

# Amendments to the Public Authorities Law:

Governance Issues

## Amendments to the Public Authorities Law: Governance Issues

***Chapter 506 of the Laws of 2009 (“Chapter 506”) makes several important changes to the Public Authorities Law (“PAL”) that will impact public authority governance.***

***Those changes include the following:***

- The PAL now imposes a fiduciary duty on authority board members, and board members must execute an acknowledgment in a form prescribed by the new Authorities Budget Office (“ABO”) in which the member acknowledges that he or she understands his or her role, fiduciary responsibilities and duty of loyalty and care to the organization and commitment to the authority’s mission and the public interest.
- Board members are now responsible to exercise oversight over all authority management personnel, not simply senior management personnel.
- New requirements apply to the composition of public authority governance and audit committees, and the responsibilities of the governance committee are expanded to include examination of ethical and conflict of interest issues, performance of board self-evaluations and recommendation of by-laws which include rules and procedures for conduct of board business.
- Authority boards must establish a finance committee that will have responsibility to review proposals for the issuance of debt and make recommendations to the board.
- The appointment of NYPA’s chief executive officer (“CEO”) is subject to confirmation by the Senate which must act within specified time frames otherwise the appointment is deemed approved.

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- The prohibition against an authority board member serving simultaneously as the authority's CEO, executive director, chief financial officer, or comptroller, or holding any other equivalent position, is eliminated. However, a board chair who is also the authority's CEO may not participate in determining the level of compensation or reimbursement, or time and attendance rules for the position of CEO.
- The CEO and chief financial officer ("CFO") of an authority must certify that they have reviewed the terms of any (1) purchase of assets by the authority in excess of fair market value, and (2) sale of any authority assets for less than fair market value, and have determined that the purchase or sale complies with applicable law and authority procurement guidelines.
- An authority's board must approve the disposal of authority property for less than fair market value based, and make a written determination based on specific information that there is no reasonable alternative to the below market transfer that would achieve the same purpose of the transfer.

***The changes made by Chapter 506 are effective March 1, 2010, except that the provisions governing Senate confirmation of the specified authority CEOs do not apply to any CEO appointed prior to March 1, 2010.***

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## ***Board member responsibilities; authority committees (PAL § 2824)***

- 1. Board members of state and local authorities shall (a) execute direct oversight of the authority's chief executive and other ~~senior~~ management in the effective and ethical management of the authority; (b) understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority; (c) establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for the time and attendance of, the chief executive and ~~senior~~ management; (d) adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in section seventy-four of the public officers law; (e) establish written policies and procedures on personnel including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance, or other inappropriate behavior by an employee or board member of the authority, investments, travel, the acquisition of real property and the disposition of real and personal property and the procurement of goods and services; ~~and~~ (f) adopt a defense and indemnification policy and disclose such plan to any and all prospective board members; **(g) perform each of their duties as board members, including but not limited to those imposed by this section, in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, and may take into consideration the views and policies of any elected official or body, or other person and ultimately apply independent judgment in the best interest of the authority, its mission and the public; (h) at the time that each member takes and subscribes his or her oath of office, or within sixty days after the effective date of this paragraph if the member has already taken and subscribed his or her oath of office, execute an acknowledgment, in the form prescribed by the authorities budget office after consultation with the attorney general, in which the board member acknowledges that he or she understands his or her role, and fiduciary responsibilities as set forth in paragraph (g) of this subdivision, and acknowledges that he or she understands his or her duty of loyalty and care to the organization and commitment to the authority's mission and the public interest.**

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**3. No chair who is also the chief executive officer shall participate in determining the level of compensation or reimbursement, or time and attendance rules for the position of chief executive officer.**

4. Board members of each state and local authority, or subsidiary thereof, shall establish an audit committee to be comprised of **not less than three independent members, who shall constitute a majority on the committee, and who shall possess the necessary skills to understand the duties and functions of the audit committee; provided, however, that in the event that a board has less than three independent members, the board may appoint non-independent members to the audit committee, provided that the independent members must constitute a majority of the members of the audit committee.** The committee shall recommend to the board the hiring of a certified independent accounting firm for such authority, establish the compensation to be paid to the accounting firm and provide direct oversight of the performance of the independent audit performed by the accounting firm hired for such purposes.

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- 5. Notwithstanding any provision of any general, special or local law, municipal charter or ordinance to the contrary, no board of a state or local authority shall, directly or indirectly, *including through any subsidiary, extend or maintain credit, arrange for the extension of credit*, or renew an extension of credit, in the form of a personal loan to or for any officer, board member or employee (or equivalent thereof) of the authority.
- 6. [~~To the extent practicable, members~~] Members of the audit committee [~~should~~] shall be familiar with corporate financial and accounting practices.

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- 7. Board members of each state and local authority, or subsidiary thereof, shall establish a governance committee to be comprised of **not less than three independent members, who shall constitute a majority on the committee, and who shall possess the necessary skills to understand the duties and functions of the governance committee; provided, however, that in the event that a board has less than three independent members, the board may appoint non-independent members to the governance committee, provided that the independent members must constitute a majority of the members of the governance committee.** It shall be the responsibility of the members of the governance committee to keep the board informed of current best governance practices; to review corporate governance trends; to **[update] recommend updates to** the authority's corporate governance principles; **[and]** to advise appointing authorities on the skills and experiences required of potential board members; **to examine ethical and conflict of interest issues; to perform board self-evaluations; and to recommend by-laws which include rules and procedures for conduct of board business.**
- **8. Board members of each state and local authority, or subsidiary thereof which issues debt, shall establish a finance committee to be comprised of not less than three independent members, who shall constitute a majority on the committee, and who shall possess the necessary skills to understand the duties and functions of the committee; provided, however, that in the event that a board has less than three independent members, the board may appoint non-independent members to the finance committee, provided that the independent members must constitute a majority of the members of the finance committee. It shall be the responsibility of the members of the finance committee to review proposals for the issuance of debt by the authority and its subsidiaries and make recommendations.**

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## *Removal of board members (PAL § 2827)*

- § 2827. Removal of authority members. Except as otherwise provided in this chapter, every member of every authority or commission heretofore or hereafter continued or created by this chapter, except ex-officio members, that is, members whose membership results by virtue of their incumbency of a public office, shall be removable by the public officer or public body which is empowered by this chapter to appoint such authority or commission member, for inefficiency, **breach of fiduciary duty**, neglect of duty or misconduct in office, provided, however, that such member shall be given a copy of the charges against him and an opportunity of being heard in person, or by counsel, in his **or her** defense upon not less than ten days' notice.

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## ***Senate confirmation (PAL §§ 1004, 2852)***

- § 1004. Officers and employees; expenses. The trustees shall choose from among their own number a chairman and vice-chairman. They shall ~~[from time to time]~~ select such officers and employees, including a chief executive officer **whose appointment shall be subject to confirmation by the senate in accordance with section twenty-eight hundred fifty-two of this chapter**, and such engineering, marketing and legal officers and employees, as they may require for the performance of their duties and shall prescribe the duties and compensation of each officer and employee. They shall adopt by-laws and rules and regulations suitable to the purposes of this title. As long as and to the extent that the authority is dependent upon appropriations for the payment of its expenses, it shall incur no obligations for salary, office or other expenses prior to the making of appropriations adequate to meet the same.
- **§ 2852. Senate confirmation of certain chief executive officers. Where the appointment of any chief executive officer is subject to confirmation by the senate pursuant to subdivision five of section sixteen hundred seventy-eight of this chapter, subdivision six of section three hundred fifty-four of this chapter, section one thousand four of this chapter, or subdivision (c) of section one thousand twenty-f of this chapter the senate shall vote to confirm any such appointment within sixty days of its submission to the senate during session, or if such submission is made when the senate is not in session, within seven days of the convening for session. If the senate fails to vote to confirm any such appointment within the time prescribed in this section, such appointment shall be deemed confirmed without any further action by the senate.**

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## *Dual office holding (PAL § 2824(3))*

- ~~[3. No board member, including the chairperson, shall 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.]~~
- **3. No chair who is also the chief executive officer shall participate in determining the level of compensation or reimbursement, or time and attendance rules for the position of chief executive officer.**

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## ***CEO and CFO certifications (PAL § 2800(1)(a)(16)(3))***

- Chapter 506 makes the following changes to PAL § 2800(1). The changes to subparagraph 16, particularly clause (iii), are relevant to property transfers.
- 1. State authorities. (a) For the purpose of furnishing the state with systematic information regarding the status and the activities of public authorities, every state authority continued or created by this chapter or any other chapter of the laws of the state of New York shall submit to the governor, the chairman and ranking minority member of the senate finance committee, the chairman and ranking minority member of the assembly ways and means committee ~~and~~, the state comptroller, **and the authorities budget office**, within ninety days after the end of its fiscal year, a complete and detailed report or reports setting forth: (1) its operations and accomplishments; (2) its ~~receipts and disbursements, or revenues and expenses, during such fiscal year in accordance with the categories or classifications established by such authority for its own operating and capital outlay purposes~~ **financial reports, including (i) audited financials in accordance with all applicable regulations and following generally accepted accounting principles as defined in subdivision ten of section two of the state finance law, (ii) grant and subsidy programs, (iii) operating and financial risks, (iv) current ratings, if any, of its bonds issued by recognized municipal bond rating agencies and notice of changes in such ratings, and (v) long-term liabilities, including leases and employee benefit plans;** (3) ~~its assets and liabilities at the end of its fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds~~ **its mission statement and measurements including its most recent measurement report;** (4) a schedule of its bonds and notes outstanding at the end of its fiscal year, together with a statement of the amounts redeemed and incurred during such fiscal year as part of a schedule of debt issuance that includes the date of issuance, term, amount, interest rate and means of repayment. Additionally, the debt schedule shall also include all refinancings, calls, refundings, defeasements and interest rate exchange or other such agreements, and for any debt issued during the reporting year, the schedule shall

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- also include a detailed list of costs of issuance for such debt; (5) a compensation schedule, in addition to the report described in section twenty-eight hundred six of this title, that shall include, by position, title and name of the person holding such position or title, the salary, compensation, allowance and/or benefits provided to any officer, director or employee in a decision making or managerial position of such authority whose salary is in excess of one hundred thousand dollars; (5-a) biographical information, not including confidential personal information, for all directors and officers and employees for whom salary reporting is required under subparagraph five of this paragraph; (6) the projects undertaken by such authority during the past year; (7) a listing and description, in addition to the report required by paragraph a of subdivision three of section twenty-eight hundred ninety-six of this article of ~~[(i)]~~ all real property of such authority having an estimated fair market value in excess of fifteen thousand dollars that the authority ~~[intends to dispose of; (ii) all such property held by the authority at the end of the period covered by the report; and (iii) all such property disposed]~~ acquires or disposes of during such period. The report shall contain ~~[an estimate of fair market value for all such property held by the authority at the end of the period and]~~ the price received or paid by the authority and the name of the purchaser or seller for all such property sold or bought by the authority during such period; (8) such authority's code of ethics; ~~[and]~~ (9) an assessment of the effectiveness of its internal control structure and

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- procedures; (10) a copy of the legislation that forms the statutory basis of the authority; (11) a description of the authority and its board structure, including (i) names of committees and committee members, (ii) lists of board meetings and attendance, (iii) descriptions of major authority units, subsidiaries, and (iv) number of employees; (12) its charter, if any, and by-laws; (13) a listing of material changes in operations and programs during the reporting year; (14) at a minimum a four-year financial plan, including (i) a current and projected capital budget, and (ii) an operating budget report, including an actual versus estimated budget, with an analysis and measurement of financial and operating performance; (15) its board performance evaluations; provided, however, that such evaluations shall not be subject to disclosure under article six of the public officers law; (16) a description of the total amounts of assets, services or both assets and services bought or sold without competitive bidding, including (i) the nature of those assets and services, (ii) the names of the counterparties, and (iii) where the contract price for assets purchased exceeds fair market value, or where the contract price for assets sold is less than fair market value, a detailed explanation of the justification for making the purchase or sale without competitive bidding, and a certification by the chief executive officer and chief financial officer of the public authority that they have reviewed the terms of such purchase or sale and determined that it complies with applicable law and procurement guidelines; and (17) a description of any material pending litigation in which the authority is involved as a party during the reporting year, except that no hospital need disclose information about pending malpractice claims beyond the existence of such claims.
- The certifications are not affirmatively mandated by the PAL but rather are required by implication from their reference in PAL § 2800(1)(a)(16)(3).

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## ***VI. Board approval for below market sales (PAL 2897(7)(b), (c))***

- 7. Disposal of property for less than fair market value. a. No asset owned, leased or otherwise in the control of a public authority may be sold, leased, or otherwise alienated for less than its fair market value except if:
- (i) the transferee is a government or other public entity, and the terms and conditions of the transfer require that the ownership and use of the asset will remain with the government or any other public entity;
- (ii) the purpose of the transfer is within the purpose, mission or governing statute of the public authority; or
- (iii) in the event a public authority seeks to transfer an asset for less than its fair market value to other than a governmental entity, which disposal would not be consistent with the authority's mission, purpose or governing statutes, such authority shall provide written notification thereof to the governor, the speaker of the assembly, and the temporary president of the senate, and such proposed transfer shall be subject to denial by the governor, the senate, or the assembly. Denial by the governor shall take the form of a signed certification by the governor. Denial by either house of the legislature shall take the form of a resolution by such house. The governor and each house of the legislature shall take any such action within sixty days of receiving notification of such proposed transfer during the months of January through June, provided that if the legislature receives notification of a proposed transfer during the months of July through December, the legislature may take any such action within sixty days of January first of the following year. If no such resolution or certification is performed within sixty days of such notification of the proposed transfer to the governor, senate, and assembly, the public authority may effectuate such transfer. Provided, however, that with respect to a below market transfer by a local authority that is not within the purpose, mission or governing statute of the local authority, if the governing statute provides for the approval of such transfer by the executive and legislative branches of the political subdivision in which such local authority resides, and the transfer is of property obtained by the authority from that political subdivision, then such approval shall be sufficient to permit the transfer.
- The board approval is not affirmatively mandated by the PAL but rather is required by implication from its reference in PAL § 2897(7)(b) and (c).

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- b. In the event a below fair market value asset transfer is proposed, the following information must be provided to the authority board and the public:
- (i) a full description of the asset;
- (ii) an appraisal of the fair market value of the asset and any other information establishing the fair market value sought by the board;
- (iii) a description of the purpose of the transfer, and a reasonable statement of the kind and amount of the benefit to the public resulting from the transfer, including but not limited to the kind, number, location, wages or salaries of jobs created or preserved as required by the transfer, the benefits, if any, to the communities in which the asset is situated as are required by the transfer;
- (iv) a statement of the value to be received compared to the fair market value;
- (v) the names of any private parties participating in the transfer, and if different than the statement required by subparagraph (iv) of this paragraph, a statement of the value to the private party; and
- (vi) the names of other private parties who have made an offer for such asset, the value offered, and the purpose for which the asset was sought to be used.
- c. Before approving the disposal of any property for less than fair market value, the board of an authority shall consider the information described in paragraph b of this subdivision and make a written determination that there is no reasonable alternative to the proposed below-market transfer that would achieve the same purpose of such transfer.