

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

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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

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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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