

For The Record

The Public Authority Accountability Act Five Years On: A Challenge to the Future of New York's Economic and Community Development Efforts



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The fifth anniversary of the enactment of the Public Authorities Accountability Act (the “PAAA”) has come and passed.¹ Like most pieces of sweeping legislation, the PAAA (amended in 2009 by the Public Authorities Reform Act (“PARA”))² is achieving some of its goals but is also resulting in some detrimental consequences, both foreseen and unforeseen.

Most of New York’s communities are going to be impacted by the PAAA, if they haven’t been already. Consequently, it is important for local government officials to understand what the PAAA is, what it requires, and its beneficial and negative impacts on New York’s local governments, particularly local efforts to spur economic and community development and revitalize downtowns and main streets.

Overview

The PAAA codified accountability and responsibility standards similar to many of the requirements of the federal Sarbanes-Oxley Act and other standards utilized by private sector companies as part of best corporate governance practices. The PAAA applies those principles to New York State’s public authorities. Specifically, the Act:

1. Requires public authority board members to undertake formal training on their legal, fiduciary, ethical and personal responsibilities;
2. Requires oversight of public authorities to be separated from their executive functions;
3. Establishes guidelines governing public authority board member independence;
4. Requires public authorities to establish audit and governance committees;
5. Establishes codes of ethical conduct for public authority directors, officers, and employees;
6. Establishes policies for procuring goods and services, acquiring real property, and disposing real and personal property; and
7. Imposes numerous other internal controls on public authority employees and operations.

In addition to imposing these requirements, the PAAA created the independent Authorities Budget Office within the Department of State to oversee and ensure compliance with the Act’s requirements. The Authorities Budget Office website is www.abo.state.ny.us.

PAAA Reporting Requirements

Overview

The PAAA imposes numerous annual reporting requirements on “local authorities,” including financial, budget, and audit reports. Copies of all the reports must be provided to:

1. The local government’s
 - Chief executive officer,
 - Chief fiscal officer, and
 - Chairperson of the local legislative body; and
2. The Authorities Budget Office.

Each public authority’s governing board must approve every financial report. In addition, the authority’s chief executive officer **and** chief financial officer must certify that, based on their knowledge, the information provided therein:

1. Is accurate, correct and does not contain any untrue statement of material fact;
2. Does not omit any material fact which, if omitted, would cause the financial statements to be misleading in light of the circumstances under which the statements are made; and
3. Fairly presents, in all material respects, the authority’s financial condition and results of operations as of, and for, the periods presented in the financial statements.

The Public Authorities Reporting Information System

To facilitate the PAAA’s reporting requirements, the Authorities Budget Office and the Office of the State Comptroller jointly designed, developed, and operate the Public Authorities Reporting Information System (“PARIS”), an online electronic data entry and collection system (www.abo.state.ny.us/paris/paris.html). Public authorities must use PARIS to:

1. Submit their budget reports (due 60 days before the start of the fiscal year for local authorities, and 90 days before the start of the fiscal year for state authorities);
2. Submit their annual reports (due

90 days after the end of their fiscal year);

3. File copies of their independent audits; and
4. Provide other documentation required to be filed.

The information public authorities are required to report and file via PARIS is extensive. Public authorities are encouraged to consult with their attorney to insure compliance with all reporting requirements.

Authority Board Members Roles and Responsibilities

The PAAA also requires local authorities’ boards to implement fundamental financial and management controls, adopt a code of ethics, establish written personnel policies, and adopt a defense and indemnification policy. Moreover, individual board members must:

1. Participate in state approved training regarding their legal, fiduciary, financial and ethical responsibilities as directors of an authority within one year of being appointed to a board; and
2. Participate in continuing training as may be required to remain informed of best practices, regulatory and statutory changes relating to the effective oversight of the management and financial activities of public authorities and to adhere to the highest standards of responsible governance.

Board members, including the chairperson, may not serve as a public authority’s chief executive officer, executive director, chief financial officer, comptroller, or hold any other equivalent position while also serving as a member of the board. Each public authority must establish an audit committee to be comprised of independent members,³ which must recommend a certified independent accounting firm for the authority.

Except for board members who serve by virtue of holding a civil

office of the state, the majority of the remaining members of the governing body of every public authority must be independent members. This provision applies to appointments made on or after January 13, 2006. The officials having the authority to appoint or remove the

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remaining members must take the actions necessary to satisfy this requirement.

Finally, pursuant to General Municipal Law Article 18, local authority board members, officers, and employees must file annual financial disclosure statements with the board of ethics for the county in which the local authority has its primary office.

The Authorities Budget Office

The PAAA established the Authorities Budget Office within the Executive Department for the purpose of studying, reviewing, and reporting on the public authorities’ operations, practices and finances. One of the substantial amendments made by the PARA was to create the Authorities Budget Office as an independent office “that, by law, receives administrative assistance and support from the Department of State for the effective and efficient execution of its powers and duties.”⁴ The Authorities Budget Office is responsible for numerous oversight responsibilities including, but not limited to, reviewing public authorities’ operations, practices, and reports to assess compliance with the Act and other provisions of law. Public authorities are required

by law to assist the Authorities Budget Office in performing its duties. In addition to publishing its own reports on its website (including an Annual Report), the Authorities Budget Office makes reports submitted by the state's public authorities available on its website⁵ and also identifies those authorities which are delinquent in submitting required reports. The Authorities Budget Office provides training and guidance on how to comply with the PAAA.

Local Authorities

While the name of the PAAA seems to imply that it applies only to public authorities, the Act defines public authority to include both state and local authorities and then further defines "local authorities" to include:

1. Public authorities and public benefit corporations created by or existing under the Public Authorities Law or any other state law whose members
 - (a) Do not hold a civil office of the state,
 - (b) Are not appointed by the governor, or
 - (c) Are appointed by the governor specifically upon the recommendation of the local government or governments;
2. Not-for-profit corporations affiliated with, sponsored by, or created by a county, city, town or village government;
3. Local industrial developmental agencies and authorities (IDA), and other local public benefit corporations; or
4. Affiliates of such local authorities.⁶

The inclusion of "not-for-profit corporations" in the definition has become the source of much consternation, confusion, and concern on the part of local government officials, not-for-profit entities, and community and economic development professionals around the state. While the meaning of the phrase "created by" is generally

understood, the terms "affiliated with" and "sponsored by" are not defined in the statute and have become the source of significant disputes and even litigation.⁷ Moreover, it is unclear what the legislature's exact intent was in subjecting "not-for-profit corporations affiliated with, sponsored by, or created by a county, city, town or village government" to the PAAA's requirements. Consequently, it appears that the PAAA applies to a very broad swath of New York's not-for-profit corporations, as the terms "affiliated with" and "sponsored by" are being interpreted broadly by both the PAAA and courts.

Negative Impacts of the PAAA and PARA

Impact on Public Authorities' Budgets

While the PAAA's many requirements may not prove to be overly burdensome for some of the state's public authorities, the reporting, training, and auditing requirements have created substantial administrative expenses for numerous public authorities that operate on shoestring budgets and which have little or no resources dedicated to administrative operations. These costs in and of themselves are significant and potentially threaten the viability of many of the smaller not-for-profit corporations that provide vital services to their communities. When combined with the fee the state began imposing on public authorities in 2010 to support the Authorities Budget Office operations, however, they are threatening the existence of many not-for-profits which have relatively limited financial resources to dedicate to complying with the PAAA. As a result, the PAAA may force not-for-profits to choose between not complying with the Act's requirements or ceasing operations altogether.

Impact on Board Members

As previously mentioned, the PAAA imposes substantial reporting and training requirements on public authorities and members of their governing boards. It is these reporting requirements which are having serious negative impacts on the ability of public authorities to retain board members. For a substantial number of New York's public authorities, and in particular for not-for-profit corporations that are classified as public authorities, members of their governing boards receiving nominal compensation and frequently serve in a completely voluntary capacity.

The requirement that these individuals must disclose substantial information about their personal finances, including property holdings, will likely cause a substantial number of not-for-profit board members to resign from their boards. Such a result could be devastating to the not-for-profit and economic development communities as these individuals, who are frequently local business owners and property developers, were asked to serve on their boards because of their business and real estate experience and their knowledge of the community. Consequently, not-for-profit corporations created to redevelop the local economy (whether it be the district management association of a business improvement district or a local development corporation) are likely to lose the expertise vital to achieving the not-for-profit's goals and objectives.

Impact on Local Governments

Finally, the PAAA is likely to have a chilling effect on the willingness of not-for-profit corporations to work with local governments. Not-for-profit corporations that have worked with local governments in the past or that have missions which coincide with local govern-

ment programs will undoubtedly think long and hard before working with local governments in the future for fear of being subjected to the Act's reporting and training requirements. Because of the overly broad language of the PAAA, it is unclear what constitutes being "affiliated with" or "sponsored by" a local government. As a consequence, not-for-profit corporations weighing the costs of having to comply with the PAAA's requirements and losing board members are likely to determine that the benefits of working with local governments are not worth the PAAA's costs.

Conclusion

The PAAA's goals of insuring the transparent operation of public authorities and of holding public authorities accountable are necessary and worthwhile. However, the overly broad application of the Act's requirements to every not-for-profit corporation that is created by, affiliated with, or sponsored by a

local government, without taking into account other already existing transparency and accountability mechanisms, the ability of many of the smaller not-for-profit corporations to comply with the requirements, and the minimal risk involved with smaller not-for-profit corporations, is likely to seriously hamper the ability of many communities across the state to revitalizing their struggling economies. Communities that find it difficult if not impossible to comply with the PAAA's requirements or who lose board members due to the financial disclosure requirements are encouraged to contact their New York State legislators as well as the Authorities Budget Office. For more information on the PAAA, visit www.abo.state.ny.us or contact NYCOM General Counsel, Wade Beltramo at (518) 463-1185 or by email at wade@nycom.org.

Endnotes

1. The PAAA was enacted by Chapter 766 of the Laws of the State of New York of 2005. It amends various provisions of State law including the Public Authorities Law, Environmental Conservation Law, and Executive Law.
2. For purposes of this article, PAAA is used to refer to the requirements of both the PAAA and the PARA.
3. 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 \$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.
4. www.abo.state.ny.us/abo/about_mission.html.
5. www.abo.state.ny.us/annualreports/PAREports.html.
6. Public Authorities Law § 2(2).
7. See *Griffiss Local Development Corp. v. State of New York Authority*, 26 Misc.3d 815 (N.Y.Sup. Albany County 2009).

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