

## TOPIC PAPER NUMBER 1

### SHOULD PUBLIC AUTHORITY BOARD MEMBERS BE SELECTED BASED UPON EXPERTISE

Prepared on Behalf of The Public Authority Project  
Government Law Center of Albany Law School

By  
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#### **Introduction**

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

Over the past two years more than 340 board members have attended training programs provided by the GLC and received the required certification. During the programs, board members discussed their concerns and questions about the fiduciary and operational issues confronting the boards of public authorities.

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

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

#### **The Issue: Selection of Candidate Board Members**

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

#### **Observation**

In New York State, board members of State public authorities are appointed for fixed terms and, by design, not directly accountable to elected officials or responsive to political cycles. Board members are not subject during their service to removal by the electorate or, absent cause, by the

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appointing authority. The board members are expected to (i) have greater independence from their appointing officials than are commissioners or heads of agencies, (ii) strike a balance between political independence and political accountability, and (iii) be sufficiently independent to make difficult and sometimes unpopular decisions outside the arena of elected politics. Boards of public authorities are held accountable to both elected officials and the public through their measure of service and financial performance.

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

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

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

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

- Appointments to the State Court of Appeals are required by statute to be the product of a merit selection process. The Commission on Judicial Selection examines each candidate’s qualifications and provides a written report and recommendations to the

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governor. Only those candidates deemed “well qualified based upon their temperament, character and experience” are recommended for appointment to the governor.

- When not required by statute, governors have nonetheless chosen to use Judicial Screening Committees to ensure that appointees “are of the highest quality.” Thus, for example, continuing this tradition of merit selection, Governor Patterson promulgated Executive Order Number 8, continuing the State Judicial Screening Committee, Screening Committees in each judicial department and the County Judicial Screening Committees.

#### **Consideration**

It may be appropriate to consider expanding the existing appointment process used for public authority board members to include some of the aspects of the process used to evaluate qualified judicial applicants. The following approach may merit consideration:

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

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

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