

## **PUBLIC AUTHORITY BOARD MEMBER DUTIES**

Anita Laremont, SVP - Legal & General Counsel

Empire State Development Corporation

December 2005

I. The duties and legal responsibilities of board of director members of public authorities (“directors”) are generally equivalent to those of directors in the private and not-for-profit sectors.

A. Duty of Care - Directors must inform themselves prior to making business decisions utilizing material information reasonably available to them, and exercise reasonable care in the discharge of their responsibilities.

B. Duty of Loyalty - Directors owe a duty of loyalty to the public authority. Requires directors to be disinterested, so that they do not appear on both sides of a transaction nor expect to derive personal financial benefit from it.

C. Day to day discharge of responsibilities includes:

1. Monitoring activities of public authority management and staff, including oversight of compensation and personnel policies.
2. Scrutinizing information provided by subordinates and consultants (such as financial audits and other business reports).
3. Providing policy direction for public authority, in light of mission, legislative direction and executive agenda.

II. Liability for Breach of Duty

A. In the absence of limitations on liability, directors may be personally liable for the breach of their fiduciary duties to the corporation.

B. Public authority enabling legislation and Public Officers Law limits liability of directors of public authorities.

III. Limitations on Liability of Directors of Public Authorities and Public Benefit Corporations

A. Public Officers Law § 17 - Provides for defense and indemnification of state officers and employees of certain public authorities by State of New York.

B. Public Officers Law § 18 - Permits public authorities and public benefit corporations to provide for the defense and indemnification of their officers and employees in any state or federal civil action arising out of any alleged duty or omission that occurred while the officer or employee was acting within the scope of his public duties.

C. Enabling Legislation of Public Authority - May provide specific indemnity for officers and employees.

D. By-Laws of Public Authority - Should include provisions implementing indemnity authorized by Public Officers Law § 18.

E. Directors & Officers or Executive Liability Insurance - Insurance coverage may provide for indemnification and defense of directors. The benefits provided by such policies varies widely, but typically insure against liability from claims arising out of actions in performance of corporate duties. Because the insurer is always interested in minimizing its exposure, an understanding of the policy and the practices of the insurer should be undertaken prior to determining which policy is best.

F. Enabling legislation of public authorities typically limits directors' liability.

#### IV. Ethics

A. §73 Ethics Public Officers Law - Regulates outside business and professional activities of state officers and employees.

1. Applicable to directors of public authorities where at least one member is appointed by the Governor, who receive other than per diem compensation and employees and officers.
2. Prohibits covered individuals from, directly or indirectly, soliciting, accepting or receiving any gift having a value of seventy-five dollars or more, where it could be reasonably be inferred that the gift was intended to influence the covered individual in the performance of his or her official duties or was intended as a reward for any official action on the covered individual's part. Applies to gifts in the form of money, service, loan, travel, entertainment, hospitality, thing or promise or in any other form.
3. Prohibits covered individuals from receiving compensation for the appearance or rendition of services by himself or another against the interest of the state in relation to any case, proceeding, application or other matter before any state agency whereby compensation is contingent upon any action by the agency.
4. Prohibits covered individuals from receiving compensation for the appearance or rendition of services by himself or another against the state in relation to matters before the court of claims.
5. Prohibits covered individuals or firms or associations of which a covered individual is a member, or corporation, ten percent or more of the stock of which is owned or controlled directly or indirectly by a covered individual, from selling any goods or services with a value in excess of twenty-five dollars to any state agency unless such goods and services are provided pursuant to an award or contract let after public notice and competitive bidding.
6. Prohibits covered individuals from receiving compensation for the appearance or rendition of services by the covered individual or others in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is in connection with: (i) the purchase, sale, rental or lease of real

property, goods or services, or a contract with any such agency; (ii) any rate making proceeding; (iii) the adoption or repeal of any rule or regulation; (iv) obtaining of grants of money or loans; (v) licensing; or (vi) any proceeding relating to a franchise provided for in the public service law.

7. Prohibits covered individuals, within two years after the termination of the covered individual's service or employment, from appearing or practicing before the covered individual's agency or receiving compensation for any services rendered by such individual on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before the covered individual's former agency (the two-year rule).

8. Prohibits covered individuals, after the termination of his/her service or employment from appearing, practicing, communicating or otherwise rendering services before any state agency or receiving compensation for any such services rendered by such former officer or employee on behalf of any firm, person, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such covered individual was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration (the lifetime ban).

B. § 74 Public Offices Law - Code of Ethics

1. Applies to all officers or employees (including unpaid members or directors) of any public benefit corporation or public authority at least one of whose members is appointed by the Governor.

2. Requires that covered individuals endeavor to pursue a course of conduct that will not raise suspicion among the public that the covered individual is likely to be engaged in acts that are in violation of his or her trust.

3. Prohibits covered individuals from

i) Having any interest, financial or otherwise, direct or indirect, or engaging in any business or transaction or professional activity that is in substantial conflict with the proper discharge of the covered individual's duties in the public interest.

ii) Accepting other employment that will impair his or her independence or judgment in the exercise of his or her official duties.

iii) Accepting employment or engaging in any business or professional activity which will require the covered individual to disclose confidential information which he or she has gained by reason of his or her official position or authority.

iv) Disclosing confidential information acquired by the covered individual in the course of his or her official duties or using such information to further his or her personal interest.

v) Using or attempting to use his or her official position to secure unwarranted privileges for the covered individual or others.

vi) Engaging in any transaction as representative or agent of the state with any business entity in which the covered individual has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of the covered individual's official duties.

vii) Giving a reasonable basis, by reason of the covered individual's conduct, for the impression that any person can improperly influence the covered individual or unduly enjoy his or her favor in the performance of the individual's official duties, or that the individual is affected by the kinship, rank, position or influence of any party or person.

4. Requires covered individuals to abstain from investing in enterprises which he or she has reason to believe may be directly involved in decisions to be made by him or her or which will otherwise create substantial conflict between the covered individual's duty in the public interest and the individual's private interest.

C. §73-a Public Officers Law - Financial Disclosure

1. Requires the filing of an annual statement of financial disclosure by covered individuals with the State Ethics Commission on a form provided by the State Ethics Commission on or before the fifteenth of May, covering the preceding calendar year.

2. Covered individuals are members or directors of public authorities, other than multistate authorities, at least one of whose members is appointed by the Governor, and employees of such authorities who receive annual compensation in excess of the applicable filing rate, or who hold policy-making position as determined annually by the appointing authority.

3. Provides that State Ethics Commission may seek the imposition of civil or criminal penalties for a failure to file.

D. Ethics Commission Regulations (19 NYCRR 932.5) (Code of Ethics for uncompensated and per diem directors, members and officers)

1. Requires public authorities and public benefit corporations whose members or directors are not subject to section 73-a of the Public Officers Law to adopt a code of ethical conduct covering conflicts of interest and business and professional activities, including outside activities, of such directors, members or officers both during and after service with such public authorities and public benefit corporations.

2. Directors should be familiar with the Code of Conduct for their respective authorities or public benefit corporations, and comport their behavior with its requirements.

E. Ethics Commission Generally - Interaction with Directors

1. Commission renders advisory opinions interpreting and applying the laws pertaining to present and former State officers and employees.
2. Issues rules and regulations to implement and enforce the Ethics in Government Act.
3. Consults with directors on a formal or informal basis with respect to ethics and conflict of interest issues.

V. Open Meetings Law (§103 Public Officers Law)

A. Requires that every meeting of a public body shall be open to the general public, except business may be conducted in executive session, for a purpose enumerated in the statute.

B. Permits videoconferencing, but requires provision of opportunity for the public to attend, listen and observe at any site at which a member participates.

C. Allows for the conduct of executive sessions of the board to consider the following subjects:

1. Matters which will imperil the public safety if disclosed;
2. Any matter which may disclose the identity of a law enforcement agent or informer;
3. Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
4. Discussions regarding proposed, pending or current litigation;
5. Collective negotiations pursuant to article fourteen of the civil service law;
6. The medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
7. The preparation, grading or administration of examinations; and
8. The proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

VI. Freedom of Information Law (Article 6 Public Officers Law)

A. Requires public authorities and public benefit corporations to promulgate rules and regulations pertaining to the availability of records and procedures to be followed to gain access to such records.

B. Requires access to all documents in possession of public authority except those specifically excepted by the statute.

VII. Public Authority Accountability Act of 2005 (S. 5927) (Awaiting Governor's Signature)

A. Covered entities include state authorities and public benefit corporations with one or more member appointed by the governor, and active subsidiaries thereof, local authorities, interstate or international authorities and affiliates of public authorities and public benefit corporations.

B. Provides that no board member or board chairman may serve as CEO or in any other senior management position in the authority. The statute amends those public authority enabling statutes that provided that the Chairman may be the CEO.

C. Provides that boards have responsibility to:

1. Oversee the CEO and other senior management in the effective and ethical management of the authority;
2. Understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority; and establish a compensation and attendance policy;
3. Adopt a defense and indemnification policy; and
4. Participate in state approved continuous training.

D. Requires that a majority of board members be "independent". They cannot be:

1. Employed by the authority currently or within the past 2 years.
2. Employed by an entity currently or within the past 2 years that has had business with the authority in an amount exceeding \$15,000.
3. A relative of an executive officer or employee in an executive position.
4. A lobbyist who has had business with the authority in the previous two years.

E. Requires all directors to file financial disclosure statements.

F. Provides that no authority or board may offer a loan to any officer, board member or employee of an authority.

G. Requires the establishment of an audit committee of the board, with members that to the extent practicable are familiar with corporate financial and accounting practices.

H. Requires the establishment of governance committees of the board, which shall be responsible to review corporate governance trends, keep the board informed of best

governance practices, update governance principles and advise appointing authorities on the skills required of potential board members.

I. Requires authority annual reports supplied to the Governor and Legislature to include certain enumerated information, including a debt schedule, a compensation schedule and a list of all property held by the authority.

J. Requires authorities to submit budget reports 90 days prior to commencement of the new fiscal year, which report shall include information on operations and capital construction setting forth the estimated receipts and expenditures for the next and current fiscal year, and the actual receipts and expenditures for the last completed fiscal years.

K. Requires annual independent audits of authorities, and prohibits auditing firms from performing any non-audit services. Requires that auditor must not have been a member of the authority's senior management within its employ one year prior to performing the audit, and that audit partners be rotated every five years.

L. Establishes procedures for the disposition of real property, including requiring the designation of a contracting officer who will be in charge of compliance with the contracting policy of the authority.

M. Provides that authorities may dispose of property for fair market value after publicly advertising, to the responsible bidder whose bid will be most advantageous to the state, price and other factors considered.

N. Permits negotiated transactions or public auctions without public advertising if the fair market value of the property does not exceed \$15,000, the disposal will be to the state or any political subdivision, the disposal is for less than fair market value and the disposal is intended to further public health, safety, welfare, or an economic development interest of the state or political subdivision.

O. Requires the establishment of an Authority Budget Office by the Governor to review and analyze the operations, practices and reports of the authorities to assess their compliance with this law, maintain an inventory of authorities and subsidiaries, assist authorities to improve their management practices and financial disclosure procedures, and make recommendations to the Governor and legislature of opportunities to improve their performance.

P. Codifies the Office of the State Inspector General, whose term shall last until the term of the governor who appoints him or her or until a successor is appointed.