



Analysis of Ethics and Conflicts of Interest Oversight at the Metropolitan Transportation Authority July 2018

Introduction

The Metropolitan Transportation Authority (MTA) is both the largest public authority in New York State and the largest public transportation system in the nation.¹ With an operating budget of \$14.9 billion² in 2018 and a 2015-2019 capital plan to spend \$33.3 billion³, its spending is larger than many state governments and it is the largest service provider in the state, with 8.6 million riders each weekday.⁴ Given its massive scope, it is crucial that it is managed by individuals who are free from conflicts of interest and that its internal ethics and conflicts of interest policies are written to eliminate the potential for corruption and set the highest standards for conduct.

Unfortunately, it is clear that the MTA's current ethics codes do not set the highest standards, as its top manager - the Chairman and CEO - holds a directorship with a company that is likely by the MTA's own standards a "prohibited source" - Madison Square Garden. The MTA's Board Code of Ethics and All-Agency Code of Ethics should be amended to follow best practices and address widespread public concerns about conflicts of interest. The standards set in state law under the Public Officers Law and Public Authorities Law should be considered a floor, not a ceiling.

Our analysis below addresses the following issues, with recommendations in each area:

1. The Chairman/CEO of the MTA as Head of Agency
2. Disclosure of Potential Conflicts of Interest
3. Outside Income
4. Prohibited Sources - Directorships and Events
5. Revolving Door/Post-Employment Restrictions
6. Political Contributions by Board Members

¹ Metropolitan Transportation Authority February 2018 Financial Plan, Expense Budget. Available at: http://web.mta.info/mta/budget/pdf/MTA-2018-AdoptedBudgetFebruaryFinancialPlan_2018-21.pdf

² Metropolitan Transportation Authority. April 2018 Amendment to Capital Plan, 2015-2019. http://web.mta.info/mta/news/books/docs/2018_April-Capital-Amendment.pdf

³ Metropolitan Transportation Authority. "MTA 2015-2019 Capital Plan, Amendment 2." As approved by CPRB July 31, 2017. http://web.mta.info/capital/pdf/2015-2019-Program_APPROVEDv5_reduced.pdf

⁴ Metropolitan Transportation Authority. "The MTA Network." Accessed July 2018. <http://web.mta.info/mta/network.htm>

1. Chairman/CEO as Head of Agency

Under Public Authorities Law, Title 11 §1263, the Chairman of the MTA is the head of agency and directly responsible for “executive and administrative functions”:

4. (a) Notwithstanding any provision of law to the contrary, the chairman shall be the chief executive officer of the authority and **shall be responsible for the discharge of the executive and administrative functions and powers of the authority.** The chairman may appoint an executive director and such other officials and employees as shall in his or her judgment be needed to discharge the executive and administrative functions and powers of the authority.

The MTA’s website echoes these responsibilities in its “Org Chart”, available at: <http://web.mta.info/mta/compliance/pdf/OrgChart.pdf>, which notes that the Chairman and CEO is responsible for the actions of executive management, including the President, Acting Manager, and Chief Development Officer, among others. This responsibility cannot be delegated away, even if tasks are.

We also believe that the Chairman of the MTA is a “public officer” under the Public Officers Law, as the law does not envision heads of agencies as being unpaid. The exceptions to the term “officer” refers to unpaid members of boards and commissions who are not paid a salary-- for instance MTA board members who are not also CEO.

Public Officers Law Section 73

(i) The term *state officer* or employee shall *mean*:

(i) *heads of state departments* and their deputies and assistants other than members of the board of regents of the university of the state of New York who receive no compensation or are compensated on a per diem basis;

(ii) officers and employees of statewide elected officials;

(iii) officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis; and

(iv) members or directors of public authorities, other than multi-state authorities, public benefit corporations and commissions at least one of whose members is appointed by the governor, who receive compensation other than on a per diem basis, and employees of such authorities, corporations and commissions.

Recommendation:

- The MTA Board should affirm by board vote that the Chairman and CEO is the head of agency - whether or not receiving a salary - and is therefore subject to all Public Authorities Law (Public Officers Law sections 73, 73-a and 74) and MTA internal ethics policies requirements covering compensated heads of agencies.
 - State law and related rules of the Joint Commission on Public Ethics should be amended to affirm that heads of agencies and public authorities - whether receiving a salary or not - are subject to all requirements of Public Officers Law sections 73, 73-a and 74, including prohibitions and/or approval of outside income.

2. Disclosure of Potential Conflicts of Interest

Under the current MTA ethics policies, members of the MTA Board are in the unfortunate position of not being made aware of potential conflicts of interest of their colleagues on the board. MTA Board members and the public, for example, were made aware via press accounts of SEC filings that reported Chairman Lhota's directorship with Madison Square Garden, an organization which is highly enmeshed with MTA activities ranging from the New Penn Station to the Belmont Development project involving the LIRR.⁵

MTA Board Code of Ethics

The MTA's Board Ethics Code⁶ provides that the Chairman or Chairman of the Audit Committee is notified of directorships of other members, but does not provide notification to the full Board of Directors.

Section 2.05 Corporate Directorships or Board Memberships

In order to protect against conflicts of interest in violation of the State Ethics Law, Board Members **should inform the Chairman or the Chairman of the Audit Committee** prior to accepting a position as a director, officer, or board member of a corporation or charitable organization. **The Chairman or Chairman of the Audit Committee**, as the case may be, **may direct the Chief Compliance Officer**, as needed, to review the business of the company or organization to determine whether a conflict of interest exists between the MTA

⁵ Rubinstein, Dana. "Lhota gets job at MSG, raising conflict concerns." February 12, 2018. Politico New York.

<https://www.politico.com/states/new-york/albany/story/2018/02/12/lhota-gets-job-at-msg-raising-conflict-concerns-248593>

⁶ MTA Board Member Code of Ethics. November 19, 2014.

http://web.mta.info/mta/compliance/pdf/Board_Code_of_Ethics_Nov_19_2014.pdf

and the Company and to advise, as necessary, on steps to address any such conflict.

Joint Commission on Public Ethics (JCOPE)

The Joint Commission on Public Ethics (JCOPE) reviews and approves certain categories of outside income for heads of agencies and agency staff such as directorships and income over \$5,000 under Title 19 NYCCR Part 932 but not unpaid, per diem board members.

In Section 932.5:(d) A head of a State Agency or a Statewide Elected Official shall obtain approval from the Commission prior to engaging in the outside activities listed in Section 932.5(a).

See also below a chart of the approval processes as provided in JCOPE’s Regulations.⁷

Outside Activity	Required Approvals / Actions
A job, employment (including public employment), or business venture that generates, or is expected to generate, between \$1,000 and \$5,000 in Compensation annually	Approving Authority must approve
A job, employment (including public employment), or business venture that generates, or is expected to generate, more than \$5,000 in Compensation annually	Approving Authority <u>and</u> the Commission must approve
Holding elected or appointed public office (regardless of Compensation) as an outside activity	Approving Authority <u>and</u> the Commission must approve
Serving as a director or officer of a for-profit entity (regardless of Compensation)	Approving Authority <u>and</u> the Commission must approve

⁷ JCOPE Regulations, Title 19 NYCCR Part 932
<https://www.jcope.ny.gov/sites/g/files/oe746/files/documents/2017/10/19-nycrr-part-932-outside-activity-regulations-and-approval-procedures.pdf>

Under Executive Law, the body of law which details JCOPE's responsibilities, JCOPE is limited in what it can release regarding opinions on these matters, as names are redacted due to confidentiality:

Executive Law Section 94

16. Upon written request from any person who is subject to the jurisdiction of the commission and the requirements of sections seventy-three, seventy-three-a or seventy-four of the public officers law, other than members of the legislature, candidates for member of the legislature and employees of the legislature, the commission shall render written advisory opinions on the requirements of said provisions. An opinion rendered by the commission, until and unless amended or revoked, shall be binding on the commission in any subsequent proceeding concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for an opinion. Such opinion may also be relied upon by such person, and may be introduced and shall be a defense, in any criminal or civil action. **Such requests shall be confidential but the commission may publish such opinions provided that the name of the requesting person and other identifying details shall not be included in the publication.**

Authorities Budget Office (ABO) Best Practices

In its recommended practices for Public Authorities on Conflicts of Interest, the Authorities Budget Office states the following as a general guideline:

Board members and employees of state and local public authorities owe a duty of loyalty and care to the authority and have a fiduciary responsibility to always serve the interests of the public authority above their own personal interests when conducting public business. As such, board members and employees have the responsibility to disclose any conflict of interest, including any situation that may be perceived as a conflict of interest, to the authority board and the public.⁸

ABO's model Conflicts of Interest policy⁹ provides the following procedures:

Duty to Disclose: All material facts related to the conflicts of interest (including the nature of the interest and information about the conflicting transaction) shall be disclosed in good faith and in writing to the Governance Committee and/or the Ethics Officer. Such written disclosure shall be made part of the official record of the proceedings of the authority.

⁸ NYS Authorities Budget Office, [Recommended Practice on Conflict of Interest Policy](#), p. 1.

⁹ NYS Authorities Budget Office, [Recommended Practice on Conflict of Interest Policy](#), p. 4-5

Records of Conflicts of Interest: The minutes of the authority’s meetings during which a perceived or actual conflict of interest is disclosed or discussed shall reflect the name of the interested person, the nature of the conflict, and a description of how the conflict was resolved.

Recommendation:

- The MTA Board Ethics Code should be amended to require notification to the full MTA Board of the any board member’s - including the Chairman/CEO - potential conflicts of interest, including creation a public record of discussions and determinations in Board and/or Committee meeting minutes, as recommended by the Authorities Budget Office.
 - Notification of boards of directors of all public authorities should be codified in state law, per the Authorities Budget Office’s recommended guidelines.

3. Outside Income

The current test of whether outside income rises to a level so as to be a conflict of interest under the state Public Officers Law is whether that outside income is “*in substantial conflict with the proper discharge of his or her duties in the public interest.*” The Public Officers Law is enforced by the Joint Commission on Public Ethics (JCOPE). The NYS Code of Ethics as established in the Public Officers Law provides a general rule in Section 74(2), which is then applied under specific prohibitions in Section 74(3), which are enforced by JCOPE. Section 73 provides more specific prohibitions related to business and personal interests which are enforced by JCOPE. These prohibitions are echoed in the MTA Code of Ethics.

Public Officers Law Section 74(2), the “Code of Ethics.”

“Rule with respect to conflicts of interest. No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, *which is in substantial conflict with the proper discharge of his or her duties in the public interest.*”

Public Officers Law Section 74(3)

3. Standards.

- a. No officer or employee of a state agency, member of the legislature or

legislative employee should accept other employment which will *impair his or her independence of judgment in the exercise of his or her official duties.*

b. No officer or employee of a state agency, member of the legislature or legislative employee should accept employment or *engage in any business or professional activity which will require him or her to disclose confidential information* which he or she has gained by reason of his or her official position or authority.

c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests.

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to *use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others,* including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.

e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he or she has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his or her official duties.

f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his or her conduct give reasonable basis for the *impression that any person can improperly influence him or her* or unduly enjoy his or her favor in the performance of his or her official duties, or that he or she is affected by the kinship, rank, position or influence of any party or person.

g. An officer or employee of a state agency should abstain from making personnel investments 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 his or her duty in the public interest and his or her private interest.

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will *not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust.*

i. No officer or employee of a state agency employed on a full-time basis nor any firm or association of which such an officer or employee is a member nor

corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by such officer or employee, should sell goods or services to any person, firm, corporation or association which is licensed or whose rates are fixed by the state agency in which such officer or employee serves or is employed.

Public Officers Law Section 73(1)(l)

“A person has a "financial interest" in any entity if that person: (i) owns or controls ten percent or more of the stock of such entity (or one percent in the case of a corporation whose stock is regularly traded on an established securities exchange); or (ii) *serves as an officer, director or partner of that entity.*”

Public Officers Law Section 73(7)

7. (a) **No statewide elected official, or state officer or employee**, other than in the proper discharge of official state or local governmental duties, or member of the legislature or legislative employee, or political party chairman **shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation**, in whatever form, for the appearance or rendition of services by himself, herself or another 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 therefor, from, to or with any such agency;
- (ii) any proceeding relating to rate making;
- (iii) the adoption or repeal of any rule or regulation having the force and effect of law;
- (iv) the obtaining of grants of money or loans;
- (v) licensing; or
- (vi) any proceeding relating to a franchise provided for in the public service law.

The exceptions set in state law provide a confusing overlay of standards that is insufficient to ensure that the public has confidence that public officers - particularly those running our agencies - are acting only in the interests of the public. As noted previously, the MTA is permitted to adopt more stringent prohibitions on outside income, per JCOPE Regulations, Title 19 NYCCR Part 932.10.

Recommendation:

- The MTA should ban outside income for the MTA Chairman and CEO - whether compensated or not - and at a minimum, appointed, non-civil service staff.

4. Prohibited Sources - Directorships and Events

Another area of concern is the potential influence of those who do business with the MTA - called “prohibited sources” by the MTA - on the board, management, and employees of the MTA. Reinvent Albany is concerned that there appears to be disparate treatment of management and employees in terms of what is permissible in terms of gifts from prohibited sources, and acceptance of directorships.

The MTA All-Agency Code of Ethics¹⁰ prohibits gifts from prohibited sources, and defines “prohibited sources” as the following:

- (a) a Vendor including any person, seller of goods or services, bidder, proposer, consultant, contractor, trade, contractor or industry association, or any other person/entity with which your MTA Agency is doing business, as well as those persons and business entities who have expressed an interest in doing business with your MTA Agency, whose activities directly or indirectly benefit your Agency, or who have a history of doing business with your Agency in the recent past; or
- (b) a tenant or licensee of your MTA Agency; or
- (c) any person or entity who on his, her or its own behalf, or on behalf of any other person or entity, satisfies any one of the following:
 - (1) is regulated by, negotiates with, appears before in other than a ministerial matter, seeks to contract with or has contracts with, or does other business with:
 - (i) the Employee, in his or her official capacity;
 - (ii) your MTA Agency; or
 - (iii) any other New York State Agency when your MTA Agency is to receive the benefits of the contract; or
 - (2) is required to be listed on a statement of registration pursuant to §1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of your MTA Agency; or
 - (3) is the spouse or unemancipated child of any individual satisfying the requirements of subsection (c)(2) above; or

¹⁰ MTA All-Agency Code of Ethics. December 2015.
<http://web.mta.info/mta/compliance/pdf/codeofethics.pdf>

(4) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Employee in his or her official capacity; or (ii) your MTA Agency; or

(5) has received or applied for funds from your MTA Agency at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the item or service of more than Nominal Value. This does not include a request for funds received by the MTA in the ordinary course of business. For example, this does not include a customer's request for a refund or MTA's purchase of tickets or a table to an event.

For purposes of this definition, the term "your Agency" refers to the Agency by which you are employed. However, certain Employees working on matters involving more than one MTA Agency may be considered an Employee of multiple MTA Agencies for purposes of this Code.

The MTA does not currently publish the list of prohibited sources online, making it difficult for the public to know if there are potential conflicts of interests.

Directorships with Prohibited Sources

Further, the MTA Board Code of Ethics and All-Agency Code of Ethics set different standards for Board members and staff in acceptance of directorships with potential prohibited sources, as well as attendance at events sponsored by such groups.

MTA Board Code of Ethics

Section 2.05 Corporate Directorships or Board Memberships

In order to protect against conflicts of interest in violation of the State Ethics Law, Board Members should inform the Chairman or the Chairman of the Audit Committee prior to accepting a position as a director, officer, or board member of a corporation or charitable organization. The Chairman or Chairman of the Audit Committee, as the case may be, **may direct the Chief Compliance Officer, as needed**, to review the business of the company or organization to determine whether a conflict of interest exists between the MTA and the Company and **to advise, as necessary, on steps to address any such conflict.**

MTA All-Agency Code of Ethics

Section 4.07, unless prior approval is obtained:

Employees holding Policy-Making Positions must comply with certain additional requirements in connection with engaging in outside employment/activities: (1) Employees holding Policy-Making Positions are **prohibited from serving as a director or officer of a Prohibited Source** (including nonprofit organizations) or a corporation or institution engaged in profit-making activities, holding an appointed or elected public office, or serving as a compensated director or officer of a nonprofit organization, **without the prior approval** of the applicable Agency Ethics Committee or Ethics Officer, and possibly the Joint Commission on Public Ethics.

For Board Members, they may speak to their peers - the Chairman or Chair of the Audit Committee - who are not required to direct ethics staff to conduct an internal review. Staff must receive prior approval from the internal ethics staff, and possibly JCOPE. The language for board members appears to lean on the side of recusal, while staff would be more likely to have bars on accepting directorships.

Gifts from Prohibited Sources

Under the MTA All-Agency Ethics Code, there is a specific carve out for Executive Staff, including the Chairman/CEO to attend “prohibited source” events (i.e. events put on by vendors) if it would align with their duties or they perform a “ceremonial function.” This does not disqualify events with expensive meals, cruises, golf, etc.

MTA All-Agency Code

Section 3.04 Senior Management Attendance at Prohibited-Source-Sponsored Events The Chair/Chief Executive Officer of MTA, the President of an MTA Agency, or their designee(s) may attend functions sponsored and paid for by Prohibited Sources when attendance is related and appropriate to that attendee’s official duties or when the purpose of attendance is the performance of a ceremonial or other function that is appropriate to that attendee’s official duties with their MTA Agency. The attendee shall provide advance written notice of such invitation to the MTA Chief Compliance Officer and their Agency’s General Counsel.

Staff instead must meet a more stringent set of criteria to attend, which specifically prohibits formal meals, cruises, and golf which executives could participate in.

Section 3.03....Employees may attend complimentary Prohibited Source/industry-sponsored events, including receptions or hospitality suites **only if all of the following conditions** are met: (1) Attendance at the event would further the interests of the MTA Agency; (2) The event relates to the Employee’s official duties or responsibilities or allows the Employee to perform a ceremonial function appropriate to his or her position; (3) The event is a “widely attended event” at which at least twenty-five individuals other than Employees attend or were, in good faith, invited to attend and the event is also complimentary to such other non-Employees attending or invited to attend; (4) Any reception or hospitality suite is open to all event attendees; and **(5) The event does not include a formal sit-down meal or involve recreational activities such as golf, tennis, or cruises.**

Recommendations:

- The MTA should post on its website the list of contractors and any others determined to be “prohibited sources” as defined in the MTA Codes of Ethics.
- The MTA’s All-Agency Code of Ethics should be amended to eliminate double standards between board and/or management and employees regarding attendance at prohibited-source sponsored events.

5. Revolving Door/Post-Employment Restrictions

We are concerned with reports regarding MTA officials and staff who leave MTA employment, and subsequently work with contractors who do business with the authority. A *New York Times* analysis of the 25 M.T.A. agency presidents who have left over the past two decades found that at least 18 of them became consultants or went to work for authority contractors, including many who have worked on expansion projects.

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The MTA Inspector General has investigated one high-profile case related to revolving door in which a Vice President/Chief Mechanical Officer handled a large contract for 300 subway cars with Bombardier and sought employment with them.¹² The investigation noted that “Bombardier was seen as attempting to lure away a high level employee from NYC Transit while simultaneously trying to sell them subway cars” and an employee of the company “explained further that this type of sensitivity to the timing

¹¹ Rosenthal, Brian. “The Most Expensive Mile of Subway Track on Earth.” December 27, 2018. The New York Times. <https://www.nytimes.com/2017/12/28/nyregion/new-york-subway-construction-costs.html>

¹² MTA Inspector General. “Report on the Integrity of the R179 Procurement.” March 2012. <http://mtaig.state.ny.us/assets/pdf/12-03.pdf>

of career moves is necessary and common in an ‘intimate,’ ‘incestuous’ transportation market.” The MTA IG referred the case to JCOPE, which settled the case with no civil penalties.¹³

The MTA IG subsequently issued a report with recommendations for revisions to the MTA Vendor Code of Ethics. However, no recommendations were made for the MTA All-Agency Code of Ethics that governs employees.¹⁴

Recommendation

- The MTA should conduct an internal review to consider revisions to the MTA’ All-Agency Code of Ethics as relates to the “revolving door” or post-employment restrictions for MTA staff.

6. Political Contributions by Board Members

The MTA Ethics Code notes in Part 4.06 that board members are prohibited from making political contributions to the governor, pursuant to an Executive Order initially put in place by Governor Eliot Spitzer, and continued by Governors Paterson and Cuomo. The code further states that “No Board Member *may request or demand that any other person* make or offer to make any monetary contribution to the campaign of the Governor”. This does not specify how this relates to contributions by businesses controlled by board members, or made by spouses of board members. The intent of the Executive Order was to ensure that employees and board members were acting in the public interest, and are “able to pursue the interests of the public in an environment that is free from political party influence or interference.”¹⁵

A *New York Times* analysis of contributions made by board members of public authorities and other government commissions shed light on contributions that were being made in spite of the Executive Order.¹⁶ The MTA has the ability to ensure clarity of the application of the order, and to affirm its continued application to MTA Board Members.

¹³ JCOPE Substantial Basis Investigation Report, Mario Guerra. April 2013. <https://www.jcope.ny.gov/system/files/documents/2017/12/mario-guerrasubstantial-basis-investigation-report-and-settlement-agreement.pdf>

¹⁴ Letter from the MTA Inspector General to the MTA Chief Compliance Officer Regarding Strengthening the MTA Vendor Code of Ethics. March 2012. <http://mtaig.state.ny.us/assets/pdf/12-04.pdf>

¹⁵ Executive Order 7 from Governor Paterson was continued by Governor Cuomo, which

¹⁶ Goldmacher, Shane, Rosenthal, Brian, and Amendariz, Agustin, “In Spite of Executive Order, Cuomo Takes Campaign Money From State Appointees.” February 28, 2018. The New York Times. <https://www.nytimes.com/2018/02/24/nyregion/cuomo-fund-raising-ethics-appointees.html>

Recommendations

- The MTA should affirm by board vote that campaign contributions to the governor from MTA board members are banned, as stipulated by the MTA Board Code of Ethics; and
- The MTA should amend its Board Code of Ethics to ban campaign contributions to the governor from board members' businesses and family.