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**TRANSPARENCY NOW**

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## Transparency Now

For much of the last year and a half, the buzz words associated with the management of the New York Racing Association [NYRA] were transparency and accountability.

In June of 2003, New York Attorney General Eliot Spitzer said, As important as individual criminal liability is, this culture of criminality within a government-chartered not-for-profit corporation raised larger questions of corporate accountability and transparency.”<sup>1</sup>

He concluded, “It is clear from these facts that crime was part of the culture at NYRA. There are many reasons for this, but foremost is the lack of accountability inherent in NYRA’s governance structure. There is little transparency and a habitual resistance to oversight. It is an insular, opaque, and unaccountable organization.”<sup>2</sup>

After NYRA responded to his June report, the Attorney General said, “Whether NYRA officials like it or not, they have an obligation to state taxpayers and track patrons to ensure integrity and accountability.”<sup>3</sup>

After State Comptroller Alan Hevesi issued a report critical of NYEA in September of 2003, the Attorney General added, “NYRA is just one example of the consequences that flow from a lack of transparency, lack of integrity and a lack of accountability.”<sup>4</sup>

New York State Comptroller Hevesi has similarly focused on NYRA’s need for accountability. In his September 2003 report on NYRA, the Comptroller noted, “Despite years of public accusations, the NYRA Board remained passive regarding its employees and asked too few questions about the management of the operation. The Board has offered insufficient leadership in the crucial areas of internal financial controls, standards of employee behavior and accountability of senior managers.”<sup>5</sup>

The Comptroller, additionally suggested the imposition of benchmark performance milestones at NYRA on Board governance and ethics issues.<sup>6</sup> The Comptroller also pledged to conduct further audits on NYRA on “administration, anti-

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<sup>1</sup> State of New York, Office of the Attorney General, An Examination of Employee Misconduct at the New York Racing Association, Inc., and Management’s Response, Eliot Spitzer Attorney General, June 2003 at Pg. 2

<sup>2</sup> Id. at 61.

<sup>3</sup> Statement By Attorney General Eliot Spitzer Regarding The New York Racing Association, June 24, 2003.

<sup>4</sup> James M. Odat, “NYRA Faces Stinging Audit,” Albany Times Union, September 17, 2003 Pg. B2.

<sup>5</sup> Office of the State Comptroller, The New York Racing Association, The Case for Reform, September 2003, Pg. 34.

<sup>6</sup> Id. at 39.

corruption systems and controls, contracting and procurement processes and budget and franchise fee calculations.”<sup>7</sup>

Newspapers have also advocated the need for accountability and transparency at NYRA. The New York Times has said, “At the very minimum, the New York Racing Association obviously needs a good shake-up, a more transparent operation and more vigilant monitors to make certain that the entire racing business is not run like an elite club for wealthy horse people and their hangers-on.”<sup>8</sup> The Albany Times Union has written, “NYRA should be held to more accountability than ever in this post-indictment era. Instead, it's sending every signal that it still prefers to operate as it did in the bad old days.”<sup>9</sup> When NYRA avoided prosecution in December of 2003, the Times Union similarly wrote, “It's all the more reason to hold NYRA to an unprecedented level of accountability rather than bend the enforcement of the law to turn a indictment into a plea bargain, and a very favorable one at that.”<sup>10</sup>

NYRA Monitor Neil Getnick, who was installed as an Independent Private Sector Management Inspector General in March of 2004 by an United States District Court Judge from the Eastern District of New York, has repeatedly stressed the need for transparency. He has listed “integrity, transparency, good governance and social responsibility”<sup>11</sup> as the characteristics he hope to instill at NYRA. He has noted that “he is seeking improved transparency by NYRA for regulators and ‘for horsemen who entrust their funds with NYRA.’”<sup>12</sup>

Even NYRA has started to stress the need for transparency. NYRA Chief Financial Officer William Byrne, who was hired in September of 2003, has stated that NYRA “is attempting to become more transparent.”<sup>13</sup> He earlier stated, “One of my charges was to make NYRA more transparent... I think the day will come when we are an open book.”<sup>14</sup>

Yet transparency has been elusive at NYRA. With one major exception, public information on NYRA’s finances, contracting processes, and management operations has been hard to find. The one exception involved CFO William Byrne publicly advising the media that NYRA had a net loss of \$20 million for the calendar year 2003.<sup>15</sup> Byrne also explained the cost of legal services to defend NYRA from criminal charges, the cost of hiring the security consulting firm Safir Rosetti, and the cost of NYRA’s pension

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<sup>7</sup> *Id.* at 40.

<sup>8</sup> “Fixing Albany; Off to the Races,” *New York Times*, August 15, 2003 Section A, Pg. 28.

<sup>9</sup> “The New NYRA,” *Albany Times Union*, April 19, 2004, Pg. A6.

<sup>10</sup> “A Break for NYRA,” *Albany Times Union*, December 10, 2003 Pg. A14. See also “The Stakes for NYRA,” *Albany Times Union*, September 19, 2003 Pg. A10.

<sup>11</sup> James M. Odatto, “NYRA Watchdog Focusing on Ethics,” *Albany Times Union*, August 4, 2004, Pg. B 3.

<sup>12</sup> James M. Odatto, “Lawyer Widens NYRA Probe,” *Albany Times Union*, June 8, 2004, Pg. A1.

<sup>13</sup> James M. Odatto, “NYRA Reveals \$20M Deficit,” *Albany Times Union*, July 17, 2004, Pg. A1.

<sup>14</sup> Paul Post, “Demystifying NYRA,” *The Saratogian*, January 12, 2004.

<sup>15</sup> See Note 13 *supra*; Tom Precious, “NYRA Losses Almost \$20M; Deficit Reduction Under Way,” *Blood-Horse*, July 16, 2004.

liabilities.<sup>16</sup> Given the fact that NYRA had in the past carefully guarded its financial picture,<sup>17</sup> this was a major step forward for financial transparency at NYRA.

Yet, so much more needs to be done for transparency at NYRA. Even on the financial picture, NYRA did not publicly release its full financial report. It did not release its comprehensive loss figure. In recent years, NYRA has been reporting both a net loss figure and a comprehensive accounting loss number. The comprehensive loss tends to be far higher than the net loss. For example in 2002, NYRA's net loss was reported as \$6.8 million while its comprehensive loss was reported as \$21.7 million.<sup>18</sup> So there is a reasonable possibility that NYRA's comprehensive loss for 2003 was considerably in excess of \$20 million.

NYRA's contractual processes need significant review. NYRA has reached a deal with MGM Mirage for that firm to manage NYRA's potential racino at Aqueduct, it has entered into a multi-million dollar contract with Safir Rossetti in 2003 to provide security consulting services, it has entered into an arrangement with United Tote to replace Autotote as its tote provider,<sup>19</sup> and it is in the process of reaching an agreement with Bradford Race, the former secretary to Governor Pataki, to provide legal and consulting services to aid NYRA in its quest for a franchise renewal.<sup>20</sup>

Yet, the Racing, Pari-Mutuel Wagering and Breeding Law provides, that all NYRA contracts, except for emergency contracts and sole source contracts "for the procurement of goods or services of a value in excess of two hundred fifty thousand dollars shall be awarded only by a process of competitive bidding approved by the board."<sup>21</sup> This provision was added in 1997 by a Governor's Program Bill<sup>22</sup> which was part of an effort to "improve the accountability and oversight of"<sup>23</sup> NYRA. Someone needs to review each of these contracts to determine whether: (a) they are subject to the statute requiring competitive bidding, (b) the processes employed by NYRA complied with the bidding statute, and (c) what remedial actions should be taken to assure compliance with the competitive bidding statute.<sup>24</sup>

Some accountability is needed on the issue of purse funds. As has been well documented, NYRA has been using funds that belonged to its horsemen to help pay for operating expenses. A public accounting is in order. That accounting would explain: how much in purse funds was diverted, who authorized the diversion of purse funds, whether any officials of the horsemen's association consented to the diversion of horsemen's funds, how much money NYRA currently owes the horsemen, and what plans are extant

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<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> "NYRA Loses \$21.7 Million Last Year," Associated Press, December 13, 2003.

<sup>19</sup> Matt Hegarty, "NYRA Switching Tote Deals," Daily Racing Form, June 10, 2004.

<sup>20</sup> James M. Odatto, "NYRA Hiring Pataki Associate," Albany Times Union, July 30, 2004, Pg. B3.

<sup>21</sup> Racing, Pari-Mutuel Wagering and Breeding Law, §213.5.a.

<sup>22</sup> Assembly Bill No. 8686, 1997.

<sup>23</sup> 1997 NYS Legislative Annual, Memorandum of Assembly Rules Committee, Pg. 456.

<sup>24</sup> Should the contracts be null and void? Should they be rebid? Should NYRA be disciplined by the Racing and Wagering Board?

for the repayment of these funds. Some additional explanation would be helpful to explain why this diversion did not constitute the crimes of larceny<sup>25</sup> or misapplication<sup>26</sup> under the New York Penal Law.

There was an inquiry into whether NYRA had utilized the moneys placed in the telephone wagering accounts of its bettors.<sup>27</sup> Again, there needs to be a public explanation as to whether such bettor's funds were appropriated and who authorized the appropriation. There needs to be an accounting as to whether NYRA is still holding on to these funds. Finally, was this diversion a crime?

Similar accountability is needed for the status of NYRA's debt to agencies of the State of New York How much money is owed the New York State Department of Economic Development and the New York State Thoroughbred Racing Capital Investment Fund [CIF]? When was the last time that NYRA paid the CIF, and what plans have NYRA and/or the CIF made for repayment of these funds?

For added transparency, there is a need for greater disclosures of payments to NYRA executives. What are the salaries of NYRA's officers? What are their perks? Numerous NYRA executives have left NYRA over the past several years. What were their incentive packages? Have there been increases in the supplemental pensions paid to former NYRA executives? Has NYRA paid the personal legal expenses of its executive staff in connection with the federal and state criminal investigations into tax fraud and money laundering at NYRA? If so, how much was paid? How much is being paid to NYRA's consultants? How much is being paid to NYRA's outside legal counsels?

There are constant rumors that the Television Games Network, which operates what is probably the largest account wagering operation in North America, owes NYRA money for source market fees. Source market fees are fees paid by the Television Games Network to its track partners based on wagers placed by bettors within that track's local market. Account wagers placed by New Yorkers with the out-of-state Television Games Network are unauthorized by statute, but a statute that restricts account wagering to New York firms only may be in violation of the Dormant Commerce Clause of the federal Constitution.<sup>28</sup> In any event, there are persistent rumors that the Television Games Network took wagers from bettors in the NYRA market and may owe funds to NYRA. What is the status of these funds?

The work of the NYRA board of trustees should have some transparency. Shouldn't there be access to the minutes of these meetings and the voting and attendance

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<sup>25</sup> Penal Law, §155.05.

<sup>26</sup> Penal Law, §165.00.

<sup>27</sup> See Note 12, *supra*.

<sup>28</sup> See Bennett Liebman "Account Wagering in New York and the Dormant Commerce Clause," <http://www2.als.edu/glc/wagering/accountwagering.pdf>

records of the NYRA trustees? Shouldn't there be some limits and certainly full disclosure of contracts that trustees and relatives of trustees have with NYRA?

The OTB's in New York have complained that lower takeout authorized at NYRA in 2001 has had a significant negative impact on their bottom lines and on NYRA's bottom line.<sup>29</sup> Some independent body ought to be determining the actual effect of lowered takeout on NYRA's balance sheet.

Since they are publicly traded corporations, we know far more about the operations of NYRA's rivals, Churchill Downs and Magna Entertainment, than we know about NYRA. With many government officials analogizing NYRA to a New York State public benefit corporation,<sup>30</sup> this lack of public information on NYRA makes no sense. If NYRA wants to continue its franchise to run the racetracks in New York, it is in NYRA's best interest to provide full transparency of its finances to the public. NYRA's CFO in January of 2004 said, "I think the day will come when we are an open book."<sup>31</sup> There is simply no reason why NYRA - especially with an independent monitor overseeing its operations - should not be an open book today. If we want transparency for NYRA, the future is now.

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<sup>29</sup> Steven Crist, "Kill Bill that's Raising Takeout," Daily Racing Form, March 26, 2004.

<sup>30</sup> James M. Odat, "State Authorities Target of Reform," Albany Times Union, February 25, 2004, Pg. A1.

<sup>31</sup> See note 14 supra.