ 28-a. Transfer of powers, duties and functions. All powers, duties and functions conferred upon the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, shall be transferred to and assumed by the authorities budget office established by section 4 of title 2 of the public authorities law, as added by section five of this act.

§ 28-b. Transfer of appropriation authority. Upon transfer of the powers, duties and functions conferred upon the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, to the authorities budget office established pursuant to a chapter of the laws of 2009, the authorities budget office shall have the authority to use any funding appropriated to the authority budget office pursuant to chapter 50 of the laws of 2009 for services, and expenses including but not limited to the responsibilities, obligations, functions, operations, and prior year liabilities of the authority budget office.

§ 28-c. Transfer of records. The former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, shall deliver to the authorities budget office established by section 4 of title 2 of the public authorities law, as added by section five of this act, all books, papers, records, and property as requested by the independent office of public authority accountability.

§ 28-d. Transfer of employees. Upon the transfer of the functions of the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, to the authorities budget office established by section 4 of title 2 of the public authorities law, as added by section five of this act, and as provided for in this act, any affected employees may be transferred to the authorities budget office in accordance with section 70 of the civil service law.

§ 28-e. Continuity of authority. For the purpose of succession to all functions, powers, duties and obligations transferred and assigned to, devolved upon and assumed by it pursuant to this act, the authorities budget office established by section 4 of title 2 of the public authorities law, as added by section five of this act, shall be deemed and held to constitute the continuation of the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, pertaining to the powers and functions herein transferred.

§ 28-f. Completion of unfinished business. Any business or other matter undertaken or commenced by the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, pertaining to or connected with the functions, powers, obligations and duties hereby transferred and assigned to the authorities budget office established by section 4 of title 2 of the public authorities law, as added by section five of this act, and pending on the effective date of this act may be conducted and completed by the authorities budget office established pursuant to section 4 of title 2 of the public authorities law, as added by section five of this act, in the same manner and under the same terms and conditions and with the same effect as if conducted and completed by the former authority budget office.

§ 28-g. Terms occurring in laws, contracts and other documents. Whenever the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, is referred to or designated in any law, contract or documents pertaining to the functions, powers, obligations and duties hereby transferred and assigned to the authorities budget office established pursuant to section 4 of title 2 of the public authorities law, as added by section five of this act, such reference or designation shall be deemed to refer to the authorities budget office established pursuant to section 4 of title 2 of the public authorities law, as added by section five of this act.

§ 28-h. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act.

§ 28-i. Pending actions and proceedings. No action or proceeding pending on the effective date of this act, brought by or against the former authority budget office created by section 27 of chapter 766 of the laws of 2005, as repealed by section five-b of this act, relating to the function, power or duty transferred to or devolved upon the authorities budget office established pursuant to section 4 of title 2 of the public authorities law, as added by section five of this act, shall be affected by this act, but the same may be prosecuted or defended in the name of the authorities budget office established pursuant to section 4 of title 2 of the public authorities law, as added by section five of this act, and upon application to the court, such office established pursuant to section 4 of title 2 of the public authorities law, as added by section five of this act, shall be substituted as a party.

§ 29. A chapter of the laws of 2009 amending the public authorities law and the executive law, relating to the creation of an authorities budget office, as proposed in legislative bills numbers S.1537-C and A.2209-C, is REPEALED.

§ 30. Severability. If any provision of this act or its application to any person or circumstance is held invalid, this invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

§ 31. This act shall take effect March 1, 2010; provided, however that the amendments to paragraph (b) of subdivision 11 and subdivision 13 of section 310 of the executive law made by sections twenty-one and twenty-one-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith; provided further, that the provisions of sections eleven-b, eleven-c, eleven-d, eleven-f and eleven-g of this act shall not apply to any executive director or chief executive officer appointed prior to the effective date of this act; provided further, that section fourteen-a of this act shall expire and be deemed repealed June 30, 2012; and provided further, that section twenty-a of this act shall apply only to the disposal of property authorized by the board of a public authority after such effective date.

New York State Senate

Introducer's Memorandum in Support

submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S66012

SPONSOR: PERKINS

TITLE OF BILL:

An act to amend the public authorities law and the executive law, in relation to creating the authorities budget office, to repeal certain provisions of the public authorities law relating thereto; to repeal section 27 of chapter 766 of the laws of 2005 constituting the public authorities accountability act relating thereto; to repeal a chapter of the laws of 2009, amending the public authorities law and the executive law, relating to the creation of an authorities budget office, as proposed in legislative bills numbers S.1537-C and A.2209-C; and providing for the repeal of certain provisions upon expiration thereof

PURPOSE:

This legislation would establish an independent authorities budget office ("IABO") to provide improved oversight and regulation of public authorities; mandate greater accountability of authority boards; and increase the transparency of public authority operations

SUMMARY OF PROVISIONS:

Section 1 of the bill would set forth legislative findings.

Section 2 of the bill would amend Public Authorities Law ("PAL") § 2 by adding a new subdivision 6 to define "authorities budget office" as the entity established pursuant to PAL § 4.

Section 3 of the bill would amend PAL § 2(5) to replace a statutory reference to the previously established authority budget office (L. 2005, ch. 766, § 27) with the phrase "authorities budget office."

Section 4 of the bill would designate PAL Article 1, §§ 1 and 2 as Title 1 and provide a new title heading: SHORT TITLE: DEFINITIONS.

Section 5 of the bill would amend PAL Article 1 by adding a new Title 2 to establish a new IABO, as follows:

* New PAL § 4 would establish the IABO as an independent entity within the Department of State.

* New PAL § 5 would create the position of Director of the IABO, who would be appointed by the Governor, upon the advice and consent of the Senate, for a term of 4 years. The salary of the Director would be established by the Governor within the limit of available funds, in an amount no less than the salaries of certain state officers holding the positions indicated in Executive Law § 169(1)(d).

* New PAL § 6 would set forth the powers, duties and authority of the IABO.

* New PAL § 7 would require the IABO to issue to certain elected officials and members of legislative committees annual reports with conclusions and opinions concerning the performance of public authorities and to study, review and report on the operations, practices and finances of state and local authorities.

Section 5-a of the bill would repeal L. 2005, ch. 766, § 27, which established the current Authority Budget Office.

Section 6 of the bill would amend PAL §§ 2800(1) and (2) to enhance the reporting requirements for state and local authorities.

Section 6-a of the bill would create a new PAL § 2800(4) to permit the IABO, upon application of any authority, to waive any reporting requirements upon a showing that the authority meets the criteria for a waiver established by the IABO's regulations.

Section 7 of the bill would amend PAL § 2801 to specify that each state and local authority must provide budget information on operations and capital construction for the next fiscal year and the current fiscal year and the actual receipts and expenditures for the last completed fiscal year, on an annual basis not more than 120 days and not less than

90 days before the commencement of its fiscal year in the case of a state authority, and not more than 90 days and not less than 60 days before the commencement of its fiscal year in the case of a local authority.

Section 8 of the bill would make technical changes to PAL §§ 2802(1) and (2) in relation to the submission to the appropriate entities of a copy of each state or local authority's annual independent audit report.

Section 9 of the bill would amend PAL § 2806 to make technical changes in relation to the submission of personnel reports by state and local authorities.

Section 10 of the bill would amend PAL § 2824 (1) to require that board members of state and local authorities perform their duties as board members in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, taking into consideration the views and policies of any elected official or body, or other person and ultimately applying independent judgment in the best interest of the authority, its mission and the public. Section 10 of the bill would also amend PAL §§ 2824(4) and (6) to mandate that the audit committee of any board have at least 3 independent members, who must constitute a majority on the committee, and that members of the audit committee be familiar with corporate financial and accounting practices. Section 10 of the bill would also amend PAL §§ 2824(7) to mandate that the governance committee of any board have at least 3 independent members, who must constitute a majority.

Section 11 of the bill would create a new PAL § 2824(8) requiring that board members of each state and local authority or subsidiary thereof which issues debt to establish a finance committee to be comprised of not less than 3 independent members who must constitute a majority on the committee and who must possess the necessary skills to understand the duties and functions of the committee. PAL § 2824(8) further provides that it will be the responsibility of the members of the finance committee to review proposals for the issuance of debt by the authority and its subsidiaries and make recommendations.

Section 11-a of the bill would amend PAL § 2827 to provide for the removal by the appointing authority of an authority member who breaches his or her fiduciary duty. Neither PAL §2827 nor PAL § 2824(1) provide for, nor is it the intent of this bill to create, a private right of action for a breach of fiduciary duty.

Section 11-b of the bill would amend PAL § 1678(5) to make the appointment of the Executive Director of the Dormitory Authority of the State of New York ("DASNY") subject to confirmation by the Senate in accordance with new PAL § 2852.

Section 11-c of the bill would amend PAL § 354(6) to make the appointment of the Executive Director of the New York State Thruway Authority ("Thruway Authority") subject to confirmation by the Senate in accordance with new PAL § 2852.

Section 11-d of the bill would amend PAL § 1004 to make the appointment of the Chief Executive Officer of the Power Authority of the State of New York ("NYPA") subject to confirmation by the Senate in accordance with new PAL § 2852.

Section 11-e of the bill would repeal PAL § 2824(3), which prohibits any board member, including the Chair, from serving as a public authority's Chief Executive Officer, Executive Director, Chief Financial Officer, Comptroller, or any other equivalent position while also serving as a member of the board; and it would add a new subdivision 3 to prohibit any Chair who is also the Chief Executive Officer from participating in setting the level of compensation of the Chief Executive Officer.

Section 11-f of the bill would amend PAL § 1020-f to make the appointment of the Chief Executive Officer of the Long Island Power Authority ("LIPA") subject to confirmation by the Senate in accordance new PAL § 2852.

Section 11-g of the bill would create a new PAL § 2852 in relation to Senate confirmation of certain chief executive officers. New PAL §2852 provides that with respect to the appointments of the chief executives for the DASNY, the Thruway Authority, NYPA, and the LIPA, the Senate must vote to confirm any such appointment within 60 days of its submission to the Senate during session, or if such submission is made when the Senate is not in session, within 7 days of the convening for session. If the Senate fails to vote to confirm any such appointment within the time set forth in this section, such appointment would be deemed confirmed without any further action by the Senate. As used in this provision, "session" refers to the regular session of the legislature that typically occurs during the months of January through June each year.

Section 12 of the bill would create a new PAL § 2824-a to require each state authority to submit to the IABO on or before March 31, 2010, and each local authority to submit to the IABO on or before March 31, 2011, a proposed authority mission statement and proposed measurements which the IABO would be required to post on its website.

Section 13 of the bill would amend PAL § 2825(2) to make a technical change to reference L. 2005, ch. 766.

Section 14 of the bill would create a new PAL § 2870-a, in relation to the review of state authority contracts by the Comptroller, as follows:

* New PAL § 2870-a(1) permits the Comptroller, at his or her discretion and upon notification, to review state public authority contracts or categories of contracts in excess of one million dollars (a) to be awarded by a state authority to a single source, a sole source or pursuant to any other method of procurement that is not competitive, or (b) which are to be paid in whole or in part from monies appropriated by the state to a state authority for such contractual expenditure. PAL § 2870-a(1) provides that any contract subject to such review will not be a valid enforceable contract without first having been approved by the Comptroller. PAL § 2870-a(1) also requires the Comptroller to promulgate such rules and regulations as may be necessary to carry out his or her responsibilities under this section, including but not limited to the standards for determining which contracts will be subject to his or her review and for approving such contracts.

* New PAL § 2870-a(2) provides that where the Comptroller has notified a state authority that any contract or category of contracts will be subject to his or her approval, the authority must include in each such contract a provision informing the other party that the contract is subject to the Comptroller's approval. If the Comptroller has not approved or disapproved a contract subject to his or her approval within 90 days of submission to his or her office, the contract will become valid and enforceable without such approval.

* New PAL § 2870-a(3) provides that the Comptroller will not review:

o contracts entered into for the issuance bonded indebtedness;

o contracts entered into by hospitals established under PAL Article 10-C that are for:

* projects approved in accordance with Public Health Law Articles 28, 36, or 40 or Social Services Law Article 7;

* projects approved in accordance with Mental Hygiene Law Articles 16, 31, 32;

* services (including but not limited to physicians, hospital administrators and medical groups), affiliations or joint ventures for the provision or administration of health care services or scientific research;

* payment for direct health care services or goods used in the provision of health care services; or

* participation in group purchasing arrangements.

o contracts entered into for the procurement of goods or services made to meet emergencies;

o contracts of purchase or sale made by an authority on a recognized market for goods, services, or commodities in question in accordance with standard terms and conditions of purchase or sale at a market price;

o contracts for the purchase, sale or delivery of power or energy, fuel, costs and services ancillary thereto, or financial products related thereto, with a term of less than five years; and o contracts for the sale or delivery of power or energy and costs and services ancillary thereto for economic development purposes pursuant to PAL Article 5, Title I or Economic Development Law Article 6.

Section 14-a of the bill would provide that no public authority shall enter into any contract under which the public authority has a substantial proprietary interest in a hotel or convention center project unless the contract requires as a material condition that the contractor or a subcontractor thereof enter into a labor peace agreement with a labor organization that represents hotel employees in the state, for a period of at least five years.

Section 15 of the bill would make technical changes to PAL § 2896(3) relative to the publication by each public authority of a report listing all real property disposed of by such public authority, and require such report to be delivered to the IABO in addition to the Comptroller, the Director of the Budget, the Commissioner of General Services, and the legislature.

Section 16 of the bill would create a new PAL § 2975(3-a) to provide that a direct portion of the funds collected from public authorities by the State representing an allocable share of state governmental costs attributable to the provision of services to public benefit corporations, shall be allocated to fund the IABO.

Section 17 of the bill would create a new § 2827-a, in relation to subsidiaries of public authorities, as follows:

* New PAL § 2827-a(1) generally prohibits state authorities from organizing any subsidiary corporation unless the legislature enacts a law permitting the authority to organize a specific corporation. New PAL § 2827-a, however, provides that a state authority may organize a subsidiary corporation if: (a) the subsidiary corporation will do a project or projects which the state authority has the power to pursue pursuant to its corporate purposes; (b) the primary reason for the subsidiary corporation is to limit the potential liability impact of the subsidiary's project or projects on the authority or

because state or federal law requires that the purpose of a subsidiary be undertaken through a specific corporate structure; and (c) the subsidiary corporation makes the reports and other disclosures as are required of state authorities.

* New PAL § 2827-a(3) provides that a subsidiary corporations formed under PAL § 2827a(1) cannot issue bonds, notes or other debts except to its parent corporation, and in that case, only in an amount that does not exceed, at any time, a principal amount of \$500,000 or, during the 9 months after the formation of the subsidiary, \$1 million.

* PAL § 2827-a(6) requires any subsidiary to provide to the Chair and Ranking Minority Member of the Senate Finance Committee and the Chair and Ranking Minority member of the Assembly Ways and Means Committee, and each Chair and Ranking Minority Member of the Assembly and Senate Committees on Corporations, Authorities, and Commissions, a report on such subsidiary public benefit corporation.

* PAL § 2827-a(7) exempts hospitals established under PAL Article 10-C from certain provisions regulating subsidiaries, so that such hospitals would be able to create subsidiaries that can issue debt, so long as the purpose for which the subsidiary corporation is organized is a project or projects which such entity has the power to pursue pursuant to its corporate purposes. PAL § 2827-a(7) further provides hospitals may not organize a subsidiary for the purpose of (a) evading the requirements of an existing collective bargaining agreement; or (b) replacing or removing a certified employee organization.

Section 18 of the bill would create a new PAL § 2856 requiring every authority that is not subject to a statutory limit on bonds, notes, or other debt obligations it may issue, to submit to the IABO a statement of intent to guide the authority's issuance and overall amount of bonds, notes, or other debt obligations.

Section 19 of the bill would amend PAL § 2897(3) to provide that the disposal of any property which, because of its unique nature is not readily valued by reference to an active market for similar property, must be accompanied by an appraisal.

Section 20 of the bill would amend PAL §§ 2897(6)(c) to permit disposals and contracts for disposal of property to be negotiated or made by public auction without public advertising of bids pursuant to PAL § 2897(a) and (b), under the circumstances permitted by PAL § 2897(7). Section 20 of the bill would also amend PAL § 2897(6)(d) to require an explanatory statement the circumstances of each disposal by negotiation of any real property disposed of by lease if the estimated annual rent over the term of the lease is in excess of \$15,000.

Section 20-a of the bill would create a new PAL § 2897(7) to permit a public authority to transfer an asset for less than its fair market value in three situations.

First, below-market transfers would be permitted where the transferee is a government or other public entity, and the terms and conditions of the transfer require that the ownership and use of the asset remain with the government or any other public entity, thereby ensuring that an authority-to-public entity transfer would not be a means to pass through property to a private entity.

Second, a below-market transfer by a public authority would be permitted if the purpose of the transfer is within the purpose, mission or governing statute of the authority.

Third, in the event a public authority seeks to transfer an asset for less than its fair market value to other than a governmental entity, and the disposal would not be consistent with the authority's mission, purpose or governing statutes, the proposed transfer would be subject to denial by the Governor, the Senate, or the Assembly. The Governor and each house of the legislature would be required to take any such action within 60 days of receiving notification of such proposed transfer during the months of January through June, but if the legislature receives notification of a proposed transfer during the months of July through December, the legislature may take any such action within 60 days of January first of the following year. If no such resolution or certification is performed within 60 days of such notification of the proposed transfer to the Governor, Senate, and Assembly, the public authority may effectuate such transfer. However, with respect to such a transfer by a local authority, if its governing statute provides for the approval of such transfer by the executive and legislative branches of the political subdivision in which such local authority resides, and the transfer is of property obtained by the authority from that political subdivision, then such approval shall be sufficient to permit the transfer.

Finally, new PAL § 2897(7) requires that before approving the disposal of any property for less than fair market value, the board of an authority shall make a written determination that there is no reasonable alternative to the proposed below-market transfer that would achieve the particular purpose of such transfer.

Section 21 of the bill would amend Executive Law § 310(11)(b) to included "state authority" under the definition of "state agency," relative to the participation by minority group members and women with respect to state contracts.

Section 21-a of the bill would amend Executive Law § 310(13) of the executive law to amend the definition of “services” to include banking relationships, the issuance of insurance policies or contracts, or contracts with a contracting agency for the sale of bonds, notes or other securities.

Section 22 of the bill would amend PAL Article 9 by adding a new Title 12. to establish a whistleblower access and assistance program, as follows:

- * New PAL § 2986(1) provides definitions for new Title 12.

- * New PAL § 2986(2) requires the Director of the IABO to develop and recommend to the legislature a whistleblower access and assistance program.

- * New PAL § 2986(3) provides that any communications between an employee and the authorities budget office pursuant to this provision must be held strictly confidential by the IABO, unless the employee specifically waives in writing the right to confidentiality

Section 23 of the bill would create a new PAL § 2857 to provide that no state or local authority shall fire, discharge, demote, suspend, threaten, harass or discriminate against an employee because of the employee’s role as a whistleblower, insofar as the actions taken by the employee are legal.

Section 24 of the bill would amend PAL Article 9 by adding a new Title 12-A to regulate public authorities lobbying contacts, as follows:

- * New PAL § 2987(1) provides definitions for new Title 12-A, including “lobbyist,” which has the same meaning as defined in Legislative Law § 1-c.

- * New PAL § 2987(2) provides that every state authority shall maintain a record of all lobbying contacts made with such authority.

- * New PAL § 2987(3) provides that every member, officer or employee of a state authority who is the contacted by a lobbyist must make a contemporaneous record of such contact containing the day and time of the contact, the identity of the lobbyist and a general summary of the substance of the contact. For purposes of this section, contact means communication between a “lobbyist,” as defined, and a person within a state authority who can make or influence a decision on the subject of the lobbying.

Sections 25, 26, 27, and 28 of the bill would make conforming changes to certain sections of the PAL to reflect the repeal of PAL § 2824(3) in section 11-e of this bill.

Sections 28-a through 28-i of the bill would provide for the transition from the prior Authority Budget Office to the new IABO established by this bill, and provide for the transfer of the appropriation for the office.

Section 29 of the bill would repeal a chapter of the laws of 2009 amending the public authorities law and the executive law, relating to the creation of an authorities budget office, as proposed in legislative bills numbers S.1537-C and A.2209-C.

Section 30 of the bill is a severability provision.

Section 31 of the bill would provide for an effective date of March 1, 2010; provided, however that the amendments to Executive Law § 310 made by § 21 of this bill would not affect the expiration of that section and would be deemed to expire therewith; provided further, that §§ 11-b, 11-c, 11-d, 11-f and 11-g of this bill would not apply to any Executive Director or Chief Executive Officer appointed prior to its effective date; provided further that § 14-a of this bill would expire and be deemed repealed on June 30, 2012; and provided further, that § 20-a of this bill would apply only to the disposal of property authorized by the board of a public authority after such effective date.

EXISTING LAW:

Chapter 766 of the Laws of 2005.

PRIOR LEGISLATIVE HISTORY:

The Assembly and the Senate passed S.1537-C/A.2209-C in 2009.

JUSTIFICATION:

This bill would strengthen the Public Authorities Reform Act of 2005 by creating an independent authorities budget office with expanded enforcement, oversight, and regulatory responsibilities. This new office would serve as an improved conduit of public information concerning the operations and finances of public authorities. The bill would also demand more transparency and accountability in relation to the formation of subsidiaries, the disposal of property, the letting of contracts, the decision-making of board members and lobbying contacts with public authorities.

Public authorities provide an expedient way to finance state capital projects and provide government services. Indeed, the dollar amount of outstanding general obligation state debt is a fraction of the debt held by public authorities for which the state has a financial obligation. The dual nature of public authorities makes their oversight and regulation a complex undertaking. This bill seeks to strike a balance by promoting and protecting the public interest relative to the governmental nature of these entities, while at the same time preserving the operational efficiencies inherent in corporate entities.

FISCAL IMPLICATIONS:

The current Authority Budget Office has a staff of seven professionals and a budget of approximately \$1.3 million. The creation of the IABO, with expanded enforcement, oversight, and regulatory responsibilities will drive costs above current levels. It can be expected that this new office will require legal and investigatory staff, as well as additional analytical and compliance personnel in order to meet these new duties.

It is estimated, based on the provisions of this bill, that these resource needs for the office could total an additional \$2.7 million on an annualized basis. This estimate does not include one-time costs associated with establishing, relocating and equipping the new office, nor does it include any additional costs that might be incurred by the Office of the State Comptroller pursuant to this bill. The bill provides for funding for the IABO to be allocated from the assessment imposed on public authorities.

EFFECTIVE DATE:

This bill would take effect would take effect March 1, 2010; provided, however that the amendments to Executive Law § 310 made by § 21 of this bill would not affect the expiration of that section and would be deemed to expire therewith; provided further, that §§ 11-b, 11-c, 11-d, 11-f and 11-g of this bill would not apply to any Executive Director or Chief Executive Officer appointed prior to its effective date; provided further that § 14-a of this bill would expire and be deemed repealed on June 30, 2012; and provided further, that § 20-a of this bill would apply only to any disposal of property authorized by the board of a public authority after such effective date.

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NEW YORK STATE BAR ASSOCIATION



2010 Annual Meeting

Committee on Attorneys in Public Service
Co-sponsored by the Judicial Section

Tuesday, January 26, 2010

Hilton New York

Sutton Parlor North, 2nd floor,
1335 Avenue of the Americas (53rd-54th St), New York, NY

2010 Educational Programs and 2010 Awards for Excellence in Public Service Reception

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Albany, New York

Program Co-Chairs

Spencer Fisher
New York, New York

Natasha Phillip
Albany, New York

Judicial Section Chair

Hon. Joseph J. Cassata
Tonawanda City Court



Tuesday, January 26, 2010 Committee on Attorneys in Public Service

Morning Educational Program: 9:00 a.m. – 12:15 p.m.

The Supreme Court: Precedents and Principles

The past term of the Supreme Court has witnessed a continuation of the Roberts Court's tendency to limit or distinguish rather than overrule precedents. This session will discuss significant Supreme Court decisions of the October 2008 term and significant cases pending in the 2009 term, and address the theme of doctrinal change. Do the Court's limited decisions reflect continuing principles or portend a wholesale reshaping of doctrine in the future?

Speakers:

William D. Araiza, Professor of Law, Brooklyn Law School

Jason Mazzone, Professor of Law, Brooklyn Law School

- | | |
|--|--------------------|
| I. Introduction | 9:00 – 9:05 a.m. |
| II. The 2008 Term | |
| A. Elections and Voting | 9:05 – 10:20 a.m. |
| B. Constitutional Rights: Civil | |
| C. Constitutional Rights: Criminal Procedure | |
| Break | 10:20 – 10:35 a.m. |
| D. Federalism | 10:35 – 11:50 a.m. |
| E. Civil Rights | |
| F. Civil Litigation and Administrative Law | |
| G. Habeas Corpus | |
| III. The Future of the Court | 11:50 – 12:15 p.m. |

Afternoon Educational Program: 2:00 p.m. – 5:15 p.m.

The State Legislature and the State Constitution: The Path Forward

The events of 2009 focused considerable attention on the role of the State Legislature and issues of succession to vacancies in State offices, as well as on the constitutional structure and function of State government as a whole.

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|-------------------------|------------------|
| I. Introduction: | 2:00 – 2:05 p.m. |
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Professor Michael Hutter, Albany Law School, Albany, NY

- | | |
|---|------------------|
| II. Focus on the Legislature: Reform and Renewal | 2:05 – 2:55 p.m. |
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The speakers will focus on potential reforms that affect the Legislature that have been the subject of broad discussion in recent months and years, including redistricting, campaign finance and ethics reforms.

Moderator:

Professor Michael A. Hutter, Albany Law School, Albany, NY

Speakers:

Laurence D. Laufer, Genova Burns & Vernoia, New York, NY

Topic: This segment will review major elements of recent legislative proposals to reform campaign financing, and will include a comparison with New York City law and consideration of the pending U.S. Supreme Court decision in the *Citizens United* case.

Justin Levitt, Brennan Center for Justice, New York, NY

Topic: In the wake of the upcoming census, this session will introduce the constitutional and statutory requirements for redistricting in New York, and place that process into national context, with a look ahead to what New Yorkers might expect in the redistricting round to come.

Mark F. Glaser, Greenberg Traurig, LLP, Albany, NY

Topic: The presentation will review amendments made to the Public Officers Law and Lobbying Act beginning in 1999 and discuss pending proposals for reform, and will include the observations of a private compliance practitioner on these laws and proposed amendments.

Annual Meeting Programs and Annual Awards Reception

Break

2:55 – 3:10 p.m.

III. Taking a Closer Look at State Constitutional Change

3:10 – 4:00 p.m.

Prominent experts from New York's academic community will speak on recent events involving the structure of State government and the possibilities for constitutional reform. This program provides an opportunity for a wide-ranging discussion of the State Constitution and possibilities for constitutional reform and structural change in light of recent events. Those events include the recent leadership crisis in the State Senate and the ensuing litigation over the unprecedented appointment of a Lieutenant Governor. More generally, the program will seek to examine the process and history of constitutional change and the possibility of a constitutional convention, while taking a fresh look at the broader changes that might be needed at this time.

Speaker:

Professor Michael A. Hutter, Albany Law School, Albany, NY

Topic: This talk will focus on constitutional change in the Executive branch as a way of improving the functioning of state government. It will include discussion of the office of Lieutenant Governor regarding appointment by the Governor to fill that office when vacant and the "casting vote" right; succession to the office of Governor when the Governor is "absent from the state" or is "unable to discharge the duties of the office"; and the filling of the office when an appointed Lieutenant Governor succeeds to the office of Governor.

Professor Richard Briffault, Columbia Law School, New York, NY

Topic: There has been considerable talk in recent years about both legislative reform and constitutional change. This talk will be on whether constitutional change is necessary or desirable to improve the legislature.

Professor Peter Galie, Canisius College, Buffalo, NY

Topic: Constitutional reform in the abstract is the easy question: figuring out what kind of constitutional reforms will work and what kinds will not is the hard one. This discussion will take on that question.

IV. Discussion on Process and Substance of Constitutional Change

4:00 - 5:15 pm

Panelists will address the events, including state constitutional litigations and controversies, of the past year as well as structural issues going forward. The segment will include opening statements and a wide-ranging interactive format that will also encourage audience participation.

Moderator:

Professor Michael A. Hutter, Albany Law School, Albany, NY

Speakers:

Justice James A. Yates, New York State Supreme Court, New York, NY

Topic: This discussion will look at the merits of holding a constitutional convention (both ideally and practically), with a focus on succession (as well as some other examples of issues of a constitutional dimension).

John R. Dunne, Whiteman, Osterman & Hanna, Albany, NY

Topic: The presentation will focus on the relationship between the legislative and executive branches of New York State government, with particular focus on the separation of powers, the interaction of the branches, and the need for constitutional change to address gubernatorial succession and other very real and critical issues.

Robert Ward, Rockefeller Institute of Government, Albany, NY

Topic: This discussion will concentrate on the balance of power between the executive and legislative branches, focusing on budgetary powers in light of recent legal, legislative and fiscal developments.

Peter J. Kiernan, Counsel to Governor David A. Paterson, Albany, NY

Topic: The office of Lieutenant Governor became vacant in 2008 when then-Lieutenant Governor David A. Paterson became Governor of the State of New York. This presentation will examine the extraordinary circumstances under which Governor Paterson appointed Richard Ravitch to fill the vacancy in the office of Lieutenant Governor, the ensuing litigation leading to the decision by the State Court of Appeals confirming the Governor's authority to do so, and potential legislation on this issue. The presentation will also reflect on some of the lessons to be drawn from the litigation and the circumstances that gave rise to it.

New York State Bar Association Committee on Attorneys in Public Service 2010 Annual Meeting Programs IMPORTANT INFORMATION

All Day Program Fee (7 MCLE professional practice credits): NYSBA members \$110, plus NYSBA's Annual Meeting general registration fee of \$85. Non-member Surcharge: \$200. Late registration surcharge after January 23, 2010 is \$50.

PLEASE NOTE: Seating for these programs is limited, so please be sure to register early to reserve your space. To register online, go to www.nysba.org/am2010. You will need your NYSBA user name and password to register. If you need this information, please call 518-463-3200 / 800-582-2452.

These programs are basic level seminars applicable for new attorneys and for experienced practitioners interested in learning more about these topics. Under New York's MCLE rule, this full day program has been approved for 7 credit hours in the area of professional practice. New attorneys admitted within the past 24 months may attend for MCLE credits.

Discounts and Scholarships: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program based on financial hardship. Under that policy, any member of our Association or non-member who has a genuine basis of his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to New York State Bar Association, Membership Services, One Elk Street, Albany, New York 12207, by e-mail to: caps@nysba.org, or via fax to 518-487-5579.



Accommodations for Persons with Disabilities: NYSBA will make reasonable modifications/accommodations to allow participation in its services, programs, or activities by persons with disabilities. NYSBA will provide auxiliary aids and services upon request. NYSBA will remove architectural barriers and communication barriers that are structural in nature where readily achievable. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Kathy Heider at 518-487-5500.



For overnight room accommodations, please call the Hilton New York at 1-800-445-8667 and identify yourself as a member of the New York State Bar Association.



For questions about this specific program, please contact Membership Services at 518-487-5578. For registration questions, please call 518-487-5621. To register online, go to www.nysba.org/am2010.

You and Colleagues are Cordially Invited to:

The Committee on Attorneys in Public Service

2010 Awards for Excellence in Public Service Reception

Tuesday, January 26, 2010, 5:30 p.m. – 7:00 p.m.

NEW LOCATION!

Hilton New York
Sutton Parlor Center, 2nd floor

2010 Honorees

Diane F. Bosse, New York State Board of Law Examiners (ret), Buffalo, NY

The Hon. Patricia D. Marks, Monroe County Court, Rochester, NY

Peter H. Schiff, New York State Department of Law, Albany, NY

Special Guests: **The Honorable Judith S. Kaye** (retired Chief Judge, State of New York)

The Honorable Susan Read, New York State Court of Appeals

This Awards Reception is a FREE event, and is open to all NYSBA members, friends and colleagues. RSVP by January 15, 2010 to: caps@nysba.org or 518-487-5571.

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Ninth Edition

The newly revised ninth edition of *Legal Careers in New York State Government* serves as the ultimate guide to New York State civil service. Everything you need to know about a career in public service is conveniently compiled from multiple sources into this one directory.

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Whether looking to begin a new career or advance an existing one, this 2008 edition is a fundamental resource guide to rewarding careers available in New York State public service.

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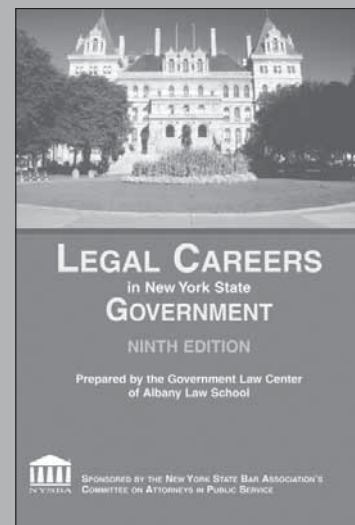
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