

**Commentary to the New York State Board of Elections (SBOE)
On Proposed Amendments to New York Codes, Rules and Regulations
(NYCRR), Title 9 (Executive Department) Subtitle V (State Board of
Elections) part 6203 (Investigations)**

May 29, 2018

Reinvent Albany opposes the sections of the proposed rules which create new procedures for the chief enforcement counsel to issue subpoenas to persons and committees being investigated for violations of Election or other laws. We believe these procedures will slow or terminate important investigations of alleged violations of Election Law. The Board should not seek to undercut the independence of the chief enforcement counsel, who has investigated types of cases not previously taken on by the Election Law enforcement unit of the Board.

We support the sections related to reporting enforcement activity but believe reporting should be made public and expanded to include all aspects of compliance and enforcement by the State and county boards of election. The Board currently does not report much, if any, compliance and enforcement activity to the general public, and it should do so as is done by other state agencies while respecting the rights of the accused.

Expanded reporting will also help address concerns about which cases the chief enforcement counsel chooses to investigate and which she does not. For example, the enforcement counsel has been criticized for not acting on referrals from the Board's compliance unit regarding political committees that have failed to file periodic statements on contributions and expenditures or failed to register entirely.

The Board and chief enforcement counsel should act to ensure fundamental requirements like political committees registering and reporting are done, and if not, administer penalties. But the chief enforcement counsel should also have the independence to conduct more complex and significant investigations regarding whether political committees' political activity is in compliance with Election Law.

Reinvent Albany's recommendations and comments on most of the seven new sections (6203.2-6203.8) proposed to be added to Rule Part 6203, are detailed below.

6203.2 Provisions related to granting the chief enforcement counsel authority to exercise the powers which the board is otherwise authorized to exercise pursuant to subdivision 5 and 6 of section 3-102 of the Election Law.

Reinvent Albany opposes this section in its entirety. The amended rules make it more difficult for the enforcement counsel to issue subpoenas. A series of bureaucratic hurdles must be surmounted by the enforcement counsel, and investigations will be slowed or terminated as a result. But if the Board is to amend the rules regardless of our opposition, it should at least strike the requirement that the name, entity and person being subpoenaed be made known to the Board. The person targeted should not be a factor in determining the validity of a subpoena.

Under current law and rules, the chief enforcement counsel may ask the State Board to grant her certain powers including the authority to “administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence it may deem relevant or material.” The enforcement counsel may also ask the Board to grant her power to confer immunity after consulting with the attorney general and related district attorney. The chief enforcement counsel’s request is considered by the Board within 20 days, and the chief enforcement counsel can participate in all matters related to the request, and cast a tie-breaking vote if the commissioners deadlock on the issue. There are few specifics in law as to how this process is conducted. Our understanding is the current practice is for the Board to review subpoenas for each case or investigation before granting its authority. However, the Board is not informed which individuals or entities are the target of the investigation and so the authority granted broadly applies to the investigation itself.

Under the new rules, to request a subpoena, the counsel will now have to write a memo to the board seeking approval, citing all potential Election Law violations; explaining how information requested via subpoena would aid the investigation; identifying the name of the entity and person served; and providing a copy of the actual subpoena to be served if granted. The Board must receive a subpoena request a week or more in advance of a vote.

Subpoena requests will be largely limited to particular investigations under the newly amended rules as opposed to blanket authority. Even if the subpoena request is approved, it can be further limited or modified by the Board through a motion of one

commissioner and a majority vote by the Board, albeit the chief enforcement counsel can participate and cast a tie-breaking vote, as is required by law. The Board also generally puts a time limit on any granted subpoena of six months, and if it does not vote on the subpoena, the chief enforcement counsel only has authority to use the subpoena for 90 days. Ongoing investigations already implemented by the chief enforcement counsel for which it has been granted the Board's general authority expire in 6 months.

6203.3 Provisions related to subpoena oversight authority.

Reinvent Albany opposes this section in its entirety. We see no reason why a target of an investigation should have an opportunity to quash or modify a subpoena through an appeal heard by a hearing officer and ultimately decided by the Board. This is unnecessary under the new rules, because the Board is evaluating again the very subpoena it previously approved. While we oppose this entire section, at the very least the hearing officer should make the final determination rather than the Board, which granted the subpoena. The Board should also be prohibited from deferring a vote on a subpoena indefinitely by granting perpetual extensions for deliberation.

If the target of an investigation believes a subpoena is overly broad or otherwise invalid, they can seek to quash or modify it in a court of law. The Senate Republicans did this when the enforcement counsel subpoenaed their books and records while seeking to determine whether housekeeping expenditures were improperly spent on candidate campaigns.¹

Furthermore, when Board members evaluate a subpoena request for the governor's campaign committee, state party committees, or legislative party committees, it appears to be or is a conflict of interest. The governor chooses the Board's commissioners, nominated by the major parties and their state committee chairs. This arrangement exacerbates a larger conflict inherent in the Board's bipartisan structure.²

¹ See:

<https://www.timesunion.com/local/article/Board-of-Elections-counsel-hit-Senate-GOP-with-11192856.php>

² Election Law 3-100(1): There is hereby created within the executive department a New York state board of elections, hereafter referred to as the "state board of elections", composed of four commissioners appointed by the governor: two commissioners, one each from among not fewer than two persons recommended by the chairman of the state committee of each of the major political parties; and two other commissioners, one upon the joint recommendation of the legislative leaders, of one major political party, in each house of the legislature and one upon the joint recommendation of the legislative leaders, of the other major political party, in each house of the legislature.

6203.4 Enforcement Reporting

The enforcement reporting in the proposed rule is a good start.

Reinvent Albany recommends all reporting of data by the Board's Enforcement Division, Compliance Unit and the Board itself should be made publicly available, at least in the aggregate, in the state's Open Data portal in a machine readable, downloadable tabular format.

We recommend the following additions and changes to the reporting requirements in the proposed rules:

- All aggregate complaint reporting data should be made available to the public on the Board's website in a machine readable, downloadable csv format.
- Reporting should be expanded beyond the chief enforcement counsel to other offices at the State Board involving compliance. This may require changes to other rules besides Part 6203 (Investigations).
- The Compliance Unit, separate from the Enforcement Division, should be required to make public a database in an open data format for each periodic statement:
 - the active number of political committees required to file.
 - the number of statements received and not received.
 - the number of statements reviewed.
 - the number of deficient statements identified, disaggregated by types of deficiencies.
 - the number of letters sent to persons and committees for deficient statements.
 - the number of deficient statements cured after notice.
 - the number of deficient statements uncured after notice.
- The commissioners should report publicly aggregate data on their own disposition of matters, including under any of the new rules which are promulgated. This could be done under current rules, for example, on referrals from the chief enforcement counsel regarding criminal violations pursuant to Election Law 3-104(5)(b).
- All applicable compliance and complaint information should include the county boards of election, and be disaggregated by county. County boards receive statements, complaints and conduct investigations if the chief enforcement counsel does not intervene. They should similarly be required to report their data to the State Board in their rules.

- Rule 6203.4(a) should include complaint information by type of violation of Election Law.
- Rule 6203.4(b)(3) should include hearing officer proceedings initiated by type of violation of Election Law.
- Rule 6203.4(c) should include settlements by type of violation of Election Law.
- Rule 6203.4(d)(3) should include special proceedings commenced by type of violation of Election Law.
- Rule 6203.4(e) appears to collect information which will create an invalid comparison of monies collected before and after the creation of the enforcement counsel's office since the enforcement counsel's office has only existed for 4 years.
- Rule 6203.4(f) should include Compliance Unit deficiency referrals by type of violation of Election Law.
- Rule 6203.4(g) should include for failure to file required disclosures by type of disclosure not filed.

6203.5 Closed Enforcement Matters

Reinvent Albany generally supports reporting of closed enforcement matters.

- We think complainants should be informed when a case is closed or otherwise reaches a conclusion in all instances, as appears to be the case in the Rule but we think it needs to be clarified.
- We believe a final determination resulting in a settlement or finding of a violation should be made public, even if the violation is cured (albeit a violation that is cured should be indicated as such). This may require rules be added or amended beyond this section.

6203.6 Notification of Failure to File

The list of persons and committees who have not filed required periodic statements after twenty days, and after receiving a letter from the Board's Division of Election Law Enforcement, should be made available in the state's Open Data portal in a machine readable, downloadable tabular format. Ideally this would be in the same database as other compliance tracking. The list of non-filers is already available via public inspection according to Election Law 14-108(7).

We do not have any opinions on proposed sections 6203.7 and 6203.8.