New York State Public Authority Reform: Where We Have Come From and Where We Need to Go

By Lynn Wilson and Clayton Eichelberger

Introduction

Governments have engaged entities similar to public authorities for centuries to conduct public business, particularly for financing capital needs. New York is no exception; since 1921, when the first public authority was created in New York State, the use of these entities has been prolific in this State.

However, in addition to the important projects and purposes these authorities were created to advance, public authorities have become known as the State's "shadow government," often operating outside of their original purpose and creating a virtually independent arm of government. These entities develop, operate and maintain some of New York's most critical infrastructure while, at the same time, avoiding the mechanisms that provide oversight and transparency to the operations of traditional government agencies. This has resulted in a call from many, including, in 2007, State Comptroller Thomas P. DiNapoli, who outlined a comprehensive approach for fiscal and public authority reform to restore accountability for authority actions to the taxpayer and eliminate authority abuse of operational flexibility.

The role of many authorities has been expanded over time, extending beyond the authorities' core missions. This has resulted in imprudent practices such as the use of "backdoor borrowing"—debt not approved by voters which the State is expected to provide the funds for repayment subject to annual appropriation—for a variety of uses beyond the initial purpose of an authority. There is no better known example of this type of practice than the 1991 sale of a State prison, Attica, to the Urban Development Corporation, which then leased the prison back to the State. The proceeds of the sale were used simply to balance the State budget that year.

Despite prior reform efforts, which did little to contribute to the transparency and accountability necessary for effective, financially stable State government, many of these practices continued to undermine the State's fiscal position. In the case of backdoor borrowing, by 1985, over 60 percent of the State's outstanding debt was issued by authorities. Between 1985 and 2009, State-funded debt supported with State revenues and issued by authorities increased from $5.7 billion to $53.7 billion, representing an average annual increase of nearly 9 percent. In 2009, authority debt made up 94 percent of State debt outstanding. Furthermore, previous efforts at public authority reform have not adequately reinforced the fiduciary duty of board members or tightened controls over procurement practices.

The 2009 Brodsky / Perkins Public Authority Reform Bill, which was recently passed by both houses of the Legislature, would, if signed into law by the Governor, enhance authority monitoring by restructuring the Authority Budget Office (ABO) and giving the office powers which allow it greater oversight of the operations and finances of authorities.[1] The newly reconstructed ABO would also conduct a thorough review of the number, types and purposes of public authorities and the potential redundancies in services. To further enhance Authority oversight, discretionary authority would be given to Comptroller DiNapoli's Office to review and approve certain authority contracts. While this bill makes great strides toward improving the accountability and transparency of authority operations, as Comptroller DiNapoli indicated in his *Report on the State Fiscal Year 2009–10 Enacted Budget*,[2] additional measures may be needed to improve long-term capital planning, restore voter control and approval for debt supported with tax dollars, and increase control over the State's debt load by comprehensively defining debt and applying caps to the revised definition. While the 2009 Brodsky / Perkins Public Authority Reform Bill demonstrates a commitment to change, continued diligence is needed to ensure transparency and accountability remain a priority.[3]

What Are Public Authorities?

Public authorities are corporate instruments of the State created by the Legislature to further public interests. Unlike traditional state agencies, many authorities conduct business outside of the typical oversight and accountability requirements for operations including, but not limited to, employment practices, contracts and procurement procedures, and financial reporting. Each public authority is governed by a separate board of directors appointed by elected officials for varying terms of office.

Public authorities have various levels of autonomy from the State based on the powers, as well as the constraints, built into their legislative mandate. Some public authorities are completely self-supporting and operate entirely outside the budget process, while others rely on

State appropriations to fund operations. In addition, most authorities are authorized to issue bonds—without voter approval—to develop and maintain infrastructure, such as roads and schools, or to fund projects for third parties, including hospitals and nursing homes. The debt service for these bonds is usually supported by revenues of the project, such as tolls that are levied by the authority, fees paid by the third party or appropriated payments from the State to repay outstanding debt. The State has also assigned specific revenue streams to an authority as a way for the authority to pay debt service.

The ability of public authorities to issue bonds without voter approval has been used in New York to support initiatives not necessarily associated with a specific project or authority. This debt is supported by a contractual agreement with the State to pay the authority an amount equal to debt service and is referred to as backdoor borrowing. Approximately 94 percent of the long-term debt outstanding for which the State is responsible has been issued by a variety of public authorities with such a contractual agreement by the State.

New York State currently has over 1,000 State and local public authorities created either in statute or as subsidiaries of other authorities. The Office of the State Comptroller categorizes these authorities into four major classifications:

- **Public authorities with statewide or regional significance**, such as the Urban Development Corporation or the Metropolitan Transportation Authority. There are currently over 250 of these authorities.
- **Entities affiliated with a State agency or created by the State** that have limited jurisdiction but with a majority of board appointments made by the Governor or other State officials or that would not exist but for their relationship with the State, such as the Erie County Medical Center Corporation or the SUNY Auxiliaries. There are 70 of these authorities.
- **Authorities with local jurisdiction**, which include local development corporations and industrial development corporations. At present, New York State has over 750 such authorities.
- **Entities with Interstate or International jurisdiction**, such as the Port Authority of New York and New Jersey. There are eight of these authorities, including subsidiary corporations.

Historical Perspective

Public Authorities in New York State were created primarily as a means to circumvent an 1846 constitutional amendment requiring voter approval of State debt. This amendment came as a result of a series of state financial decisions to build public infrastructure that left New York $38 million in debt by 1846.[4] The use of public debt nationwide to support large public infrastructure projects was inspired by the successful completion of the Erie Canal in 1825, which had been funded by debt issued by New York State. It was the canal's success which led states across the country to begin selling municipal bonds to finance public works projects.[5] However, just as many of these projects were in progress, the economic panic of 1837 and subsequent depression occurred, resulting in a substantial decline in the rate of return on the states' investments.[6] New York's largest exposure at the time of the panic was a $3 million credit line to the Erie Railroad Company. The Erie Railroad Company, like other companies during the period, then defaulted on the line of credit, leaving the financial burden on the State, as well as rail beds that were largely worthless.[7]

While several other states defaulted on their debts, New York was not among them. Instead the State, like numerous others, proposed constitutional amendments in 1846 to curtail the amount and the way the State could issue debt.[8] These revisions significantly limited what the Legislature and State government could do independently, including restrictions on the purposes for which debt could be issued and the requirement of voter approval of debt. Notably, in 1846 the New York State Constitution, Article VII § 9 was amended and stated, "[t]he credit of the state shall not, in any manner, be given or loaned to or in aid of, any individual, association, or corporation."[9] In addition, § 12 of the same article of the New York State Constitution affirms, "[n]o such law [which creates debt] shall take effect until it shall at a general election have been submitted to the people and have received a majority of all the votes cast for and against it at such election."[10]

With these provisions in place, the State's voters would be responsible for the approval and payment of State debt. Eventually, however, the increasing demand for infrastructure and services to support the State's growing urban centers required an alternate approach to development which could be supported by project revenues. Public authorities were introduced as a vehicle to fill that role.

The first authority in New York State, the Port Authority of New York, now known as the Port Authority of New York and New Jersey, was created in 1921 by congressional compact. The use of public authorities continued to grow in the decades that followed as New York created additional authorities, including eleven in 1933 alone.[11]

Responding to increasing concern regarding the growing number of public authorities, their operations and, most importantly, the State's potential liability for public authority debt, the 1938 Constitutional Convention sought to provide additional controls. A constitutional amendment provided that public authorities were to be created only by a special act of the Legislature, required the State Comptroller to supervise the accounts of public authorities and stated that public authority debts were not an obligation of the State or local governments.[12]

In response to the restrictions on debt imposed in 1938, the State entered into its first lease-purchase financing agreement with the Dormitory Authority of the State of New York in 1944.[13] The Dormitory Authority would issue bonds to build dormitories and the State would annually appropriate money to make lease payments, which would be used by the Dormitory Authority to pay debt service on the bonds. Since lease-purchase agreements are contractual obligations, it is the expectation that the State will make the rental payments necessary to support debt service. Once the bonds are paid, the title of the properties reverts to the State. Use of this type of financing arrangement would continue to grow throughout the 1950s and the 1960s.

In 1951, a constitutional amendment provided for the State to guarantee up to $500 million of authority bonds. Taking advantage of this change, the Thruway Authority (TA) issued $250 million of State guaranteed bonds in 1953. These bonds did not, however, cover the cost of the numerous projects the TA had begun. This deficit was addressed on April 7, 1954 when Governor Dewey signed legislation allowing the TA to issue additional revenue bonds, above and beyond the amount guaranteed by the State.[14]

The legislation avoided the bond cap restrictions by considering these bond issuances as "non-guaranteed." "Non-guaranteed" bonds, at the time, were not considered to place a debt burden on the State but they also held a prior claim to any revenues of the authority. This provision allowed the TA to issue an additional $350 million by 1956 in "non-guaranteed" revenue bonds, which, if counted, would have brought the amount of bonds issued over the $500 million cap.[15]

The use of lease-purchase financing and the concept of State-backed debt was a precursor to the shift in the nature of public authorities that occurred in the 1960s. In a 1967 report, the State Comptroller noted, "In the newer financial-type authority, the authority finances the construction of facilities but does not operate the facility, and derives its revenue through lease-purchase payments made by the State out of earmarked revenue."[16] The Housing Finance Agency (HFA) was created in 1960 for the purpose of building middle income housing. The HFA was authorized to issue bonds to be repaid with revenues of the agency and was required to establish a reserve fund equivalent to one year's debt service. If the revenues of the agency were not sufficient to cover debt service, HFA would call on the State to replenish the reserve fund. While not a legally enforceable obligation, these bonds were considered a "moral obligation" of the State.[17]

The use of public authorities to issue debt backed by State revenues continued to grow in this manner during the 1960s due to a number of proposals for general obligation bonds that were not approved by New York voters. The use of lease-purchase agreements and moral obligation financing proliferated. Following the formation of HFA, legislation was enacted in 1962 creating the State University Construction Fund and, in 1968, the Urban Development Corporation (UDC) was created.

In several annual reports and studies on public finance issued in the 1960s, the State Comptroller cautioned against the increasing use of these financing methods. In the 1963 *Annual Report of the State Comptroller*, the Comptroller cautioned, "The financial community regards the obligations created through these methods of financing as carrying the moral commitment of the State. The financing costs are higher than if State-issued bonds were used to pay such construction costs."[18]

In a 1972 study on public finance issues, the Comptroller examined the interdependence between the State and its public authorities, and the idea of public authorities as a "fourth branch of government" began to gain momentum.[19] In the letter to the Legislature accompanying this report, State Comptroller Arthur Levitt stated, in regard to public authorities, "Nor are they necessarily self-sustaining—as a group, they have already received heavy assistance from the general taxpayer, and the commitments they are making may result in substantial future calls upon the tax dollar. It is clear that any true picture of public sector activity within the State must include the services performed by authorities. This argues for a closer tie-in with the State budgetary process and with all fiscal planning."[20]

In 1975, UDC was in danger of defaulting on $105 million in short-term debt. The risk of default, as well as the increasing use of short-term borrowing to address cash flow problems at the State and New York City levels, prompted the investment community to push the State to change its debt issuance practices. Bankers and investors refused to market the State's short-term notes until the State capped the issuance of debt with moral obligation provisions. In addition, the problems at UDC highlighted the need for more accountability in both State and City debt practices. As a result, the Public Authorities Control Board was created to review projects proposed by certain authorities at the State level and the State took actions to control New York City's financial issues.

Limitations on the use of moral obligation debt, included in legislation enacted in 1976 in response to the UDC crisis, resulted in the creation of an alternative mechanism, the "service contract obligation." Service contracts represent an agreement by the State to pay an amount equal to debt service to an authority for a project or projects. The payments are subject to annual appropriation and reflect a contractual, not a moral, obligation. Although lease-purchase agreements reflect contractual obligations, service contracts differ in that the asset being financed is not part of the payment guarantee. The asset being financed always belongs to the State, whereas in a lease-purchase arrangement, the asset is held by the authority and reverts to the State when the bonds are satisfied.

Debt Reform Act of 2000

To address the State's growing debt burden, Chapter 59 of the Laws of 2000, known as the Debt Reform Act of 2000, added Article 5-B to the State Finance Law. The provisions of this article established statutory limitations, phased- in, beginning April 1, 2000, on State-supported debt. The legislation included three key provisions:

- Cap new debt issued after April 1, 2000 at 4 percent of personal income. The cap is phased in over 10 years and fully implemented by SFY 2010-2011.
- Cap debt service on new debt issued after April 1, 2000 at 5 percent of all funds receipts. This cap is phased in over 13 years and fully implemented by SFY 2013-2014.
- Provide that debt can only be used for capital works or purposes and that State-supported debt cannot have a maturity longer than 30 years.

Unfortunately, the Debt Reform Act did not provide sufficient fiscal discipline or ensure that future debt is affordable. The definition of State-supported debt counted under the caps does not include all borrowing that is funded with State resources. In 2005, the Office of the State Comptroller created a new definition of debt financed by the State that is more comprehensive than the existing statutory definition. The Comptroller's definition of State-funded debt includes general obligation bonds and other State-Supported debt, as defined by Section 67-a of the State Finance Law, as well as obligations associated with the following: bonds issued by the Tobacco Settlement Financing Corporation (TSFC) to securitize the State's tobacco settlement revenue stream; bonds issued by the Sales Tax Asset Receivable Corporation (STARC) to refinance New York City's Municipal Assistance Corporation (MAC) debt from the 1975 fiscal crisis; bonds issued by the Municipal Bond Bank Agency (MBBA) to amortize prior year school aid claims; and, most recently, Building Aid Revenue Bonds (BARBs) issued by New York City's Transitional Finance Authority (TFA).

Using this definition:

- New York's current State-funded debt outstanding is approximately 6 percent of personal income.
- New York's total current debt service costs for State-funded debt outstanding, including pre-2000 debt, average approximately 4.5 to 5 percent of all governmental fund receipts.

The sale of the State share of tobacco settlement revenue also illustrates the ineffectiveness of the Debt Reform Act of 2000 caps. Over $500 million in State resources annually supports the debt service on the remaining $3.6 billion in tobacco bonds, issued by the TSFC. This Corporation was established solely to purchase the State's portion of tobacco settlement revenues through debt backed by the revenues. The debt was issued outside of the parameters defined in the Debt Reform Act of 2000 as it did not support a capital purpose, and it is paid with the revenues originally used to fund State health care needs from the 1998 Master Settlement Agreement.[21] As a result, the State has had to replace tobacco settlement dollars to continue financing health care needs.

Furthermore, the Debt Reform Act of 2000 did not include the roughly $35 billion in debt outstanding that existed at the time of its enactment under the statutory caps. If these existing obligations had been included, the State's debt caps would have been exceeded at the time the Reform Act was signed into law.

Another inherent weakness of the Debt Reform Act of 2000 is that the imposed caps are statutory and not constitutional. Consequently, provisions are more easily avoided or "notwithstood" in the face of budgetary or other pressures. While the cap currently stands as originally enacted, there have been several legislative authorizations for debt issuances not included under the Act's cap. In addition, the Debt Reform Act of 2000 preserves backdoor borrowing by public authorities on behalf of the State.[22]

In certain instances, debt management changes, such as the authorization for Personal Income Tax (PIT) Revenue bonds, have made authority-issued debt more attractive than General Obligation (G.O.) debt. At present, PIT Revenue bonds have split ratings from the rating agencies with Standard & Poor's giving these bonds the highest rating (AAA), currently higher than G.O. bonds. In addition, public authorities generally have less restrictive issuance and repayment provisions, which may not result in the most prudent debt management practices.

Public authorities continue to play a significant role in the debt structure of New York State. Currently, over 94 percent of all State-funded debt outstanding was issued by public authorities without voter approval. The State Fiscal Year (SFY) 2009-10 Enacted Budget continues to rely heavily on public authorities to issue debt to finance capital projects and to supplement general spending. The rate of issuance for State-supported debt is projected to increase by 50 percent during the five-year period ending SFY 2013-14.[23]

Authority Accountability and Oversight

Public authorities are not subject to the same oversight and accountability standards required of State agencies. Over the years, audits and investigations by the Office of the State Comptroller have revealed serious ethical and legal violations, as well as financial mismanagement, by public authorities.

In 1991, a Manhattan District Attorney's office investigation of union corruption involving the Jacob Javits Convention Center Operating Corporation led to twenty-three indictments, including extortion and falsifying names and Social Security numbers. This was uncovered when exhibitors at the Jacob Javits Convention Center complained of high labor costs and the use of "featherbedding"—the practice of requiring an employer to hire more workers than needed.

A 1995 audit of the Olympic Regional Development Authority (ORDA) by the Office of the State Comptroller revealed that the Executive Director of ORDA engaged in nepotism, contracted with firms in which he was a partial stakeholder, and approved raises for himself and others beyond what was allowed in contracts or by board policy.

A 2003 audit of the Metropolitan Transportation Authority's (MTA's) finances revealed that the Authority hid more than half a billion dollars in the 2002 budget by maintaining two sets of financial plans—one that was publicly disclosed, the other that was kept internally. The Comptroller's budget review found that the MTA was shifting surplus between years, thus showing a smaller surplus or creating a deficit in the out-year plans. In addition, the MTA justified the need for a fare increase by referencing these misleading financial plans. More recently, Comptroller DiNapoli has issued a series of reports on the MTA designed to provide information to taxpayers and decision makers regarding the financial condition and outlook of the Authority.

Also in 2003, the President of Roosevelt Island Operating Corporation granted bonuses to himself and fourteen other staff members without board approval.[24] More recently, a 2008 audit of the New York State Thruway Authority's Capital Plan, conducted by the Office of the State Comptroller, found that information on capital plan projects was not provided in its entirety to the Authority's Board of Directors, State policymakers or the public for review. In addition, the audit concluded that completing its $2.7 billion capital plan will take the Authority longer and cost substantially more than was originally forecast in 2005.[25]

More recently, the use of public authorities has been stretched beyond the purposes for which they were originally intended. The SFY 2009-10 Enacted Budget authorizes over $350 million in transfers from public authorities to provide General Fund support for State programs and purposes. In addition, the level of backdoor borrowing, which is not approved by voters, has continued to rise. As the purposes of authorities have expanded over the years, so have questionable management practices. The result has been rising employee compensation levels, bonus payments, and procurement practices and expenditure controls that are less stringent than those required of State agencies.

In a 2006 audit of internal controls over financial operations, the Office of the State Comptroller found that the Albany Port District Commission (The Port) awarded a number of contracts without competition. The Port did not document the reasons for the non-competitive awards or obtain formal Board approval to conduct a non-competitive award process. In another instance, the Port continued to pay monthly marketing services bills even after the contract had expired and was not renewed or extended.[26]

As a result of proposed toll hikes by the New York State Thruway Authority, Comptroller DiNapoli commenced an audit in November 2007 to determine if the proposed increases were necessary. One of the audit findings suggested that rapid increases in the percentage of revenue necessary to cover operating costs should have indicated the need for expense-reduction plans instead of rate hikes.[27]

In addition, political influence and lobbying have been an ongoing issue with regard to public authorities whose board members are largely appointed by the Governor and other elected officials. In 2002, the HFA approved $100 million in tax-free bonds to be granted to each of three luxury housing projects. Two of the developers of the projects had made campaign contributions exceeding $458,000 to candidates on the State level and $221,000 on the city level.[28]

Public Authorities Accountability Act of 2005

Largely as a result of decades of allegations ranging from the unethical to the illegal, Governor George Pataki formed the New York State Commission on Public Authority Reform (Commission) in 2004. The Commission was charged with making recommendations to improve the operations, governance practices and accountability of public authorities. Also in 2004, the Governor established the Public Authorities Governance Advisory Committee (Committee) to help public authorities implement "Model Governance Principles" based on corporate governance "best practices" and the requirements of the Federal Sarbanes-Oxley Act of 2002.

As a starting point, in 2005 the State Comptroller introduced an expansion to existing regulations to increase the accountability and improve the transparency of public authority operations. In March 2006, the revised regulations were adopted. The regulations enhanced budget and financial plan reporting requirements, expanded reporting and supervision requirements to include all State and major regional public authorities, required authorities to establish investment guidelines and implemented corresponding oversight measures. In addition, reporting requirements for authorities that issue State-supported debt were added. The new regulations required reports on debt issuance within fifteen days of issuance, as well as quarterly summaries of debt issued pursuant to statutory authorization.

Meanwhile, a reform proposal submitted by the State Comptroller, Attorney General and members of the Assembly was later introduced and signed by Governor Pataki in 2006.[29] The Public Authorities Accountability Act of 2005 (Act) contained extensive changes to existing

Public Authorities Law. Many of the provisions of the Act reflected the recommendations of the Commission.

The Act clearly defined public authorities as State, local, interstate or international and also defined what constitutes an affiliate or subsidiary of an authority. More importantly, the Act made comprehensive changes to governance, reporting, auditing standards and property transactions. In addition, the Act established the Authority Budget Office (ABO) and codified the Office of the State Inspector General (State IG), which had previously been established by Executive Order. The Act outlined the conditions under which the State IG would have jurisdiction over public authorities.

The governance provisions of the Act established that board members should be independent, are prohibited from accepting personal loans from the authority and are prohibited from serving as Chief Executive Officer (CEO) or any other senior management position while serving on the board of the same authority.

The roles and responsibilities of board members were more explicitly described as well. Board members are required to oversee the CEO and senior management of the authority, monitor the implementation of financial and management controls, and establish policies regarding salary, time and attendance of the CEO and senior management. In addition, the board must implement a code of ethics for all officers and employees, and establish protections for whistleblowers.

Provisions were also added to require each board to create an audit committee, the members of which should be familiar with corporate financial and accounting practices, and a governance committee. The Act also altered the structure of several specific authority boards by increasing the number of members required.

Compliance reporting was expanded to include a schedule of debt, a compensation schedule, information on projects commenced during the fiscal year, data on real property disposal and internal controls assessments. The Act also required that public authorities make their most recent annual budget and audit reports available on the Internet. These requirements were expanded to include local authorities as well.

Independent audit standards were enhanced to require the rotation of the auditing firm or lead partner every five years and to prohibit the use of the firm for non-audit services unless prior written approval is granted by the audit committee. The new provisions also prohibit any audit firm that employed the CEO, Chief Financial Officer, Controller or Chief Accounting Officer in the year preceding the audit from performing the authority audit. These audit standards were extended to include local authorities.

The Act also addressed the disposition of property by public authorities. Over the years, instances of serious mismanagement of authority property likely led to the property reforms contained in the Act. In 2003, the Canal Corporation awarded exclusive land use rights to a single bidder, who had contributed $6,000 to the gubernatorial campaign, without soliciting additional bids. The exclusive development rights were sold for $30,000. Provisions in the Act require the authority to have property disposition guidelines and to publish those guidelines on the internet. In addition, each authority is required to maintain an inventory of all property, publish an annual report of property to be disposed of and hold public bidding for all sales, except under certain circumstances.

In order to address the lack of oversight and accountability historically associated with public authorities, the Act created the ABO. The ABO was granted the power to review and analyze authority operations, practices and reports to ensure compliance. In addition, the ABO was authorized to make recommendations to the Governor and Legislature regarding opportunities to improve the performance, structure and oversight of authorities, and to maintain a comprehensive inventory of all authorities and subsidiaries and the annual reports of authorities. The Act also empowered the ABO to assist authorities in improving management and disclosure practices.

Even after the Act was signed into law, the Commission continued its work. In May 2006, the Commission released its final report which recommended new legislation, in addition to the 2005 Act, to reform various aspects of public authority governance, operations and oversight. The report highlighted several areas where the Commission believed the Act fell short.

The Commission recommended several enhancements to the Act related to disclosure, board member qualifications and the ABO. The most significant proposals related to strengthening the fiduciary duty of board members, suggesting that the ABO develop an oath to be executed by board members pledging to adhere to the authority's mission.

In response to a need for greater accountability and transparency through more timely data collection and analysis, the Office of the State Comptroller developed the Public Authorities Reporting Information System (PARIS). The system was fully implemented under the leadership of Comptroller Thomas DiNapoli in November 2007 and is jointly managed by the Comptroller's Office and the ABO. Public authorities have reported nearly $28 billion in budgeted expenditures for fiscal year end 2009. In addition, over $27 billion in actual expenditures were reported in PARIS for fiscal year end 2007.

2009 Public Authority Reform Legislation

Reform legislation passed in recent years, including the Debt Reform Act of 2000 and the Public Authorities Accountability Act of 2005, represented important steps to control the State's increasing debt and improve oversight, accountability and transparency for public authorities, but more remained to be done.

During the 2009 legislative session, both houses of the Legislature passed public authority reform legislation (A.2209-C Brodsky / S.1537-C Perkins) with the goal of providing more oversight while also requiring more accountability from the authorities.[30] Comptroller DiNapoli has noted that this bill is the first major step toward public authority reform the State has seen in years. This bill, if signed by the Governor, would restructure the existing Authority Budget Office (ABO) and would charge the ABO with several important roles, including:

- Conducting reviews and analyses of the operations, practices and reports of public authorities;
- Maintaining a comprehensive inventory of authorities;
- Verifying the existence of and looking for opportunities to consolidate or clarify names of certain authorities;
- Promulgating regulations to effectuate the provisions of the bill.

The ABO would also be authorized to undertake in-depth investigations, request additional data or reports, make recommendations to State officials on numerous authority practices and suggest additional reform measures. In addition, the ABO would be empowered to issue subpoenas and commence special proceedings in New York State Supreme Court if an authority fails to comply with the ABO's requests for information to perform its duties. Perhaps most importantly, the ABO would be granted the power to publicly warn and censure non-compliant authorities.

This bill would also strengthen and reinforce the importance of independence, loyalty, care, commitment to the authority mission and fiduciary duty of authority board members by requiring each board member to execute an acknowledgement of these duties upon taking their oath of office.

While the ABO is given significant new roles and powers under the Brodsky / Perkins bill, Comptroller DiNapoli's Office would also take on new roles and responsibilities in relation to the authority procurement process. The new bill would give the Office of the State Comptroller the discretion to review certain contracts prior to publication for bid or proposal. The purpose of this process is to ensure that higher dollar amount contracts that may become a fiscal burden on the State are deemed prudent, reasonable and necessary.

While the Brodsky / Perkins Public Authority Reform Bill would close many of the gaps that currently allow some authorities to avoid the accountability and transparency to which taxpayers are entitled, opportunities for improvement may still exist.

The Future of Reform

The 2009 Brodsky / Perkins Public Authority Reform bill should be viewed as a catalyst for continued long-term change in New York's fiscal policy. While many practices of public authorities have largely been addressed in both the 2005 Accountability Act and this 2009 legislation, other complex, interrelated issues still exist. Comptroller DiNapoli has consistently commented that the State's dependence on backdoor borrowing through public authorities remains a hindrance to the State's future fiscal health. In addition, the Comptroller has indicated that the lack of strategic capital expenditure planning processes puts the State's budget at risk each year and, even more importantly, puts critical infrastructure needs at risk as well.

As a first step, Comptroller DiNapoli recommends that a comprehensive definition of debt, as well as a meaningful debt cap, must be established. The existing definition of State debt for purposes of the current debt cap includes some, but not all, categories of debt backed by State resources. As a result, the State's outstanding debt burden is under-represented to citizens and policymakers. A comprehensive definition of debt—State-funded debt—would provide the basis for a comprehensive evaluation of the State's long-term debt burden. The comprehensive State-funded debt definition would include all instances whereby the State makes payments with State resources directly for General Obligation (G.O.) bonds or indirectly to a public authority, bank trustee or municipal issuer to enable them to make payments on debt issued for State purposes. The Office of the State Comptroller has used such a definition since 2005 to more accurately account for all such debt outstanding. A new cap on total allowable debt outstanding based on an all-inclusive debt definition would improve transparency in decisions and provide a better sense of affordability as it relates to available borrowing capacity.

Comptroller DiNapoli has also called for the elimination of backdoor borrowing to restore control over debt issuances to the taxpayers. Backdoor borrowing should be replaced with voter approved debt issued by the State Comptroller, including a new category of State-issued debt backed by specific revenues. Backdoor borrowing limits accountability and transparency by circumventing public participation and transferring control over the spending of billions of taxpayer dollars to largely autonomous public authority boards. Reform should also include the authorization to propose more than one bond referendum to the voters annually to better allow for long-term capital planning and to ensure all critical needs are addressed.

But debt reform by itself is not sufficient to ensure a more balanced and stable fiscal future. The Comptroller has proposed a comprehensive process to evaluate long-term capital needs to ensure that the highest priorities are addressed first. The process for selecting capital projects, which are often supported by debt, results in pressure to add spending and/or debt for projects that have not been prioritized based on current and future needs. While agencies prepare multi-year plans for capital spending, these rarely extend more than five years with no independent assessment of competing priorities. A systematic capital needs assessment and long-term strategic capital plan, including the State's infrastructure needs for transportation, energy, higher education facilities or economic development projects, would ensure a more effective prioritization to aid decision-making.

As the State faces unprecedented fiscal challenges, it is imperative to improve the transparency and accountability of its component public authorities which have, for too long, been a shadow government existing outside of customary public oversight and control. It is time to return public authorities to their core mission, restore control over State-funded authority debt to New York's taxpayers and expose authority operations to systematic oversight. While public authorities provide important services and support for New York's critical infrastructure, lasting reform will help the State ensure long-term fiscal stability, affordability and transparency.

Endnotes

1. *See* S.1537-C, 232nd Sess. (N.Y. 2009); *see also* A.2209-C, 232nd Sess. (N.Y. 2009) [*hereinafter* S.1537-C/A.2209-C].
2. Thomas P. DiNapoli, Report on the State Fiscal Year 2009-10 Enacted Budget (2009), *available at* http://www.osc.state.ny.us/reports/budget/2009/rptenactedbudget09_10.pdf.
3. A.2209-C (2009).
4. William J. Quirk & Leon E. Wein, *A Short Constitutional History of Entities Commonly Known As Authorities*, 56 Cornell L. Rev. 521, 526 (1971).
5. *Id.*
6. M. David Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 Minn. L. Rev. 545, 546 (1979).
7. Quirk & Wein, *supra* note 4, at 527.
8. D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L. Econ & Org. 62, 62-93 (1996).
9. N.Y. Const. art. VII, § 8 (amended 1966).
10. *Id.* at § 12 (amended 1993).
11. Office of Budget & Pol'cy Analysis, Office of the State Comptroller, Public Authority Reform: Reining in New York's Secret Government 7 (2004), *available at* http://www.osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf.
12. Peter J. Galie, The New York State Constitution: A Reference Guide, 227 (1991).
13. Temp. State Comm. on Coordination of State Activities, Staff Report on Public Authorities Under New York State 22 (1956).
14. *Id.* at 34.
15. *Id.*
16. Office of the State Comptroller, Study No. 4, Public Authorities in New York State: A Financial Study, Comptroller's Studies for the 1967 Constitutional Convention 2 (1967).
17. New York State Div. of the Budget, The Executive Budget in New York State, A Half-Century Perspective 121–23 (1981).
18. Office of the State Comptroller, Annual Report of the Comptroller 3 (1963).
19. Office of the State Comptroller, New York State Comptroller's Studies on Issues in Public Finance, Statewide Public Authorities: A Fourth Branch of Government? 2 (1972).
20. *Id.*
21. On November 23, 1998, the Master Settlement Agreement (MSA) was agreed to by the attorneys general of 46 states, several U.S. territories and the four largest tobacco manufacturers (Phillip Morris, R.J. Reynolds, Brown & Williamson and Lorillard Tobacco). Under the MSA, the tobacco manufacturers agreed to make payments to the settling states and territories in exchange for the release of all past, present and future claims related to the use of tobacco products. See C. Stephen Redhead, Cong. Research Service., Tobacco Master Settlement Agreement (1998): Overview, Implementation by States, and Congressional Issues (1999), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30058.pdf.
22. For a more comprehensive review of the Debt Reform Act of 2000, see Office of the State Comptroller, Debt Impact Study (2008), *available at* http://www.osc.state.ny.us/reports/debt/debtimpactstudy08.pdf.
23. Office of the State Comptroller, Report on the State Fiscal Year 2009-10 Enacted Budget 6 (2009), *available at* http://www.osc.state.ny.us/reports/budget/2009/rptenactedbudget09_10.pdf.
24. Public Authority Reform: Reining in New York's Secret Government, *supra* note 11, at 36.
25. Office of the State Comptroller, New York State Thruway Authority: Status of the Board-Approved Capital Plan for 2005–2011 2 (2008), *available at* http://osc.state.ny.us/audits/allaudits/093009/08s48.pdf.
26. Office of the State Comptroller, Albany Port District Commission: Internal Controls Over Financial Operations (2006) *available at* http://www.osc.state.ny.us/audits/allaudits/093006/05s47.pdf.
27. Office of the State Comptroller, New York State Thruway Authority: Audit Summary and Recommended Actions (2008), *available at* http://www.osc.state.ny.us/reports/thruwayauthauditsumrecomactions01-25-08.pdf.
28. Public Authority Reform: Reining in New York's Secret Government, *supra* note 11, at 35.
29. Public Authorities Accountability Act, ch. 766 L. 2005, 228th Sess. (N.Y. 2005) (codified as amended at Pub. Auth. Law §§ 2 *et seq.* (2006)).
30. *See* A.2209-C/S.1537-C (2009), sponsored by Assemblyman Richard Brodsky and Senator Bill Perkins, passed the New York State Assembly on June 17, 2009 and passed the New York State Senate on July 16, 2009. At the time this article was written, the bill had not yet been signed by the Governor.

Lynn Wilson is a Senior Municipal Financial Analyst and Director of State Public Authority Reporting for New York State Comptroller Thomas P. DiNapoli.

Clayton Eichelberger served as a 2009 Summer Intern in the Office of Budget and Policy Analysis for the Office of the State Comptroller. He attends Mercer University School of Law.