NEW YORK STATE COMMISSION ON

PUBLIC AUTHORITY REFORM

REPORT

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Ira M. Millstein, Chair
Peter Clapman
Elizabeth W. Factor
Diana Fortuna
Jane Hoffman
Hon. James P. King
Alan Levine
Louis Lowenstein
John F. McGillicuddy
J Thomas Roohan
Hon. Jay T. Snyder
Carole E. Stone
Kathryn S. Wylde

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EXECUTIVE SUMMARY

The New York State Commission on Public Authority Reform, established by Governor Pataki in Executive Order 135, was specifically created to make recommendations for improving the governance, operations, and disclosure of the State's public authorities. We considered the thrust of our mandate to be recommendations for the future, rather than an investigation of the past. In the course of our work, we did not find widespread misdeeds on the part of authorities, and did find that most board members we interviewed were endeavoring to do their best. That, however, provides no assurance that all is well in the vast network of authorities doing the public's work. No one can so assert with any degree of assurance. Nor is it assured that going forward, authorities and their boards will understand the totality of their responsibilities to the public, and have the training and experience to fulfill those responsibilities.

Oversight of public authorities, under any administration, has never matched the oversight of state agencies. State agencies are carefully monitored by the Division of the Budget. Authorities have had no such centralized overall monitor.

We are therefore recommending, in this Report, new legislation which sets forth:

a) explicit fiduciary duties for authority directors, and disclosure requirements for authorities;

b) explicit empowerment of the Authorities Budget Office (ABO) to further articulate, oversee and enforce the performance of those duties and requirements;

c) a restructured ABO, insulated from political influence in its legislated functions, which recognizes the justified role of the Governor regarding matters of major State policy which are impacted by authority action; and

d) an ABO director, appointed by the Governor for a fixed term, upon approval of the Senate, who is part of the Governor's cabinet.

With this restructured ABO, responsibility for the authorities is centered in one place.

Only through legislation can the public be assured that oversight, disclosure and transparency will continue from administration to administration irrespective of changing priorities. The Public Authorities Accountability Act of 2005 should be amended to provide that assured continuity of attention and compliance.

The public is entitled to no less.

I. INTRODUCTION

Public authorities were created in response to the amendment of New York State's Constitution in 1846, which mandated that all future issuance of general obligation state debt be done through referendum once per election. While public authorities issue debt and serve important public functions, often more effectively and efficiently than a government agency might, they do so largely outside the regulatory restrictions and oversight applicable to government entities. Public authorities, from their inception, have been the subject of criticism and debate. Although a public authority's debt is not, by definition, considered to be state debt, as the debt load of the authorities has grown, and rare instances of apparent impropriety have come to light, calls for reform have intensified.

In order to address the criticisms and respond to the need for improving the accountability and oversight of public authorities without undermining their vital contributions, Governor Pataki, in 2004, requested Ira Millstein to develop "model governance principles", appropriate to the authorities, based on best practices of corporate governance used by private sector companies. Subsequently, Governor Pataki appointed Mr. Millstein to serve as chairman of the Public Authority Governance Advisory Committee (the "Committee"). The Committee, which was the precursor to the New York State Commission on Public Authority Reform (the "Commission"), was directed to develop an action plan and legislative recommendations to improve accountability and transparency at the State's public authorities. The Committee's recommendations called for authority board independence; board member training; greater disclosure and transparency; creation of an oversight entity, and determining whether the fiduciary responsibility of public authority board members is sufficiently articulated. Many of the Model Governance Principles and recommendations of the Committee were incorporated into the Public Authorities Accountability Act (the "Act"), which was signed by the Governor in January 2006.

In February 2005, prior to passage of the Act, Governor Pataki established the Commission to follow up on the work of the Committee. Chaired by Ira Millstein, the Commission is comprised of 13 individuals with demonstrated expertise in corporate governance and public finance.[1] Seven commissioners, including its Chairman, were appointed by Governor Pataki with the Senate Majority Leader, Speaker of the Assembly, State Comptroller, Attorney General, Senate Minority Leader, and Assembly Minority Leader each appointing one member. The primary charge of this bipartisan Commission was to recommend model principles for the effective governance of public authorities, policies governing the responsible and transparent disclosure of financial information, and guidelines for the conduct of internal and independent audits. The Commission was also asked to identify appropriate opportunities for the elimination, dissolution, consolidation, or merger of public authorities and to consider realignment of individual authority functions.

Over the past year, the Commission has met regularly to debate and thoughtfully examine issues which were put before it, and has addressed them both in the context of

[1] See Appendix D – Commission Structure and Appendix E – Biographies.

the Act and in the broader context of the principles of good governance as articulated by Chairman Millstein. During the course of its work, the Commission met with many public officials, legislators, and experts in the fields of finance, auditing, corporate governance, public finance, and municipal bond law. The perspectives and collective experience of these individuals helped to shape the Commission's understanding of public authorities as well as its final recommendations. The Commission thanks them all for their invaluable assistance.[2]

II. THE ROLE OF PUBLIC AUTHORITIES IN NEW YORK STATE

Public authorities are corporate entities created in statute by State or local government primarily to finance, build, manage, or improve capital assets and further public works. As public benefit corporations, public authorities are governed by appointed boards of directors and have a degree of autonomy generally not afforded to government agencies.

The historical expansion in the number and importance of public authorities paralleled the growth in the size and complexity of government and higher expectations for safe, reliable, and affordable public services, goals that became increasingly difficult to meet in view of the State's constitutional restrictions on debt issuance.

Most State and local authorities were created to provide critical funding for such public purposes as highway maintenance and transportation systems; energy production, environmental protection; water and sewer improvements; the construction of universities, schools, hospitals, affordable housing, and other public buildings; and as a source of investment capital for private economic development initiatives. Based on the most recent data available, state public authorities generated approximately $28.5 billion in revenue and had $113.8 billion in outstanding debt.[3] Arguably, this significant capital investment in the State's infrastructure could not have been made without the ability of authorities to issue debt and to operate with some independence.

While public authorities vary in function, composition, organization, size and reporting, they have one key common feature – a board of directors. The board's role is to oversee and monitor the public authority in the absence of the type of control exercised by the Governor over State agencies.

Clearly, public authorities contribute significantly to the public good. And just as clearly, it is this central role in providing for the public good that requires all authorities to meet the highest standards of professionalism, accountability, and integrity. Recent examples of mismanagement, poor financial practices, and questionable ethical behavior reported in the press and by the State Comptroller, even if isolated, demonstrate the need to improve the governance, disclosure, oversight, and management capacity of these important institutions. This means clearly articulating the responsibilities of the board of directors, assuring that these responsibilities are

[2] See Appendix F – *Acknowledgements*.
[3] Financial data taken from 2006-07 Executive Budget, Table 1 on pp. 272-273 and Table 3 on pp. 276-277.

carried out, and improving authority disclosure.

III. THE GOVERNANCE PARADIGM IN THE PRIVATE AND PUBLIC SECTORS

As discussed above, public authorities were established and have been successful in fulfilling their mission largely because they are free of many of the restrictions and limitations applicable to State government agencies. On the other hand, while in many respects they operate more like private sector corporations than government agencies, authorities are not subject to the competitive pressures, regulation, and oversight applicable to such corporations. Arguably, public authorities enjoy many of the freedoms of publicly-held stock corporations, but without the expressed concomitant responsibilities of their board of directors and required disclosure.

A. The Private Sector

Most publicly-held stock corporations operate in competitive markets and that competition drives the need to operate efficiently and to satisfy consumer needs. Companies that are mismanaged, inefficient, or misleading about their financial dealings are unlikely to survive.

Publicly-held stock corporations are likely to be statutorily regulated and required to make a public disclosure of their finances and corporate activities to both regulators and shareholders. Most jurisdictions place the principal responsibility for the economic performance of the publicly-held stock corporations, public financial disclosure, respect for the rights of shareholders and compliance with law, on a board of directors. The corporation is said to be managed by or under the direction of a board of directors who are elected by the shareholders. The board may delegate operational responsibilities to an executive management team, but the ultimate responsibility for corporate policy and behavior lies with the board.

In this capacity, the "law" insists that directors of publicly-held stock corporations have a "fiduciary" responsibility to the shareholders. In common law countries this fiduciary responsibility is judge made, case by case, while in code law countries it may be spelled out in statutes.

The responsibility for enforcing compliance with statutory law is placed on government (e.g. the SEC, or equivalent securities regulator, and an attorney general or equivalent). And in many countries, the US and UK for example, shareholders of publicly-held stock corporations are legally entitled to file lawsuits to enforce both compliance with statutory law, and more importantly, the "fiduciary" duties of boards of directors. This board of director focused corporate governance paradigm for publicly-held stock corporations is generally satisfactory and operational in most parts of the world that are market oriented.

B. The Public Sector

New York State public authorities have historically operated under a similar, but not identical paradigm. Each authority has a board of directors, nominally responsible for the authority's operation, and State law and practice has required reporting of financial and operating information. However, authorities have not been subject to the control or regulatory oversight and procedural checks and balances that apply to State and local government agencies. Further, there has been little monitoring of authority compliance with appropriate governance, disclosure or operational standards, and little in the way of enforcement activity.

The requirements placed on public authorities were strengthened with the passage of the Act. It requires public authorities to submit annual reports, budget reports, and the results of independent financial audits to government monitors. Public authorities, generally, must by law adopt codes of conduct, have written operating procedures and personnel policies, follow established internal control practices, and adopt investment guidelines.

Debt issued by public authorities is also subject to some form of statutory control. The Public Authorities Control Board (PACB) reviews the revenue sufficiency of projects prior to approving the debt issued by 9 of the major State public authorities. All State supported, conduit, and authority debt issued by these 9 public authorities is subject to PACB review and approval. Approximately 65 percent of the total debt issued by State authorities (exclusive of the Port Authority of New York and New Jersey which is not subject to the Act) is subject to this review and approval process. In addition to the statutory caps on the amount of debt they can issue, public authorities are also subject to limitations on the purpose and form of that debt.

The books, contracts, and accounts of public authorities are subject to examination by the State Comptroller. The Legislature has established committees with oversight jurisdiction of authorities. In addition, the statutes creating public authorities provide remedies for bond holders in the event of default or the failure of a public authority to comply with any agreements or legal requirements.

However, while there are public sector elements of control, there are gaps in oversight. The application of and compliance with these controls is not uniform. There is no single oversight and monitoring agency, a function performed by the Division of the Budget (the "DOB") with respect to state agencies. And there is, for authorities' boards of directors, no centralized and identified point of accountability and enforcement. By the very nature of the public authority governance structure, neither the Governor, nor the Legislature, nor any regulatory body has explicit responsibility for assuring that boards of directors and executive management comply with their fiduciary and corporate governance obligations.

For the most part, this Commission believes that public authorities operate in a manner consistent with their defined mission and in accordance with existing bond covenants, legal requirements, and ethical standards. However, without regular oversight, close public scrutiny, and enforcement of compliance, the opportunity exists for impropriety and mismanagement, an opportunity of which certain authorities and individual managers have taken advantage. Unfortunately, these rare instances have undermined public confidence in the accountability and integrity of public authorities.

This Commission does not believe that simply enacting and articulating generic rules of director behavior and disclosure will bring abut compliance in all cases, nor does the Act assure continuity of oversight and compliance. For that reason, the Commission urges the State to consider further legislation to centralize oversight and strengthen its enforcement over the activities of public authorities.

IV. REFORM OF PUBLIC AUTHORITIES REQUIRES CONTINUING OVERSIGHT AND ENFORCEMENT

A. The ABO should be explicitly authorized by legislation to establish board fiduciary duties, monitor performance, and enforce compliance

The above comparison of public and private sector paradigms with that of the public authorities demonstrates significant missing elements which require further legislative attention.

The Act established an Authority Budget Office (the “ABO”) which is empowered to “provide the governor and the legislature with conclusions and opinions concerning the performance of public authorities and to study, review, and report on the operations, practices, and finances of public authorities”. The Commission is strongly supportive of this endeavor. The Governor has established the ABO within the Division of the Budget. Based upon discussions with DOB, we understand that it believes that the Act permits the ABO to expand its activities beyond the duties articulated in the Act, consistent with its overall authority even though that expansion is not expressly authorized in the new enabling legislation. However, the Commission does not believe it wise, after years of non-supervision, to rely on implicit power to bring about true reform. Furthermore, under the State Constitution the authorities are separate from the Executive and not formally subject to the Governor’s Executive Orders. This argues strongly for legislative empowerment of the ABO’s role.

The Commission, therefore, recommends that the Legislature amend the Act to include explicit authorization for the ABO to undertake the expanded role envisioned by the Commission. Without this, we believe that the legislation creating the ABO is simply an exhortation to the authorities to be "good”, and at best, relies on good faith, rather than mandated compliance. The low turnout for the director-training offered by CUNY, prior to enactment of the Act, among other experiences, convinces us that simple exhortation is not enough.

The missing links in the private sector corporate paradigm, enforceable and well understood fiduciary duties, need to be supplied by further legislation, as do the missing links in the public sector paradigm, namely explicitly authorized monitoring.

Legislation cannot supply a competitive marketplace to punish public authorities for negligence and inefficiency. But it can supply an explicit "fiduciary duty" for directors to perform the responsibilities placed on them under the new law, and it can supply a means of enforcing the board's fiduciary duties and other responsibilities. This Commission has concluded that without both, the explicit and well understood fiduciary responsibility and a means of enforcing it, the director based corporate governance paradigm is incomplete and will not lead to the type of board required to assure the public that authority missions are being efficiently carried out.

Legislatively, requiring a fiduciary duty is a first step. Giving that duty context for public authorities is the next step.

This Commission and its predecessor Committee, laid the groundwork necessary to focus the fiduciary duty and its enforceability by concentrating their efforts on reforming and improving the functioning of authority boards. And the legislation already signed into law, the Act, does likewise. Only generic reforms could be articulated because the authorities are so varied in size and function. These generic and, necessarily for legislative purposes, uniform reforms will need to be tailored to the mission and implementation capacity of each authority. Governance and reporting requirements appropriate for the Empire State Development Corporation, one of the largest and most complex authorities in the State, are likely excessive for a local industrial development agency (IDA) or parking authority.

What is missing in the existing legislation is statutory authority for the ABO to articulate in more detail the broad reforms outlined in legislation, to tailor them to the appropriate standards and capacities of each authority, and then to monitor and enforce compliance authority by authority.

There is no single silver bullet appropriate for every authority. Improved governance and disclosure must be considered on an authority by authority basis, and be continuously monitored if we are all to have confidence in the efficacy and integrity of New York State's public authorities and the boards which govern them.

Hence, this Commission has recognized specific areas which require the establishment of more detailed direction than the uniform generic requirements of the existing legislation. We also recommend a system of "comply or explain", by which we mean that each authority is to report that it is complying with each standard, or to explain "why" it cannot. "Comply or explain" is a time tested system for public companies in the U.K. and other jurisdictions.

This system provides the flexibility needed to tailor the more generic standards to the needs of the diverse authorities, and to thereby be quite specific as to what's expected of each board. The ABO must then monitor compliance and review requests for deviation. Equally important is enforced adherence to the established standards.

To carry out the foregoing, the Commission recommends new legislation which would:

1. Ensure board fiduciary performance

Legislation should clearly articulate the fiduciary duties of directors, closely tied to their obligation to oversee adherence to the authority's mission. To this end, directors should be required to take an oath that embodies the fiduciary duties of a director and the exercise of that duty. Directors should also pledge to listen to and consider the viewpoint of elected officials, provided they are offered transparently, but to ultimately make good faith decisions that are, above all, in support of the best interests of the authority mission.

2. Set performance standards

The ABO should be explicitly authorized to expand on the generic principles of the Act by establishing minimum standards pertaining to board training, board committee structure, board compensation, internal controls, annual reporting of financial performance and disclosure, among other things. With regard to board training, the ABO will be responsible for qualifying both trainers and specific training programs.

The ABO should also be authorized to establish criteria for the creation of new subsidiaries of public authorities. The standards should provide that the parent corporation make a determination that at least one of the enumerated criteria exist and therefore necessitate the creation of a subsidiary.[4]

3. Establish and tailor standards

The ABO should be explicitly authorized to issue standards on a "comply or explain" basis. Authorities who do not comply will be required to file a detailed explanation and proposed modification with the ABO. The ABO should be authorized to review and take action on all responses and enforce "good faith" compliance. A submission regarding compliance should be deemed acceptable until notification from the ABO.

The ABO, as the entity which will both receive and analyze authority disclosure information, is uniquely qualified to not only monitor compliance, but to provide specific standards and guidance for authorities.

4. Enforcement

The ABO should be explicitly authorized to receive and act upon complaints or recommendations from the public or other persons or entities regarding any authority,

[4] See Section VII – *Reorganization* for additional information on subsidiary criteria.

and should be authorized to initiate formal investigations in response to a complaint or if it believes that a public authority may be in material non-compliance with any duty imposed on the authority either by statute or by the ABO. The ABO should be granted subpoena power. Where the ABO has formally found an authority to be in material non-compliance or otherwise at fault, the ABO should be authorized to impose disciplinary measures ranging from formal warnings, to public censure, or to recommend to the Governor and the Legislature suspension or dismissal of officers or directors. Criminal activity will be reported to and dealt with by the Offices of the Attorney and Inspector Generals.

5. Access to public authority information

Legislation should require that all non proprietary information reported by authorities should be made available by the ABO to the public. A website should be established that provides easy access to information. The ABO should be authorized to provide guidance regarding standardization in the format of authority reports.

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The foregoing proposed legislation would create fiduciary duties and authorize the ABO to articulate the details of, and pursue enforcement, of those duties. It also requires ABO disclosure. In addition, in the Governance section below, the Commission recommends legislation to mandate certain best practices for boards.

B. The ABO should be expressly structured by legislation

The Commission believes that the ABO must be properly structured to execute its statutory obligations in a perceived fair and objective manner.

With the assistance of scholars, the Commission examined various models for an ABO. The Commission might have proposed an "independent" administrative body comparable to the SEC or FTC, but the Commission does not believe that the "independent" model would satisfy the existing needs. Rather, the Commission believes, given the fact that authorities have long existed and are carrying out important government functions, the ABO should have a well defined administrative role.

As explained above, the ABO's administrative duties will include:

- tailoring more precise standards under the generic imperatives of the Act;
- monitoring those standards through a system of "comply and explain";
- providing guidance and education to Authority boards;
- developing means of enforcing fiduciary duties of directors;
- referring potential criminal matters to the Attorney General and/or the Inspector General; and
- reporting to the public and legislature on all of the foregoing.

These administrative duties should however be carried out without being perceived to be subject to political considerations or pressures or inappropriate control by the Governor who appoints a majority of the directors whose conduct is to be monitored. The ABO model which the Commission recommends, attempts to insulate the ABO in fulfilling these administrative duties.

Yet, neither the authorities, nor the ABO, can be completely insulated from important policy issues, which of course are political in nature. Nor should they be. The ABO is not intended to be a policy making entity for the authorities. The ABO, however, must be attuned to the Governor's political input on authority activities which impact major policy issues regarding the State, and for which the Governor, the elected Chief of State, does have responsibility. The authorities finance projects for drinking water and environmental protection; they build bridges and roads, and provide power and mass transportation, for example. The Commission recognizes the propriety of the Governor's input on such issues.

Accordingly, it has recommended that the ABO director shall be appointed by the Governor and assume a role similar to that of an agency head, but with independence regarding the ABO's administrative duties. To help ensure the ABO fulfills its responsibilities in a fair and objective manner, we recommend that the ABO director serve a fixed term of office rather than "at the pleasure of the Governor". As part of the Governor's senior staff, the ABO director will have the gravitas and access needed to support the ABO's work.

The Commission recommends new legislation to structure the ABO to balance its apolitical administrative function, where independent objectivity is crucial (both in reality and perception), with the necessary and appropriate political interaction with the Governor on major State policy issues.

1. Appointment of the ABO Director

The ABO director should be appointed by the Governor for a fixed term upon consent of the Senate and concurrent with that of the appointing Governor.

2. Operations in conjunction with DOB and Comptroller

The ABO should have the authority to enter into cooperative agreements with the DOB and the Comptroller, and any other apposite government entity, in order to efficiently carry out its work and not duplicate the resources of any other agency of the State. It is not intended that the unique responsibilities of the ABO will be assumed by either the DOB or the Comptroller's staff. Rather, the ABO will leverage the existing data collection and public authority oversight functions currently embedded within those organizations. And importantly, it will ensure the coordination of information requests among all entities.

The Commission believes that the administrative duties of the ABO can be carried out by a staff of 10-15 professionals with assistance through agreements with the DOB and Comptroller.

3. Distinctive reporting requirements

The ABO director should serve as a member of the Governor's senior officer group with explicit reporting requirements that set him/her apart from the heads of executive branch agencies. The ABO director should be accountable to the Governor and should coordinate with the Comptroller and the Attorney General to the extent necessary.

Additionally, the ABO director should be required to report to each legislative chamber on annual basis outside the normal legislative review of executive agencies. This will give the ABO special prominence in the administrative oversight by the legislature and make the ABO less likely to abuse its authority, or to get lost in the shuffle. It would also be consistent with § 27.2(f) in the Act.

4. Funding

The executive office of the ABO shall be funded through a direct allocation of a portion of the § 2977 authorization monies paid by public authorities which now go into the general fund, further emphasizing the independence of this office. This allocation provides an identified annual revenue source, which is still subject to the annual appropriations process.

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It should be noted here that some of the items laid out above, pertaining to the administrative functioning of the ABO, are contended to be implied in the existing legislation. Again, the Commission strongly believes that in order to ensure the attention and compliance of the authorities, all of these items need to be explicitly authorized in the Act.

After all these years of non-active monitoring, the Commission does not recommend relying solely on "good faith" compliance by the authorities. Implied power is not sufficient; a legislative mandate is required. The public needs to be assured by legislation that a system of attention and compliance will continue from administration to administration irrespective of changing priorities.

V. DISCLOSURE

A. Suggestions for Consolidated Reporting of Authority Debt to Enhance Financial Disclosure

The Commission's work and this report are focused on the role of the independent public authority run by and accountable to a board of directors. These authorities are responsible for financing and managing much of the infrastructure, both public and private, throughout the State. They are empowered to issue debt not only on behalf of the State, but also on their own behalf as operating entities and as conduits on behalf of private credits. They may therefore, be classified not only as state or local, but also based upon the type of debt they issue, conduit, operating or state related. The authorities which issue conduit debt, generally for housing, economic development, health care, or educational purposes, be they local or statewide, issue debt backed by private sector credits which benefit from the lower cost of tax exempt financing. Those which are operating authorities, for example, constructing roads, bridges and highways, running transport systems, issue debt backed by revenues derived from their operations. However, for purposes of examining the adequacy of authority disclosure, it is important to focus on the authorities which issue state related debt. [5]

Those authorities which issue so-called “back-door” financing (state related debt), because of the Constitutional limits which require a general referendum for all general obligation bonding and limit the referendum to one per election, are critical to the State’s capital plan. They issue bonds backed by appropriations of state controlled revenues to secure projects set forth in the State’s capital plan. These bonds sidestep the debt issuance restrictions imposed on the State because they are issued by authorities. Therefore, the State’s comprehensive financial reporting would not be complete without including authority debt. Similarly, authority financial disclosure would not be complete without reporting on its state related debt issuances.

Disclosure of the state’s budget, its capital financing plan, and its outstanding debt are reported in three exhaustive documents: the State’s Annual Information Statement (AIS), the Executive Budget, and the Comptroller’s Comprehensive Annual Financial Report (CAFR). The aggregate financial picture must be extracted from among these reports and it is difficult for the public to trace and understand. One result of this information over-saturation is that the authorities’ role in financing the State’s capital budget is not well understood by the public and the authorities are often unjustly blamed for being profligate issuers of debt, whereas they are, in large part, acting at the behest of the Governor and the legislature.

Although as noted, the Commission was not charged with studying the need for State debt reform, the authorities’ issuance of state-related debt and other long-term liabilities is highly significant with respect to the governance, disclosure, and transparency of the authorities’ operations. In fact, much of the criticism that has been leveled at the authorities is a direct result of their issuance of state related debt. Although nominally independent, when it comes to the issuance of “state related” debt, the authorities are instruments of the State when they are used to finance the gubernatorial budget with the legislature’s concurrence. As a result, authority boards, which are charged with independence and duties of care and loyalty in adherence to the

[5] After the State’s capital budget is negotiated, specific capital projects are assigned by the legislature to designated Authorities. They issue bonds to fund, and often run, these projects on behalf of the State. The bonds are secured by legislative “appropriations” of State controlled revenue, including lease payments or a dedicated tax, currently the personal income tax (“PIT” bonds). PIT bonds are backed by revenues derived from a portion of state personal income taxes.

authority's mission, are in certain circumstances financing a portion of the State's capital plan over which they have virtually no independent voting power.

The new ABO will need to take this "fact of authority life" into consideration when monitoring the boards of authorities which issue such state related debt.

Financial disclosure by the authorities, and the State, needs to make clear that the State is responsible for answering questions and criticisms related to the state budget and the cost of financing its capital projects. Improved financial reporting of state and state related debt, which clearly delineates it from authority initiated offerings, would enable the public to make a more legitimate assessment of an individual authority's' operations and procedures relative to their stated mission.

Ultimately, a clearer distinction between the State and the authorities' own debt obligations would be best achieved either through constitutional debt reform or by designating one authority to issue all state related debt. That designated issuer of state related debt could be run by a board of directors comprised of State officials who would authorize the issuance of what, absent the constitutional limits, would be issued directly by the State. Such an issuer would then be under the direct supervision of the Governor and be answerable to the legislature. This would remove the shadow of the non-discretionary State related financing from the authorities' financial reporting and promote transparency and "big-picture" disclosure and analysis of the State's entire budget and capital plan.

Constitutional reform is the ultimate solution to clarifying the differences between the State's financing program and the authorities' independent activities. Absent such constitutional reform or consolidation of issuance, the ABO should format and establish a reporting system of the state related and other long-term debt that is more transparent and fully comprehensible than what has been routinely available. As discussed in Section B below, the ABO should be explicitly authorized to do so by legislation.

B. The ABO should be explicitly authorized by legislation to set standards of authority disclosure

Disclosure is central to the reforms recommended by the Commission. Full and timely disclosure of the finances, programs, management, and operations of authorities in a comprehensible format is essential to ensuring good governance and sound operations. The underlying premise of the Commission's recommendations on disclosure is that the mere availability of information does not necessarily provide complete, relevant, or comprehensible disclosure. In order for information to qualify as disclosure, it has to not only be readily accessible and understandable by experts, but by the public as well. Good disclosure is also the best tool for restoring public confidence in the State's authorities and ensuring compliance with the rules and regulations governing authorities. "Sunshine is the best disinfectant".

Disclosure as practiced in the corporate world, under SEC regulations and the federal securities law, including Sarbanes-Oxley, provides a rich resource from which to draw standards for public sector disclosure. The Commission examined these precedents to determine what was germane to public authorities and to draft appropriate guidelines for authorities.

The Commission makes the following specific recommendations to improve disclosure:

- § 2800(b) of the Act, which requires each public authority to support a website "to the extent practicable", should be changed to a mandatory requirement. Such public authority websites should include all information in the annual report, as well as timely notification of material changes in the authority's financial or other condition.
- § 2800(a)(7) of the Act regarding the acquisition, disposition and fair market value to require that the fair market value be reported should be modified to read "only at acquisition and/or disposition of assets of significant value (i.e. property having a value equal to the lesser of 10% or more of the authority's total assets or $250,000).
- § 2800(3) of the Act should be modified so that the standard for financial certifications by the Executive Director and Chief Financial Officer reads that "to the best of their knowledge and belief and after reasonable inquiry …" The Executive Director and Chief Financial Officer of each authority should certify as to the budgetary reporting of the authority.

The public authority's primary disclosure document is the annual report. It describes the financial, operational, and managerial aspects of the authority. The Commission finds that in order for the information contained in the authorities' annual reports to become the basis for a "big picture" evaluation, three fundamental changes are essential, 1) the adoption of a common fiscal year, 2) standardized content and 3) a uniform format for all reports.

The ABO should be authorized to develop a standardized content and format for authority annual reports. The following is the Commission's comprehensive list of the minimum information that should be included in an authority Annual Report. There is some overlap with the requirements set forth in the Act, but this recommendation expands upon the basic financial categories which the Act describes. It is subject to implementation and refinement by the ABO.

The Commission recommends that the content of the Annual Report include the following information:

1. A legal description of the authority including the mission statement and references to the statutory basis of the authority, its by-laws, and charter;

2. Biographical material of board members and senior management, including compensation paid to directors in any amount and to executive staff in excess of $100,000;

3. A description of the authority and its board structure, including
- Names of committees and committee members,
- Number of board meetings and attendance,
- Description of major authority units, subsidiaries, and
- Number of employees

4. A plain English discussion by management of any material changes in operations and programs.

5. Financial Reporting:
- Audited financials in accordance w/ GAAP/GASB;
- Information on state and federal grant/subsidy programs,
- Description of operating and financial risks (funding sources and uses),
- Current ratings and notice of changes,
- Long-term liabilities including leases and employee benefit plans;
- A multi-year financial plan, minimum of four (4) years, including a capital budget (current and projected) and an operating budget report, including actual vs. estimated with an analysis and measurement of financial and operating performance (developed w/ consultation of ABO);

6. Activities and Accomplishments:
- Information on what services the authority has provided, the efficiency of its operations, and the impact on the authority's customers, using performance measurement techniques; and the authority's goals for service delivery and performance in the future year or multi-year period

7. A description of conflicts of interest or related party issues, according to SEC 1934 Act standards, including
- Description of the total amounts of assets or services bought or sold without competitive bidding, the nature of those assets and services, the names of the counterparties, and where the contract price or fair market value exceeds $____, as determined by the ABO, an attestation of the fair market value by the CEO and CFA;

8. A plain English description of the fair market value of real property and assets of "significant value" at the time of disposition or acquisition of such property or assets. Provision of data on the current condition or significant changes in condition of the authority's assets, including recent and planned expenditures for maintenance and enhancements, and how maintenance expenditures and capital investments will alter the condition of the assets.

9. A description of any pending litigation.

Publications issued by the Governor's office and the Comptroller's office also provide information on certain authorities and place their activities within the overall context of the State government and its financial reporting. More specifically, the ABO should establish a format for reporting which clearly distinguishes between state related and other forms of authority debt.

The Commission's focus regarding authority disclosure is the development of consistent presentation from year to year, which permits comparisons between or among various authorities, and allows for consolidation of financial and other information among authorities as a group, so as to provide a "big picture" for comparable evaluation and analysis of the performance and activities of the authorities. Going forward, this "big picture" analysis of performance and activities of public authorities will be a critical component of the annual ABO reports.

VI. GOVERNANCE

The Act, which includes many of the recommendations from the Model Governance Principles, makes clear that every state and local public authority is subject to its provisions. As discussed previously, the Commission focused on interpreting, modifying and adding to the Act in order to enhance its applicability across the wide range of diverse authorities (see Section IV above).

In making its recommendations, the Commission notes that the timing of the implementation of regulations and best practices among authorities will vary subject to the resources of the authority. Thus, all enforcement will be in accordance with procedures established by the ABO and will be universally applied subject to "comply or explain". The Commission also found that the burden of receiving a "waiver" or a modified rule sits squarely with the petitioning authority, although, any request for a waiver will be considered tacitly approved until a contrary response is received from the ABO.

New York's authorities require good governance and qualified leadership. The fact that the governance committee is one of the two standing board committees required in the Act testifies to the importance of the concept. From the Commission's perspective, governance is ultimately embedded in the board of directors of an authority. The quality and qualifications of those board members is at the center of good governance practices.

The Commission has made the following recommendations which entail additions and modifications to the Act to strengthen its force regarding board member qualifications.

A. Qualifications

The Commission believes that the Governor and all appointing officials have a collective obligation to assure that board members have appropriate skills and experience for their appointment, and that the board, as a whole, represents the diversity of skills necessary to achieve the authority's mission. It is recommended that "a process shall be developed for screening proposed board members, which includes a standard questionnaire with basic information" that appointees must fill out, supporting the candidate's suitability for the selection. This questionnaire should be prepared and the responses reviewed by the ABO. Additionally, all board members are required, in the Act, to attend state-approved training.

B. Size

In addition to the Act's mandate requiring the number of board members from certain authorities to be increased to seven (7), the Commission further recommends that "public authorities, not specifically named in the Act, shall have a minimum of five (5) members."

C. Duties

Foremost among the Commission's recommendations is the formal recognition by board members of their fiduciary duty, including the duty of loyalty and care to the organization and commitment to its mission. The Commission recommends that "board members execute an oath on assumption of office that sets forth these duties." (This subject is discussed above in Section IV above).

With regard to director independence, the Commission carefully considered language to provide guidance to board members and notes that "an appointee can and should accept input from the appointer, as well as from any other informed and educated parties. However, any final decisions and actions should be his/her own and determined by strict adherence to the authority's mission."

D. Committees

Though committee member skills are fundamental to the proper functioning of a board, so is the committee structure. The Commission recommends, in addition to the creation of audit and governance committees, the formation of a finance committee for those authorities which issue debt. Further, it recommends that these board committees "shall have no less than three (3) members" and "shall be comprised of members who possess the necessary skills to understand the duties and functions of the committee." The Commission also recommends that authority staff not be allowed to sit as a member of a committee.

E. Financial Skills

The language in the Act § 2824 (6) "to the extent practicable, members of the audit committee should be familiar with corporate financial and accounting practices" should be changed to "members of the audit committee shall be or shall become financially literate as determined by the board."

F. Compensation

One issue which was closely debated by the Commission is that of board compensation. The Commission, recognizing the increased responsibilities and commitment of board members, recommends that compensation be paid to directors in accordance with a compensation plan developed by the individual authority and subject to approval by the ABO.[6]

G. Open Meetings

The Commission, in order to promote good governance and to clarify the existing Open Meetings Law, which is not explicit, has stated that it "believes that all committee meetings may be closed to the public, so long as no binding resolutions occur in the course of the business conducted at those meetings."

H. Harmonization of Laws

The Commission also found that there are numerous provisions existing in law, which apply to some, but not all authorities. Specifically, the Public Officers Law stipulates that the application of Ethics Law has two standards; one applies only to "paid" directors and, the other applies only to directors on boards of which one member is appointed by the Governor.[7] The indemnification language for directors is similarly limited.[8] In general, the Commission recommends that any and all standards to which authorities are subject be applied across the board. Both the ethics law and the indemnification language must be extended to the directors of all authorities. The ABO should be authorized to make recommendations to the Governor and Legislature for harmonization of these laws as applicable to authorities.

I. Audit Committee

As with governance, the importance of the audit function is underscored by the fact that the audit committee is one of the two standing board committees mandated by the Act. It is charged with engaging and overseeing the certified independent public accounting firm who performs the annual audit. Until passage of the Act, authorities were not required by law to make public annual reports and audited financials. The Commission recognizes the significant progress that has been achieved through the provisions of the Act, which contain language to promote uniform audit practices in all authorities. Such practices are fundamental to achieving the proper disclosure upon which good governance is based. The Commission has examined the provisions of the Act and studied the industry literature in order to provide clarification and further direction to the authorities.

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[6] See Appendix G – *History of Director Compensation* for authority director compensation prior to 1992.
[7] Standards for "Paid" directors in Public Officers Law § 73; for "Appointed" in Public Officers Law § 74.
[8] Indemnification in Public Officers Law §17.

There are numerous recognized publications that describe auditing standards applicable to the public or corporate sector. A study of the relevant materials and standards has provided the Commission with a basis upon which to make recommendations specifically applicable to authorities.[9]

The standards described in the materials studied by the Commission are all subject to regulatory oversight. The Commission was concerned that the Act, which imposes a requirement for all authorities to publish and submit their financials, track industry standards and provide clear direction to the authorities. After undertaking an analysis of the Act and the audit function the Commission concluded that it is in agreement with the majority of the provisions in the Act. Attention was directed to internal audit and internal control, which are not subject to regulatory standards, such as those applied to external audit.

The Commission recommends that the newly created ABO be responsible for providing to the authorities guidance and administration of "comply or explain" submissions in the areas of training, internal audit, the rotation of partners in external auditing firms, and any other areas deemed necessary.

The Commission also focused on any language in the Act which could have unforeseen negative consequences.

The greatest negative unforeseen consequence of the Act may be instances when there is direct incorporation of language describing specific rules and standards, rather than citations of recognized industry standards with incorporation by reference. For example, § 2802(5) of the Act states that audit firms "shall be prohibited from performing non-audit services for such authority contemporaneously with the audit, unless receiving previous written approval from the audit committee". However, published audit standards categorically prohibit certain non audit services, with or without written approval.

The most critical modification to the provisions regarding audit practices is based upon the recognition that the audit function is subject to industry standards which bind the practitioner, and that legislation is not readily modified when such standards change. Circumstances and the need for specific standards evolve over time as needs change, as do industry or governmental standards like the US Government Accountability Office's (GAO) Government Auditing Standards (the "Yellow Book)".[10]

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[9] Materials reviewed by the Commission include the Government Auditing Standards (the "Yellow Book"); Sarbanes-Oxley Act of 2002; Securities Exchange Act of 1934; Committee of Sponsoring Organizations of the Treadway Commission "Internal Control - Integrated Framework;" American Institute of Certified Public Accountants' Auditing Standards; NYS Division of the Budget Item B-350 "Governmental Internal Control and Internal Audit Requirements"; the Federal Office of Management and Budget Circular A-123 "Management's Responsibility for Internal Control in Federal Agencies"; the Comptroller's "Standards for Internal Control In New York State Government", among others.

[10] Government Auditing Standards (GAS) (the "Yellow Book") contains auditing standards for government offices and organizations, and may also be referred to as generally accepted government auditing standards (GAGAS).

Therefore, rather that outlining specific rules for authorities to follow, since such standards are subject to change, the Commission strongly recommends that the Act be amended, and any subsequent legislation pertaining to public authority audits, incorporate by reference published standards for financial accounting and audit reports. Specifically, the Commission recommends reference to the US GAO Government Auditing Standards.

The Commission also recommends adding to § 2824 “audit committees shall have at least 3 members”, and changing the language § 2824 (6) to “members of the audit committee shall be or shall become ’financially literate’ as determined by the Board” in order to provide a standard more effectively applied standard in keeping with the Act.

The Commission finds that standards for internal controls as set forth in law governing state agencies and covered authorities are sufficient. While the Act does not stipulate internal control practices or standards, it does require an “assessment” of such practices by management.

The Commission recommends that the internal control standards set forth in Public Authorities Law § 2930-2931 be extended to cover all authorities. Additionally, the Commission notes that “internal controls over financial reporting” are now required of federal agencies and recommends consideration by the ABO as to whether such concepts should be applied to authorities. The Commission has also noted that some smaller authorities with limited resources may require advice as to how to set up internal control systems.[11]

The Act does not change current state law with respect to the internal audit function. The Public Authorities Law § 2932 states that the governing board shall determine and periodically review whether an internal audit function within the “covered authority” is required. The Commission has concluded that the standards for internal audit set forth in current law are sufficient. However, it recommends that all public authority boards be subject to the requirement to decide on an annual basis whether to adopt an internal audit function. This requirement should be subject to the “comply or explain” process.

Smaller authorities are also likely to have difficulty implementing an internal audit. The Commission recommends that , when appropriate, the ABO examine the possibility of establishing teams consisting of larger authorities or of independent professionals to assist with internal audits for small local authorities – the Comptroller’s Office has provided this service in the past, but is now precluded from doing so in accordance with industry regulations.

The Commission generally agrees with § 2802 of the Act (4) of the legislation requiring the rotation of auditing partners every 5 years. The Commission notes here that the legislation may have unintended negative consequences and recommends that in the event that an authority has difficulty meeting this requirement, the issue should fall under “comply or explain” subject to ABO approval.

[11] See Appendix H - *Internal Controls and Internal Audit Function.*

J. Governance Committee

Language should be added to § 2824 (7) to clarify the duties of the governance committee, "members of the governance committee shall examine ethical/conflict issues and perform board/self-evaluations, investigate term limits; re-appointments; and board and/or committee responsibilities, as well as make recommendations for new directors."

The Commission also recommends that "all public authorities adopt by-laws which include rules and procedures for conduct of board business." These can be developed by the Governance Committee and approved by the board.

K. Implementation

Although all of the recommendations listed above will promote greater efficiency, transparency, and accountability in the long run, the Commission reiterates once again that New York's authorities vary greatly in size, purview, and resources. The Commission, therefore, endorses the adoption of a phased implementation schedule for authorities whose resources cannot support immediate implementation of all of the provisions of the Act and our recommendations.

VII. REORGANIZATION

The Commission, which was authorized to provide definitions and an inventory of public authorities and to make recommendations for dissolution or consolidation, as well as recommendations for changes in function of the authorities, has 1) researched existing lists of authorities in order to develop a verifiable list of "recognized" state and local public authorities, 2) grouped the recognized list of public authorities into functional categories, and 3) considered recommendations for consolidation, merger and dissolution of those authorities. The Commission recommends further in-depth investigation prior to implementation of any changes that could significantly alter the way the State or any single authority conducts its business.

Since authorities have been created and defined in several different laws, including the Public Authorities Law, General Municipal Law, Education Law and elsewhere, the Commission finds that a comprehensive legal definition of authorities is required, including a single consolidated listing of authorities by class.

New York's several hundred public authorities are now categorized in different ways. The Act divides authorities into five (5) categories, including State Authority, Local Authority, Interstate or International Authority, Affiliate, and Subsidiary. The Comptroller's Office divides authorities according to four classes, A (Statewide), B (Regional), C (Local), and D (Interstate/International). In conducting our research, which included reviewing packages of information from hundreds of authorities, the Commission deems the following categorizations to be accurate: 1) State, 2) Local, and 3) Interstate or International authorities.

The Commission recommends consistency in the categorizations of authorities among the Act, the Comptroller's Office, the ABO, and any other offices.

The Commission has categorized the authorities as either state or local, consistent with the definitions contained in the Act. It has also coined the term "recognized" to designate an authority which has been identified and categorized in accordance with the Act. State authorities are the larger state entities, some of which issue state related debt, while the second group, local authorities, consists generally of much smaller local entities. The Commission recognizes "Interstate or International Authorities," but does not discuss them in this report because there are only four (4) – the Buffalo and Fort Erie Public Bridge Authority, Niagara Falls Bridge Commission, the Port Authority of New York and New Jersey and its subsidiaries, and the Thousand Islands Bridge Authority. Additionally, these authorities are not under the purview of the Commission because of their unique multi-state nature.

The Commission also does not consider subsidiaries, as defined in § 5927 (2) of the Act, either with or without an independent board or separate operational control, as authorities (unless legislatively independent). The Comptroller's list of 733 authorities includes over 200 subsidiaries, 188 of which are under Empire State Development Corporation (ESDC) alone.

The Commission recommends that one sub group of authorities, housing authorities, which report to and are monitored by the U.S. Department of Housing and Urban Development and are defined under the Laws of 1957, ch. 913 (7), should be excluded from the purview of the Act. Those same laws state that:

> "Any act of the legislature of the year nineteen hundred fifty-seven or of any year thereafter which, by expressive language, has general application to authorities or commissions heretofore or hereafter continued or created by the Public Authorities Law shall, unless otherwise expressly provided, be deemed inapplicable to any municipal housing authority enumerated in article thirteen of the public housing law, as added by this act."

The Commission notes that are several entities listed as Class B authorities on the Comptroller's list, including the Adirondack Park Institute, Aging Research, Inc., Charitable Trust Foundation, CUNY Auxiliary Services (all), Health Research, Inc., Life Insurance Company Guaranty Corporation, New York Racing Association, New York Wine & Grape Foundation, NYS Archives Partnership Trust, Research Foundation of CUNY, Research Foundation for Mental Hygiene, Inc., Research Foundation of SUNY, SUNY Auxiliary Service (all) and Welfare Research, Inc. (WRI) that do not seem to exactly fit the definition of a public benefit corporation.

Though they may fall under the Act as a “not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town, or village government”, these entities do not seem to truly be local or state authorities, and the Commission does not view them as “recognized” authorities. Nevertheless, the ABO or another appropriate entity may have a diverging viewpoint or may choose to elaborate on their status.

The Commission is also concerned regarding potential state liability for these entities. The Commission recommends clarification of their status vis-à-vis state liability.

Moreover, the Commission has not classified “affiliates” and finds the definition currently in the legislation to be limited and in need of clarification. The Commission further recommends that the Act clarify that there be no “affiliates”, or affiliated entities, outside of the definition of an authority.

During the course of research, the Commission found 40 local authorities and 35 housing authorities that do not exist.[12] After verifying the information through various sources, including phone calls to town clerks, city halls, and mayors, the Commission feels confident in stating that those entities do not exist in any real sense. (Some may have been “on the books” somewhere, but never physically created, while others might have ceased to exist without being removed from the books.)

The Commission’s verifiable list has 46 statewide public authorities and 246 local authorities.[13] These authorities, a combined list of less than 300, fall into easily recognizable groupings both in the state and local categories.

The Commission recommends that the “state” and “local” categories each be sub-divided into functional groupings to better understand the purpose and operations of the authorities. These functional groups also highlight potential opportunities for reorganization.

A. Statewide Authority Functional Groupings

The Commission has divided the 46 state authorities into ten (10) functional categories to better understand their operations and any overlap in function.

1. **Agricultural Development (2):** Agriculture and NYS Horse Breeding Development, and NYS Thoroughbred Breeding and Development

2. **Facility Development and Operation (11):** Battery Park City Authority, Development Authority of the North Country, Hudson River Park Trust, Hudson River – Black River Regulating District, Industrial Exhibit Authority, Nelson A. Rockefeller Empire State Plaza Performing Arts Center Operating Corporation, New York Convention Center Operating Corporation, NYS Olympic Regional

[12] See Appendix I – List of *Defunct Authorities.*
[13] See Appendix J – List of “*Recognized” Authorities*.

Development Authority, NYS Theatre Institute, Roosevelt Island Operating Corporation, United Nations Development Corporation

3. **Health Care (3):** Nassau Health Care Corporation, Roswell Park Cancer Center Corporation, Westchester County Health Care Corporation

4. **Housing and Bond Bank (3):** NYS Housing Finance Agency and its subsidiaries, the NYS Housing Trust Fund Corp, Homeless Housing Assistance Corp., and NYS Affordable Housing Corp.; the Municipal Bond Bank Agency and its subsidiary, the Tobacco Settlement Financing Corporation); and the State of New York Mortgage Agency.

5. **Municipal Assistance (5):** Buffalo Fiscal Stability Authority, Erie County Fiscal Stability Authority, Municipal Assistance Corporation for The City of New York, Municipal Assistance Corporation for The City of Troy, Nassau County Interim Finance Authority

6. **Power and Energy (2):** Long Island Power Authority, New York Power Authority

7. **Research, Technology, and Environment (4):** Natural Heritage Trust, NYS Environmental Facilities Corporation, NYS Foundation for Science, and NYS Energy Research and Development Authority

8. **State Construction Finance (3):** City University Construction Fund, Dormitory Authority of New York State, and State University Construction Fund

9. **Transportation (10):** Albany Port District Commission, Capital District Transportation Authority, Central New York Regional Transportation Authority, Metropolitan Transportation Authority (including NYCT and TBTA), Niagara Frontier Transportation Authority, NYS Bridge Authority, NYS Thruway Authority, Ogdensburg Bridge and Port Authority, Port of Oswego Authority, Rochester – Genesee Regional Transportation

10. **Other Authorities (3):** Empire State Development Corporation (ESDC) (consisting of the Job Development Authority and Urban Development Corporation and all subsidiaries), and NYS Local Government Assistance Corporation (LGAC)

B. Local Authority Functional Groupings[14]

The Commission recommends grouping local authorities into the following functional categorizations:

- Community Development Agency/Urban Renewal Agency (same)
- Economic Development Corporation/Local Development Corporation (same)
- Industrial Development Agency

[14] See Appendix K - *Definitions of Local Authority Types.*

- Off Track Betting
- Parking Authority
- Resource Recovery Agency
- Solid Waste Disposal Agency
- Water Finance Authority
- Water or Sewer Authority

Other possible categories could include:

- Construction Authority
- Cultural Authority
- Healthcare Authority
- Power Authority
- Sports Authority
- Transportation Authority

C. Authorities to be evaluated further by the ABO or other qualified entity for potential future consolidation or reorganization:

1. NYS Housing Finance Agency, State of New York Mortgage Agency, Municipal Bond Bank and all subsidiaries

2. Metropolitan Transportation Authority and all subsidiaries

3. Empire State Development Corporation, including JDA, UDC, and all subsidiaries

The Commission recommends that further thought also be given to the following actions:

4. Whether certain facility development and operating authorities should be privatized.

5. Whether certain healthcare authorities should be privatized.

6. Whether the Dormitory Authority of New York State (DASNY) should be renamed for its function, “State Construction Finance Authority;” and merging the City University Construction Fund and State University Construction Fund into DASNY as subsidiaries.

With regard to the horse-breeding authorities, the Commission recommends that other entities with greater insight into this industry make the necessary recommendations.

D. Subsidiary Criteria

Over 200 subsidiary corporations have been established by authorities. Many of these subsidiaries have been created without legislative approval. The Commission recommends a review of all subsidiary corporations to determine which ones no longer serve a useful purpose. It recommends that those subsidiaries that are no longer useful be consolidated or dissolved.

The Commission recommends that the ABO have sole discretion and authority to establish standards and criteria regarding the creation of any new Authority subsidiaries. The Commission also recommends that the ABO be given the authority to review and recommend the continuation, consolidation, or dissolution of existing subsidiaries.

Subsidiaries should not be established unless the parent authority makes a determination that one of the following circumstances necessitates the creation of a subsidiary. In establishing criteria for the creation of subsidiaries, the Commission recommends the following to be utilized as a basis for establishing criteria.

1. There exists a potential legal liability to be incurred by the parent in undertaking a project or entering into an agreement that can be ameliorated or minimized by the imposition of a subsidiary in a deal structure (limitation of liability);

2. The objective to be accomplished can be achieved only through the creation of a special purpose vehicle (such as the development of certain types of housing through housing subsidiaries created under the private housing finance law, or the establishment of not-for-profit subsidiaries with the ability to solicit tax-exempt donations);

Only in very special circumstances, and with careful and thorough review and approval by the ABO, may a subsidiary be created with a governance structure that permits the involvement of others outside the parent in situations where such involvement is necessary to ensure success (such as the creation of LMDC, where it was essential to ensure involvement of local representatives).

The Commission has found that the majority of New York's recognized authorities are functional and productive entities. Nevertheless, what has been lacking in the past is a recognized, independent body to provide guidance, oversight, and centralized disclosure for the authorities.

The creation of the ABO ensures that there will be such an entity in the future which, among other things, can undertake the actions mentioned above.

VIII. CONCLUSION

We applaud the Public Authorities Accountability Act; a first major focused step forward for public authority improvement. We appreciate the Governor's initiative establishing an ABO. Both actions represent significant steps toward improving the governance and accountability of public authorities. The new ABO, in good faith, has attempted to find implicit authority to execute some of the recommendations of this Commission. This is constructive and we trust the initiative will be continued pending formal action on our Report.

We are convinced, however, that further legislation and administrative actions are required, in order to insure appropriate control over the authorities. New York State depends on the authorities for financing and managing public infrastructure facilities and services. The public cannot rely solely on implicit powers and good intentions to embed reform in such important entities. The public is entitled to reform that is legislatively mandated, embedded, and thereby assured to continue. Each of our recommendations is part of a mosaic of regulation needed to solidly, and with some certainty, anchor reform.

In this Report, we have attempted to identify what the Commission has concluded, as succinctly as possible, are the legislative steps necessary to assure implementation and continuity of the reform process consistent with the highest standards of responsibility and accountability.[15]

Public authorities vary greatly in mission, organization, and culture; generic aspirations simply won't do. As we noted when we started this work, one size was not going to fit all, and it didn't. Hence the need to legislate a governance system which, while setting out generic principles, has the flexibility to accommodate the variances and is empowered to implement and enforce them. Such a system is not provided in the Act.

Specifically missing in the Act is a requirement that authority directors acknowledge their "fiduciary" duties; duties which are the cornerstone of corporate governance. Missing too, is empowerment of some entity to shape the application of those duties to the unique circumstances of each authority, then to monitor and enforce the execution of those duties.

The powers of the ABO as currently structured, cannot accomplish the Commission's objectives. Under the State Constitution the authorities are not part of the Executive Branch, and therefore not formally bound to obey Executive Orders. The 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. That issue of empowerment should not be left open.

[15] An *Index of Legislative Recommendations* contained in this Report is in Appendix L.

These missing elements must be filled by new legislation. The description of that legislation is the core of this report. Exhortation has been tried in the past with no assurance of compliance. Experience teaches that it is necessary to solidify reform through legislation.

We propose not only very clear powers for the ABO, but also a structure that insulates it from outside influence in the conduct of its administrative duties, while preserving the Governor's right and obligation to influence matters of significance to the welfare of the State.

The balance of our Report fills in details on the important matters of disclosure, clarity regarding the issuance of debt, and the need to classify and reorganize the public authorities.

Taken as a whole, the legislation we have recommended should secure reform of these authorities for the foreseeable future. We trust that the Governor, the Controller, the Attorney General, and the Legislature will collaborate to complete the job we all started.

This Report is submitted with the unanimous endorsement of the members of this non-partisan Commission and with the sincere hope that it will be considered with the same thoughtful care and deliberation that went into its creation.

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