STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

DIVISION OF CRIMINAL JUSTICE
PUBLIC INTEGRITY BUREAU

June 29, 2018

Nicholas Cartagena, Esq.
Deputy Counsel
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207

Re: Proposed Amendments to 9 NYCRR, Part 6203

Dear Mr. Cartagena:

The New York State Office of the Attorney General ("OAG") submits these comments on the proposed amendments to New York Codes, Rules and Regulations, Part 6203, on standardizing subpoena requests and requiring reporting of enforcement activity. Although the OAG supports reasonable efforts to facilitate increased communication between the Chief Enforcement Counsel and the Board of Elections Commissioners, certain of the proposed amendments would lead to a serious diminution of the Chief Enforcement Counsel's ability to investigate Election Law crimes, making it more difficult to fight corruption across New York State. The OAG therefore urges the Board of Elections to reject Sections 6203.2(e)(1), (4) & (5) and 6203.3 of the proposed amendments.

1. The Creation of the Chief Enforcement Counsel Position in 2014 Strengthened Election Law Enforcement in New York State

Changes to New York Election Law enacted in 2014 created a new, independent Division of Election Law Enforcement, led by a Chief Enforcement Counsel, with authority to refer cases to District Attorneys or the OAG. These statutory changes strengthened enforcement of the Election Law in New York State.

The amendments created the Chief Enforcement Counsel position and gave the Chief Enforcement Counsel sole authority to launch investigations on his or her own, or upon receiving complaints.[1] To issue subpoenas, the Chief Enforcement Counsel is required to request approval from the Board of Elections, which consists of four commissioners. The Chief Enforcement Counsel can break a tie if the Board is split two to two, and if no vote takes place 20 days after

[1] N.Y. ELEC. LAW § 3-104(1)(b) (Consol. 2014)

subpoena authority is requested, the subpoena may be issued.[2] The 2014 amendments also empower the Chief Enforcement Counsel to refer cases to a district attorney or to OAG.[3]

Finally, the Chief Enforcement Counsel is responsible for preparing an annual report summarizing the activities of the Division of Election Law Enforcement.[4]

The creation of the Chief Enforcement Counsel position has facilitated important investigations and prosecutions for violations of New York's Election Law that had long gone undetected, and unpunished. The Chief Enforcement Counsel has referred several cases to OAG, leading to arrests, indictments, and convictions for violations of the Election Law and related crimes. Because of the statutory changes in 2014, the OAG has been able to pursue numerous legal actions against individuals who have violated New York's Election Law. The bipartisan group includes two candidates who knowingly and willfully failed to file campaign finance disclosure reports, a now-former elected official who funneled campaign funds to a former staffer who had left government service amid charges of sexual harassment and illegally reported the funds, and three members of a political committee who illegally used that committee to coordinate with candidates for elected office, among others.

The OAG has only latent criminal jurisdiction to pursue public corruption cases in New York State. To activate that criminal jurisdiction to investigate and prosecute these cases, the OAG must obtain a referral from another agency pursuant to Executive Law § 63(3).[5] The Chief Enforcement Counsel is one of OAG's most important sources for Executive Law § 63(3) referrals and its primary source of referrals to prosecute crimes under the Election Law. New York needs stronger—not weaker—enforcement of public corruption laws. The OAG is concerned that the rule changes proposed in 6203.2(e)(1), (4) & (5) and 6203.3, will weaken the Chief Enforcement Counsel, one of OAG's most important partners in rooting out public corruption in New York's campaigns and elections, as detailed further below.

2. The Proposed Rule Change Imposes New Limits on the Chief Enforcement Counsel's Subpoena Power

The proposed rule change in Section 6203.2(e)(1), (4) & (5) imposes new limits on the Chief Enforcement Counsel's subpoena authority that would hamper his or her ability to investigate and ultimately refer cases to the OAG. First, under the proposed new rules, all subpoenas issued by the Chief Enforcement Counsel would automatically expire after six months, or after 90 days if the subpoenas were issued after 20 days of inaction from the Board of Elections.[6] Each of these subpoenas would require a renewal upon expiration.[7] Putting an expiration date on these subpoenas would require more layers of approval for lengthy

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[2] *Id.* § 3-104(3)
[3] *Id.* § 3-104(5)(b)
[4] *Id.* § 3-104(7)
[5] Previous attorneys general have requested that the governor grant a general referral—a standing order to investigate and prosecute any case of public corruption. Thus far, these requests have not been granted.
[6] N.Y. COMP. CODES R. & REGS. tit. 9 § 6203.2(e)(4) (proposed May 2, 2018)
[7] *Id.*

investigations, and could incentivize strategic delays in the production of documents from subpoena recipients. Second, under the proposed rule change, subpoena requests from the Chief Enforcement Counsel would need to be "directly related to a particular investigation" and "shall not include authority to issue subpoenas other than to those persons or entities identified in the application for such subpoena unless the board specifically grants such blanket authority."[8] By limiting the scope of the subpoenas, this new rule could undermine the Counsel's ability to uncover a violation of the Election Law or other violations. For example, a forensic accounting examination of a campaign's bank records may lead to questions about a variety of vendors used by that campaign. Each time the Chief Enforcement Counsel wanted to issue a subpoena to a different vendor, he or she would need to seek separate permission from the Board of Elections. That could significantly impede the ability of the Chief Enforcement Counsel to conduct investigations. Similarly, an investigation of one matter may lead to a discovery of other wrongdoing. Requiring approval to issue a new subpoena every time a new act of wrongdoing is uncovered would unnecessarily delay investigations. These new limitations could delay or excessively limit the scope of subpoenas required to identify Election Law violations.

3. The Proposed Rule Change Threatens to Cripple the Chief Enforcement Counsel's Investigations

OAG is also concerned that the proposed rule change in Section 6203.3 regarding challenges to subpoenas creates an onerous process that could cripple the Chief Enforcement Counsel's investigations. Recipients of subpoenas, under the new rules, could promptly apply to the State Board of Elections, asking the Board to quash or modify the subpoena authority of the Chief Enforcement Counsel.[9] A hearing would then be held by a hearing officer, and a report with that officer's recommendations would be provided to the Counsel's Office, and then to the Board of Elections.[10] The Board of Elections, within 30 days, must render a final decision, either denying the challenge to the subpoena, or rescinding, modifying, or amending the subpoena.[11] Until that decision is issued, "all requirements to comply with the subpoena shall be stayed and the expiration of the subpoena shall be likewise tolled."[12] At best, this provision will likely delay by several weeks or months any responses by recipients to subpoenas from the Chief Enforcement Counsel, since once a challenge is made, the subpoena is stayed during the appointment of a hearing officer, the hearing itself, the recommendation from the hearing officer, and during the Board's deliberations, a duration that the Board can extend beyond 30 days by majority vote. Meanwhile, the statute of limitations continues to run, meaning delays can quite literally allow wrongdoing to go unpunished. At worst, the rule change could prevent effective investigations altogether, since this subsection does not specify what happens in the event of a Board split on how to respond to a challenge to a subpoena. (Other sections of the statute and the proposed amendments explicitly allow the Chief Enforcement Counsel to cast a tie-breaking vote in such situations.) In short, this rule change is a recipe for the same gridlock that led to the 2014 statutory amendments in the first place. It raises the possibility that many, if not all, subpoenas

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[8] *Id.* § 6203.2(e)(1)
[9] *Id.* § 6203.3
[10] *Id.*
[11] *Id.*
[12] *Id.*

issued by the Chief Enforcement Counsel will be delayed, if not stymied altogether. Such a rule change would undermine the authority and independence of the Chief Enforcement Counsel to investigate Election Law violations in New York, and, ultimately, to refer cases to a district attorney or to the OAG for prosecution. At minimum, this provision should be amended to clarify that a challenged subpoena may be enforced if the Board does not act within 30 days, and to allow a tie-breaking vote by the Chief Enforcement Counsel in the event of a Board split.

4. Conclusion

For the foregoing reasons, the OAG urges the Board of Elections to reject Sections 6203.2(e)(1), (4) & (5) and 6203.3, which would weaken the Chief Enforcement Counsel's efforts to hold individuals accountable for violating the Election Law.

Sincerely,

Daniel G. Cort
Public Integrity Bureau Chief, Office of the
New York State Attorney General