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Riders Alliance • Rise and Resist Elevator Action Group • StreetsPAC
Tri-State Transportation Campaign

May 13, 2021

Senate Majority Leader Andrea Stewart-Cousins
Assembly Speaker Carl Heastie

Re: Please end Governor Cuomo's EO 168, which has suspended some anti-corruption and transparency rules at MTA since 2017.

Dear Majority Leader Stewart-Cousins and Speaker Heastie,

We write today to ask you to pass a resolution ending Governor Cuomo's Executive Order (EO) 168¹, which has kept the Metropolitan Transportation Authority (MTA) in a state of emergency since June 2017 and has been renewed monthly 48 times, most recently on April 29, 2021.² Since March 2020, the MTA has been under two emergency EOs, with the Governor's COVID-19 EO 202³ also affecting its operations.

The Legislature's action to overturn several COVID-19-related directives on April 28, 2021 was a welcome step toward ending the overuse of executive power. We believe that the Legislature should build upon this action by also overturning EO 168.

We believe EO 168 is no longer justified because:

1. The order is an overly broad use of executive powers that suspends important anti-corruption and environmental safeguards.
2. The Subway Action Plan has been completed, and MTA performance has rebounded.
3. The order undermines the ability of the MTA Board to fulfill their fiduciary duty through review and approval of contracts before decisions are made. EO 168 has excluded \$467 million worth of contracts from prior Board approval before contracts were let or amended.

¹ Governor Andrew Cuomo. Executive Order 168. June 30, 2017.
<https://www.governor.ny.gov/news/no-168-declaring-disaster-emergency-five-boroughs-new-york-city-and-counties-dutchess-nassau>

² Governor Andrew Cuomo. Executive Order 168.48. April 29, 2021.
<https://www.governor.ny.gov/news/no-16848-continuing-declaration-disaster-emergency-five-boroughs-new-york-city-and-counties>

³ Governor Andrew Cuomo. Executive Order 202. March 7, 2020. Renewals also available here:
<https://www.governor.ny.gov/executiveorders>

Overly Broad Use of Executive Powers

Executive Order 168 raises significant questions about whether the MTA's problems meet the definition of a "disaster" as defined by state law. Under Section 20 of Article 2-B of the Executive Law, a disaster is an "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse." ("Disease outbreak" was added in 2020 after the COVID-19 pandemic hit New York.) The original order cited three subway derailments, the F train being stuck between stations, signal switch trouble, a home signal problem, and a track circuit failure in justifying the disaster designation. While the order has since been modified, its continued inclusion of service disruptions and track outages goes beyond the definition of disaster in state law.

Penn Station is also specifically cited in the order. If the Executive believes that the condition of Penn Station warrants the issuance of a disaster declaration, the Governor should issue a separate EO specific to this concern. This would allow the merits of an emergency order for Penn Station to be considered separately by the public and Legislature. (Our groups note, however, that the state's blight determination citing "substandard conditions" in Penn Station and the surrounding area for the Empire Station Project project has been criticized as being overly dire and broad, despite public support for transit improvements.)

Suspension of Anti-Corruption and Environmental Safeguards

Executive Order 168 Declaring the MTA an Emergency Disaster suspends multiple state laws which ensure a fair, transparent and accountable contracting process designed to prevent corruption and establish a level playing field for vendors. The order suspends a number of sections of Public Authorities Law, State Finance Law, and the Environmental Conservation Law as they apply to "contracts, leases, licenses, permits or any other written agreements." In total, 13 sections of law were suspended relating to competitive bidding, prevention of collusion between vendors, use of Minority and Women Business Enterprises (MWBE) contractors, comptroller review of certain contracts, and requirements for environmental review under the State Environmental Quality Review Act (SEQRA), among other suspensions.⁴

While the MTA has serious maintenance and repair issues that need to be addressed through its capital program, it is hard to see how dispensing with competitive, transparent contracting processes will provide better, more cost-effective service for MTA riders.

Subway Action Plan Has Been Completed, and Performance Rebounded

The MTA state of emergency under EO 168 was announced in conjunction with the launch of the Subway Action Plan in July 2017 to address the deterioration of service and repeated

⁴ See Reinvent Albany's annotation and analysis of EO 168 at <https://reinventalbany.org/2017/07/governor-cuomos-mta-disaster-declaration-suspends-anti-corruption-and-environmental-safeguards/>

subway meltdowns. Since then, the MTA announced that the Subway Action Plan was completed and the program has been institutionalized. The MTA's Subway Action Plan Final Action Report released in January 2020 concluded the following:⁵

“MTA’s execution of SAP was a success. The MTA delivered crucial maintenance to stabilize the system, which is in dramatically better condition now than it was in 2017. The subway system now has fewer regular incidents, as well as improved infrastructure and signal reliability.”

Prior to COVID-19, subway performance and ridership hit recent highs in 2019 after the institution of programs like Save Safe Seconds and the Subway Action Plan.⁶ While performance is difficult to measure in 2020 and 2021 due to the impact of COVID-19, the MTA's subway performance dashboard indicates that the gains made in 2019 have continued despite a number of challenges facing the MTA workforce.

Undermining Fiduciary Duty of MTA Board

The MTA's Procurement Guidelines,⁷ which are routinely approved by the Board, authorize the MTA to make emergency procurements of goods and services. The guidelines also allow the Board to authorize non-competitive bidding under certain circumstances. For all of these processes, there are important notification requirements for the Board. The Executive Order goes beyond this existing authority, and undermines the Board's obligations to approve contracts and serve as fiduciaries of the MTA as required under the Public Authorities Law.

Executive Order 168 was implemented by MTA staff through Emergency Guidelines which were not reviewed or approved by the Board. Under the Emergency Guidelines, the MTA Board initially was not able to review contracts made under the order. It was not until there was the threat of litigation from some Board members concerned about their ability to uphold their fiduciary duty to the MTA that a “ratification” process was established for Board members to approve staff actions that have already been made for contracts under EO 168.⁸

Since the EO 168 ratification process was created, \$467 million worth of contracts and change orders were processed by MTA staff without the Board's approval, dating from September 2017 to March 2019. This includes \$105 million in sole-source or non-competitive contracts, \$163 million in contract amendments, and \$198 million worth of “informal competitive” contracts.

Further, the EO 168 appears not to have been used since March 1, 2019, when the last contract was brought forward to the MTA Board for ratification under the order.⁹

⁵ MTA New York City Transit. Subway Action Plan: Final After Action Report. January 2020. Page 12. <https://new.mta.info/document/13951>

⁶ Meyer, David. “Subways had best on-time performance in six years during 2019.” New York Post. January 20, 2020. <https://nypost.com/2020/01/20/subways-had-best-on-time-performance-in-six-years-during-2019/>

⁷ MTA Procurement Guidelines. June 2019.

http://web.mta.info/mta/compliance/pdf/All_Agency_General_Procurement_Guidelines_Approved_06262019.pdf

⁸ Rubinstein, Dana. “Distrustful of MTA leadership, board members seek outside counsel.” Politico. 12/21/2017. <https://www.politico.com/states/new-york/city-hall/story/2017/12/20/distrustful-of-mta-leadership-board-members-seek-outside-counsel-158554>

⁹ See MTA Board Book from March 2019, page 78. The \$17.9 million contract went to LK Comstock & Company, Inc. for signal maintenance work. http://web.mta.info/mta/news/books/archive/190327_0900_Board.pdf

For the foregoing reasons, we ask that you overturn Emergency Order 168 to help bring about a return to normal, transparent governance at the MTA. This action will help ensure that the MTA Board is better able to fulfill its fiduciary duty to the MTA and its riders, and allow for greater transparency of the MTA's contracting decisions.

Thank you for your consideration. Should you wish to discuss this matter further, please contact Rachael Fauss, Senior Research Analyst, Reinvent Albany at rachael@reinventalbany.org or 518-859-5307.

Sincerely,

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Cc. Senator Leroy Comrie, Chair, Corporations, Authorities & Commissions Committee
Senator Tim Kennedy, Chair, Transportation Committee
Assemblymember Amy Paulin, Chair, Corporations, Authorities & Commissions
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