

**REPORT BY THE ELECTION LAW COMMITTEE AND
THE GOVERNMENT ETHICS AND STATE AFFAIRS COMMITTEE**

**SAFEGUARDING NEW YORK'S ELECTIONS:
THE UNFINISHED BUSINESS OF THE MORELAND COMMISSION TO
INVESTIGATE PUBLIC CORRUPTION**

I. EXECUTIVE SUMMARY

In 2014, following a report by the Moreland Commission to Investigate Public Corruption, which found that the enforcement policies and practices of the New York State Board of Elections (“SBOE”) were “designed for inaction,” the New York Legislature created the position of Chief Enforcement Counsel (“CEC”). The Legislature empowered the CEC, a gubernatorial appointment subject to legislative confirmation, to exercise sole authority within SBOE to investigate violations of the state Election Law, and it prescribed procedures by which the CEC is to enforce the law.

In September 2014, Risa Sugarman took office as CEC for a five-year term. Ms. Sugarman’s term has demonstrated that the structure of the office can support politically independent work, but it has also made clear that the statutory procedures and tools currently in place limit enforcement. In essence, the Legislature replaced SBOE’s ineffectual procedures and policies with a statutory procedure designed to prevent too much action. The statutory procedure includes a cumbersome, two-step process for imposing civil penalties: an administrative hearing to assess whether a violation has occurred, followed by a court proceeding to impose a penalty where a violation is found. The two-step process is required regardless of the severity or complexity of the violation. Additionally, the civil penalties in the Election Law do not cover much of the conduct that the CEC is authorized to address, including filing inaccurate or untrue disclosure reports and improperly converting campaign contributions to personal use.

Unsurprisingly, this half-baked statutory scheme has resulted in little civil enforcement. Through 2018, and with oversight of more than 16,000 candidates and campaign committees, the CEC obtained fines in 20 matters in total. By comparison, the New York City Campaign Finance Board assessed penalties against 51 of the 249 campaigns in the 2013 municipal election for a single category of violation, accepting over-the-limit contributions.

Election Law enforcement should not necessarily be excessive. Indeed the CEC has reasonably dedicated time and resources bringing committees into compliance with the law. But

the record suggests that, year after year, committees are coming into compliance, if at all, on their own timeframe. Moreover, the CEC is meant to be an enforcement officer, not a personal compliance officer to campaign committees.

Accordingly, we recommend revisions to the statute, including establishing comprehensive civil penalties and streamlined procedures for enforcing routine violations. As an additional deterrence tool, we recommend more reporting of enforcement activity, including reporting of candidate and committee violations.

Finally, in April 2019, the state Legislature established a commission to recommend how to implement a public financing system for statewide and state legislative candidates. The commission is tasked with, among other things, identifying a state agency to oversee administration and enforcement of the program or, if appropriate, recommending a new agency. In light of the above considerations, we encourage the commission to recommend that the Legislature create a single non-partisan agency to regulate all aspects of campaign finance. The current enforcement scheme, which is needlessly cumbersome, cannot serve as a template for enforcing a public financing system, and so the establishment of a single agency would best safeguard taxpayer dollars and encourage the development of a more coherent and consistent enforcement scheme of campaign finance rules for all regulated parties.

II. THE MORELAND COMMISSION TO INVESTIGATE PUBLIC CORRUPTION

In July 2013, under the Moreland Act, Governor Andrew Cuomo established the Commission to Investigate Public Corruption (“Moreland Commission”), which was charged with investigating, among other things, SBOE affairs. The Moreland Commission issued a report in December 2013 that highlighted various SBOE policies and practices “designed for inaction,” including the mismanagement of complaints, incompetent enforcement of campaign finance laws, and a failure to use available resources.¹

The Moreland Commission noted unexplained delays of almost a year by staff in making recommendations to the SBOE Commissioners regarding complaints and a refusal by SBOE to open formal investigations into alleged violations for about 90% of complaints.² It further criticized SBOE’s practice of seeking a civil judgment against every person who did not file a required campaign finance disclosure report.³ According to the Commission, the practice was neither required by statute nor a prudent use of resources, principally because SBOE failed “to identify large-scale violations or repeat violators of the campaign finance laws.”⁴ Additionally, the Commission found that SBOE failed to use its “considerable power to meet its enforcement

¹ The Commission to Investigate Public Corruption, *Preliminary Report* (December 2, 2013), 63-85, https://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf. (All links in this report were last visited on August 21, 2019.)

² *Id.* at 70.

³ *Id.* at 73.

⁴ *Id.*

obligations,” noting, for example, that SBOE had issued only four subpoenas since the beginning of 2012, all in relation to one investigation.⁵

Because SBOE polices were “rooted in partisanship,”⁶ the Commission recommended creating a “structurally independent enforcement agency” to be “headed by a director appointed to a fixed, five-year term by the Governor with Senate confirmation, and removable only for cause.”⁷ The agency would be “structured to promote political independence” and would allow SBOE to “focus on its constitutional duty as an elections administrator.”⁸

III. CREATING THE POSITION OF CHIEF ENFORCEMENT COUNSEL

Following issuance of the Moreland Commission report, as part of the 2014 state budget, the State established the office of chief enforcement counsel (“CEC”) to head the Division of Election Law Enforcement within SBOE.⁹ The CEC is empowered with sole authority within SBOE to investigate alleged violations of the state campaign finance law and other statutes “governing campaigns, elections and related procedures.”¹⁰ The CEC is selected by the Governor to a five-year term, upon the confirmation of a majority vote by the Senate and Assembly.¹¹ The CEC may only be removed by the governor for substantial neglect of duty, gross misconduct in office, or the inability to discharge the powers or duties of office.¹²

The statute provides that the CEC can conduct investigations upon receipt of a complaint or upon her own initiative.¹³ To facilitate an investigation, the CEC can request that the four-member board authorize the issuance of a subpoena or the granting of immunity.¹⁴ If necessary, the CEC can break any tie vote on such request.¹⁵ If the allegations in any complaint would not constitute an Election Law violation or are not supported by credible evidence, the CEC must issue a letter “forthwith” to the complainant dismissing the complaint and notice to the board.¹⁶ If the

⁵ *Id.* at 79-83.

⁶ *Id.* at 63. In accordance with the State Constitution, SBOE is composed of two Democratic commissioners and two Republican commissioners. *See* Article II, § 8.

⁷ *Preliminary Report* at 85.

⁸ *Id.* at 85-6.

⁹ *See* S6355-D (2014).

¹⁰ Election Law § 3-104(1)(b).

¹¹ *Id.* § 3-100(3-a).

¹² *Id.*

¹³ *Id.* § 3-104(1)(b).

¹⁴ *Id.* § 3-104(3).

¹⁵ *Id.*

¹⁶ *Id.* § 3-104(4).

CEC finds substantial reason to believe that an Election Law violation that does not warrant criminal prosecution has occurred, she may commence an administrative hearing.¹⁷

The CEC commences an administrative hearing with a report, which must state whether: (1) substantial reason exists to believe an Election Law violation has occurred and, if so, the nature of the violation and any applicable penalty; (2) the matter should be resolved extra-judicially; and (3) a special proceeding should be commenced in state court to recover a civil penalty.¹⁸ A hearing officer, who is assigned at random by SBOE,¹⁹ must make findings of fact and conclusions of law based on a preponderance of the evidence as to whether a violation has been established and, if so, who is guilty of such violation.²⁰ The hearing officer, however, may dismiss the complaint if, “on balance, the equities favor dismissal.”²¹ To determine whether dismissal is proper, the hearing officer shall consider whether: (1) the complaint alleges a *de minimis* violation of the campaign finance laws; (2) the subject of the complaint has made a good faith effort to correct the violation; and (3) the subject of the complaint has a history of similar violations.²² The CEC must adopt the report of the hearing officer and may settle the matter or commence a special proceeding in state court.²³ In such special proceeding, the court may “accept, reject or modify the findings of fact and conclusions of law made by the hearing officer.”²⁴

As part of the law establishing the CEC, the State created a compliance unit within SBOE to examine campaign finance reports.²⁵ If such reports are found to be deficient, the compliance unit must notify the person required to file the report of the deficiency.²⁶ The CEC may commence an administrative hearing, in accordance with the above procedures, if the deficiency is not remedied within 30 days of receipt of the deficiency notice (or within 7 days of receipt of the deficiency notice if the notice is received within 30 days of an election).²⁷

¹⁷ *Id.* § 3-104(5)(a). In cases where the CEC finds reasonable cause to believe that a violation warrants criminal prosecution, she must present findings to SBOE for a vote on whether to accept or reject such findings. The CEC can break any tie vote. If SBOE fails to vote within 30 days of being presented with the CEC’s findings or SBOE accepts the CEC’s findings, then the CEC must refer the matter to the attorney general or the proper district attorney. *Id.* § 3-104(5)(b).

¹⁸ *Id.* § 3-104(5)(a).

¹⁹ 9 NYCRR § 6218.2.

²⁰ Election Law § 3-104(5)(a).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* § 3-104-a.

²⁶ *Id.*

²⁷ *Id.* § 3-104-a(2).

IV. OVERVIEW OF ENFORCEMENT ACTIVITY BY THE CEC

On September 1, 2014, Risa Sugarman took office as CEC to lead the Division of Election Law Enforcement.²⁸ The Division has an operating budget of \$1,450,000 and consists of attorneys, investigators, and auditors.²⁹ Broadly speaking, the CEC has authority over candidates and committees for elected statewide and state legislative offices and for elected county and local offices. There are roughly 16,000 active candidates and committees that are required to file campaign finance disclosure reports twice a year, in January and July, as well as additional disclosure reports around an election.³⁰

a. Independence

In many respects the CEC has functioned as the politically independent watchdog that the Moreland Commission envisioned, taking action against politically powerful groups regardless of party affiliation or leanings. The CEC initiated an investigation into the campaign housekeeping account of the State Senate Republican Campaign Committee,³¹ successfully challenged an illegal campaign finance deal between the New York State Independence Party and the now-defunct Independent Democratic Conference in the State Senate,³² and most recently settled an administrative enforcement proceeding against the Democratic-leaning political action committees of New York State United Teachers, the state teachers union.³³

The independence and the desired professionalism of the CEC, however, have been challenged. In April 2016, the *New York Daily News* published an article on an investigation by the CEC into Democratic New York City Mayor Bill de Blasio's campaign contributions.³⁴ The article was based on confidential documents prepared by the CEC and, in accordance with the law, submitted to SBOE for possible criminal referral. A subsequent investigation by the New York

²⁸ New York State Board of Elections Annual Report 2017, 44, <https://www.elections.ny.gov/NYSBOE/download/AnnualReport2017.pdf>.

²⁹ *Id.*

³⁰ *Id.* at 12; Election Law § 14-108.

³¹ Chris Bragg, *Board of Elections Questions Senate Republicans Campaign Spending*, ALBANY TIMES UNION (June 19, 2017), <https://www.timesunion.com/local/article/Board-of-Elections-questions-Senate-Republican-11231773.php>.

³² David Lombardo, *IDC-Independence Party Campaign Finance Deal Declared Illegal*, ALBANY TIMES UNION (June 7, 2018), <https://www.timesunion.com/news/article/IDC-Independence-campaign-finance-deal-declared-12975561.php>.

³³ Chris Bragg, *Sugarman Reaches \$100k Settlement with NYSUT*, ALBANY TIMES UNION (May 21, 2019), <https://www.timesunion.com/news/article/Sugarman-reaches-100k-settlement-with-NYSUT-over-13866475.php>.

³⁴ Kenneth Lovett, *De Blasio Team Skirted Campaign Donation Limits; Investigators Found 'Willful and Flagrant' Violations 'Warranting Prosecution'*, NEW YORK DAILY NEWS (April 22, 2016) <https://www.nydailynews.com/new-york/de-blasio-gamed-donation-limits-hid-names-board-elections-article-1.2611406?cid=bitly>.

State Inspector General revealed that a Republican SBOE staffer had disclosed the documents to the press and to a staffer for the State Senate Republicans.³⁵

In August 2018, SBOE enacted rules setting limitations on the CEC's subpoena authority, which former New York Attorney General Barbara Underwood described as "gutting the Enforcement Counsel's authority and independence."³⁶ The rules provide, among other things, that SBOE reserves the right to quash or modify a subpoena, upon the motion of an SBOE commissioner.³⁷ The rules further provide that authorization to exercise subpoena authority expires within six months of authorization unless the SBOE extends the authorization.³⁸ Finally, the rules establish a process by which a person to whom a subpoena is issued may apply to the SBOE to quash or modify a subpoena.³⁹ The CEC is currently engaged in litigation with SBOE over the rules, claiming, among other things, that they exceed SBOE's authority.⁴⁰

b. Performance Metrics⁴¹

With respect to the metrics considered by the Moreland Commission, the CEC has reported more activity than the prior SBOE Enforcement Unit. For example, the CEC reported initiating 113 formal investigations in 2015 and 52 formal investigations in 2017.⁴² The CEC has also obtained SBOE approval for subpoenas and criminal referrals.⁴³

³⁵ New York Office of the Inspector General, *Investigation of the Dissemination of New York State Board of Election Enforcement Division Documents* (May 2016) <https://ig.ny.gov/sites/g/files/oe571/files/2016-11/BOEREP0RT5.31.16.pdf>.

³⁶ Karen DeWitt, *NY Board Of Elections Curtails Investigator's Powers*, WAMC (August 8, 2018) <https://www.wamc.org/post/ny-board-elections-curtails-investigators-powers>.

³⁷ 9 NYCRR § 6203.2(e)

³⁸ *Id.*

³⁹ 9 NYCRR § 6203.3

⁴⁰ Chris Bragg, *Sugarman Sues to Strike Down Rules Reining in Her Subpoena Power*, ALBANY TIMES UNION (January 23, 2019), <https://www.timesunion.com/news/article/Sugarman-sues-to-strike-down-rules-reining-in-13555375.php>.

⁴¹ Data reported in this section is drawn from multiple sources, including SBOE Annual Reports, transcripts of SBOE Commissioners Meetings, litigation papers, and records made public by SBOE pursuant to the Freedom of Information Law.

⁴² Although the CEC is required to inform SBOE of any complaint that is dismissed, the status of these investigations remains unclear. The CEC indicated that SBOE would be informed of dismissed complaints in the SBOE's annual report. *See* SBOE Commissioners Meeting, September 15, 2016, Tr. at 16, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions09152016.pdf>. However, the annual reports do not provide such information. The rule package relating to the CEC's subpoena authority also required reporting of enforcement activity, including dismissal of complaints. The CEC is seeking to annul this reporting component of the rule, as well as the subpoena component.

⁴³ Although not the focus of this report, the CEC's work has resulted in the filing of criminal charges, including against a former state senator who ultimately pleaded guilty to falsely filing disclosure reports. *See* A.G. Schneiderman Announces Guilty Plea And Admission By Former State Senator George Maziarz, March 2, 2018, <https://ag.ny.gov/press-release/ag-schneiderman-announces-guilty-plea-and-admission-former-state-senator-george>.

	2015	2016	2017	2018
Subpoenas	19	9	4	0
Criminal Referrals	9	5	1	0

Civil Enforcement Proceedings. Through 2018, the CEC commenced 26 proceedings for which a fine was sought.⁴⁴ As compared to prior SBOE practice of seeking judgment against all persons who failed to file a report, the CEC pursued action against more serious violators, primarily persons who failed to file at least three disclosure reports in an election cycle.

Civil Enforcement Proceedings ⁴⁵				
2015	2016	2017	2018	Total
3	11	6	6	26

Candidates or Committees	Failure to File Disclosure Reports	Accepting Over-The-Limit Contributions	Filing Inaccurate Disclosure Reports	Other	Totals
State Legislative	7	1	-	-	8
Local Elected Office	11	1*	-	-	12
Other (PACs/Party)	4*	-	1	1**	6
Totals	22	2	1	1	26

*Two proceedings also involved claims about incomplete or inaccurate disclosure reports.

**Proceeding regarding improper coordination between committees.

The CEC has not always succeeded in resolving these matters expeditiously. As detailed above, nearly all of the enforcement activity during this period was against persons who failed to file disclosure reports, which presents relatively simple legal and factual questions. Yet these matters could take up to two years to resolve – typically by settling for a small fine.

Civil Penalties. Through 2018, the CEC obtained fines in 20 matters.⁴⁶ The CEC negotiated fines in 17 of the 20 matters, and with one exception, the negotiated fine amounted to \$10,000 or less. In the remaining three matters (identified by asterisk), a court imposed a fine.

⁴⁴ To compare to prior practice, in 2013, SBOE obtained 484 judgments against candidates and treasurers for failing to file disclosure reports.

⁴⁵ Two of the three proceedings in 2015 were initiated in state court before SBOE’s adoption in November 2015 of rules governing the administrative hearings.

⁴⁶ The 20 matters consisted of 18 of 26 civil enforcement proceedings commenced through 2018, as well as two matters that the CEC settled outside of any civil enforcement proceeding.

Fine Amount	Failure to File Disclosure Reports	Accepting Over-The-Limit Contributions	Filing Inaccurate Disclosure Reports	Independent Expenditure Reporting	Totals
0 – 1,000	7		1		8
1,001 – 3,000	5				5
3,001 – 7,000					0
7001 – 10,000	1	2			3
10,001 – 20,000	2*				2
20,001 – 30,000				1	1
30,001 – 40,000	1*				1
Totals	16	2	1	1	20

Universe of Non-Filers. The effectiveness of the CEC has been questioned, particularly, with respect to enforcement against persons who failed to file disclosure reports (“non-filers”).⁴⁷ SBOE has reported an increase in the number of non-filers since adoption of the CEC position. In January 2019, SBOE reported the following numbers regarding non-filers:

Periodic Reports	Non-Filers Referred to CEC by Compliance Unit	Outstanding Reports as of January 2019
January 2015	765	397
July 2015	1154	545
January 2016	1682	811
July 2016	2075	986
January 2017	2105	1107
July 2017	1879	1357
January 2018	2531	1928
July 2018	2500	2311

The CEC has responded in part that the list of non-filers contains committees that should be terminated.⁴⁸ The CEC has also focused on bringing non-filers into compliance.⁴⁹ The

⁴⁷ See, e.g., Karen DeWitt, *NY Board Of Elections Curtails Investigator's Powers*, WAMC (August 8, 2018), <https://www.wamc.org/post/ny-board-elections-curtailed-investigators-powers> (“Susan Lerner, with the government reform group Common Cause, says the [SBOE] commissioners have a legitimate point that the chief enforcement officer has not done enough to go after the non-filers[.]”).

⁴⁸ See SBOE Commissioners Meeting, August 2, 2017, Tr. at 14, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions08022017.pdf>; SBOE Commissioners Meeting, June 1, 2017, Tr. at 20, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions06012017.pdf>.

⁴⁹ SBOE Commissioners Meeting, May 3, 2018, Tr. at 10, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions05032018.pdf>.

following charts show the number of outstanding periodic reports for January 2017 and January 2018 at various points in time following the applicable reporting deadline. For example, for the January 2018 periodic report, approximately 600 persons filed reports after the reporting deadline, 300 of whom filed more than five months after the deadline.

January 2017 Periodic Report	
	Unfiled Reports
Reporting Deadline	2,105
April 2017	1,947
September 2017	1,454
January 2019	1,107

January 2018 Periodic Report	
	Unfiled Reports
Reporting Deadline	2,531
May 2018	2,318
June 2018	2,207
August 2018	2,069
January 2019	1,928

Deficient Disclosure Reports. The SBOE Compliance Unit refers reporting deficiencies that have not been remedied within a certain timeframe to the CEC for possible enforcement. SBOE considers a report deficient if it is missing statutorily required data or “contains other entries identified as deficiencies.”⁵⁰ In 2016, the CEC noted that negative balances and the failure to provide loan documentation were serious violations and that she would attempt to bring committees into compliance and, if necessary, file an administrative complaint.⁵¹ As reported in January 2019, a total of 1,385 deficiencies referrals remain outstanding, including 438 instances of negative balances, 461 instances of reimbursement/payments to individuals without proper itemization, and 510 instances of missing data.

V. THE STATUTORY SCHEME CURTAILS EFFECTIVE ENFORCEMENT

The CEC has been an improvement on what came before, demonstrating greater political independence and a more nuanced approach to enforcement. Nonetheless, as the scale of enforcement activity is small compared to the magnitude of the problems, state elections are, not surprisingly, still described as “all but lawless.”⁵² As noted above, over a four-year period, the CEC, who has oversight of more than 16,000 candidates and committees, obtained civil fines in 20 matters in total. By comparison, the New York City Campaign Finance Board assessed penalties against 51 of the 249 campaigns in the 2013 municipal election cycle for only a single category of violation, accepting over-the-limit contributions.⁵³

⁵⁰ New York State Board of Elections Campaign Finance Handbook 2017, 41, <https://www.elections.ny.gov/NYSBOE/download/finance/hndbk2017.pdf>. SBOE sends training letters to committees for reporting errors that do not constitute deficiencies. *Id.*

⁵¹ Bill Mahoney, *BOE Counsel Targets Committees with Negative Balances, and There are Dozens*, POLITICO (Feb. 24, 2016), <https://www.politico.com/states/new-york/albany/story/2016/02/boe-counsel-targets-committees-with-negative-balances-and-there-are-dozens-031550>.

⁵² Will Bredderman, *State Budget Winners and Losers*, CRAIN’S NEW YORK BUSINESS (April 1, 2019), <https://www.crainsnewyork.com/politics/state-budget-winners-and-losers>.

⁵³ See New York City Campaign Finance Board, *Keeping Democracy Strong: New York City’s Campaign Finance Program in the 2017 Citywide Elections*, 136, https://www.nycfb.info/pdf/2017_Post-Election_Report_2.pdf.

Moreover, the significant number of non-filers, as well as persons who file months after a reporting deadline, undermines the interests advanced by disclosure, namely, providing the electorate with information about where political campaign money comes from, deterring corruption and the appearance of corruption, and gathering data to detect violations.⁵⁴ To a certain extent, the limited enforcement activity is a product of the limited resources available to the CEC, as well as the prioritization of such resources.⁵⁵ However, it is also undoubtedly a product of the cumbersome statutory scheme.

a. The Failure to Empower Hearing Officers to Impose Penalties and to Accord Their Findings Any Weight Renders the Process Nearly Meaningless.

Of the administrative enforcement regimes in New York, the Election Law regime is unique. Generally agencies are empowered to adjudicate violations and impose penalties. For example, state and local agencies are authorized to adjudicate building violations, environmental violations, health violations, insurance violations, labor violations, or traffic violations, and assess a broad range of fines.⁵⁶ A person can challenge the agency determination to impose penalties in a judicial proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules, but judicial review is deferential, typically limited to questions of law and the extent of the penalty imposed.⁵⁷ This framework promotes efficiency and further recognizes agencies' knowledge of and experience in the field in which they regulate.⁵⁸

With respect to the enforcement of the Election Law, however, the Legislature took a different approach. The law requires that an administrative hearing be held before imposing a civil penalty, but does not authorize the hearing officer to impose a penalty. Rather, if the hearing

⁵⁴ *Citizens Union of New York v. AG of New York*, 269 F.Supp.3d 124, 142 (S.D.N.Y. 2017).

⁵⁵ SBOE Commissioners Meeting, September 15, 2016, Tr. at 18, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions09152016.pdf> (Ms. Sugarman: "I think that everyone has to decide what their priorities are with the resources that they're given. . . . I need to . . . decide whether it's better to bring someone into compliance and to get a committee to understand what they need to do and how they do it and not impose a small fine.").

⁵⁶ See, e.g., *Sherwood Medical Co. v. N.Y. State Dept. of Envtl. Conservation*, 158 Misc. 2d 281 (Sup. Ct., Albany Co. 1993) (affirming agency decision to impose a \$750,000 fine against a factory for violating air quality regulations); *Saoulis v. N.Y. City Envtl. Control Bd.*, 50 Misc.3d 1211(A) (Sup. Ct., Queens Co. 2016) (affirming agency decision to impose more than \$132,000 in fines against building owner for various building and sanitation violations); *A.G. Odell, Inc. v. Axelrod*, 106 A.D.2d 736 (3d Dep't 1984) (affirming agency decision to impose a \$13,000 fine against a pharmacy and its owner for prescribing controlled substances in violation of state health law); *Scuderi v. Gardner*, 103 A.D.3d 645 (2d Dep't 2013) (affirming state Department of Labor decision to require employer who willfully failed to pay prevailing wages and supplements to employees to pay employees for the underpayment plus interest, as well as a civil penalty of 25% of the underpayments); *Nichols v. N.Y. State Dept. of Fin. Servs.*, 148 A.D.3d 1400 (3d Dep't 2017) (affirming agency decision to impose \$10,500 fine against insurance agent/broker for engaging in untrustworthy conduct); *Margolis v. N.Y. State Dept. of Motor Vehicles*, 170 A.D.3d 843 (2d Dep't 2019) (affirming agency decision to impose a \$150 fine and suspend driver's license for using a cell phone while driving).

⁵⁷ *Pell v. Bd. of Education*, 34 N.Y.2d 222, 230 (1974).

⁵⁸ *Ahsaf v. Nyquist*, 37 N.Y.2d 182, 186 (1975) ("As we have said the courts must recognize the capability, competence, and experience of the administrative agency in the fashioning of regulatory penalties.").

officer finds that a violation has been established, the CEC can either enter into a settlement agreement or commence a special proceeding so that a state court can impose the fine.⁵⁹ In the special proceeding, the court must not exercise deference with this administrative action, as it typically does for any other administrative action, but can “accept, reject or modify findings of fact and conclusions of law made by the hearing officer.”⁶⁰ These procedures must be followed for any violation, regardless of its severity or complexity.

The inability of hearing officers to impose penalties and the lack of weight accorded their findings renders the administrative hearing a nearly empty procedural hurdle. This is even more so because hearing officers do not even recommend a specific penalty that could become the basis for settlement negotiations; they simply authorize the CEC to seek the highest penalty provided for by law. Consequently, there is little reason for the subjects of the complaint to participate in the hearings, and the limited record to date bears this out. In 14 of the 16 administrative cases that were fully decided by the end of 2018, a decision was made without an answer from any named party (in most cases, not even an appearance was recorded).

Following the hearing, the cases are typically resolved by settlement.⁶¹ While settlement can offer an efficient option for resolving these matters, as noted above, it has not always been the case. Moreover, settlement does not render the statutory procedures any less cumbersome, and the lack of resources and adequate staffing and the time and expense of prosecuting violations undoubtedly place pressure on the CEC to settle (most often for a small fine).

b. A Threshold Analysis Required at Each Administrative Hearing Sweeps Too Broadly in Screening Out Minor Violations from Enforcement.

Before the CEC position was created, SBOE could initiate a proceeding to seek penalties for Election Law violations, and a court would assess penalties by considering the following non-exhaustive list of factors: the severity of the violation, whether the subject of the violation made a good faith effort to correct the violation, and whether the subject of the violation has a history of similar violations.⁶² With the enactment of the CEC position, these factors for assessing penalties remain. As shown below, however, they are also incorporated into the administrative hearing process. Thus, any civil enforcement action is subject to a similar analysis at both the beginning and end of the process, which is unique to the Election Law.

⁵⁹ Election Law § 3-104(5)(a).

⁶⁰ *Id.*

⁶¹ Under SBOE rules, the CEC is permitted to enter into a settlement agreement, either before or after a hearing decision. 9 NYCRR § 6218.5.

⁶² Election Law §16-120(2).

Factors to determine if an administrative complaint should be dismissed:	Non-exhaustive list of factors that court may consider when assessing penalties:
(1) whether the complaint alleges a <i>de minimis</i> violation; (2) whether the subject of the complaint has made a good faith effort to correct the violation; and (3) whether the subject of the complaint has a history of similar violations.	(1) the severity of the violation or violations; (2) whether the subject of the violation made a good faith effort to correct the violation; and (3) whether the subject of the violation has a history of similar violations.
Election Law § 3-104	Election Law § 16-120

At the penalty phase, these factors serve to guide a court in fashioning a penalty. As a threshold matter, however, the factors serve to slow or stop enforcement activity. Previously, a minor violation could be subject to penalty, whereas now, it would likely be dismissed. Additionally, the threshold factors require the CEC to undertake a more labor intensive review of a person’s history to bring any type of case. According to Ms. Sugarman, “[e]nforcement cases involve a review of all statutory filing requirements for hearing officer and court proceedings, evaluating a person’s legal filing obligations over multiple accounts including years of possible violations and making the decisions about which cases are legally sufficient to proceed.”⁶³

The threshold factors have also undermined statutory prima face evidence of willful violations. The Election Law has long provided that SBOE notify a non-filer no later than ten days after a reporting deadline of its reporting obligations and that a failure to file within five days of receipt of such notice is “prima facie evidence of a willful failure to file.”⁶⁴ Yet, under the current framework, before enforcement action against non-filers arguably becomes conceivable, committees are not only notified on multiple occasions to file a report even after the deadline,⁶⁵ but also afforded multiple opportunities to disregard filing obligations altogether.⁶⁶

⁶³ SBOE Commissioners Meeting, August 8, 2018, Tr. at 19, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions08082018.pdf>.

⁶⁴ Election Law § 14-108(5).

⁶⁵ See SBOE Commissioners Meeting, October 25, 2018, Tr. at 24, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions10252018.pdf> (Ms. Sugarman: “[I]t seems, when I read the law, that in order to avoid a dismissal, because a hearing officer finds that we can’t allege that the committee did not try in good faith to come into compliance, that that’s part of the process I have to go through to bring a hearing officer case.”); SBOE Commissioners Meeting, February 23, 2016, Tr. at 16, <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions02232016.pdf> (Commissioner Peter Kosinski: “[A]s I understand it from what you’re describing is that committees are getting really 2 opportunities to comply; one through the Compliance Unit if they fail to comply there, once you get the referral you’ll make another effort to get them to comply....”).

⁶⁶ Nearly all of the civil enforcement proceedings for failing to file disclosure reports involve candidates or committees that failed to file at least three or more disclosure reports in an election cycle.

c. The civil penalty structure is limited in scope and does not encompass all the violations that the CEC was explicitly authorized to address.

The effectiveness of civil enforcement is curtailed not only by cumbersome procedural hurdles, but also by the lack of penalties. The civil penalties set forth in the Election Law cover a limited number of violations, consisting of penalties of up to \$1,000 for failing to file a single report and up to \$10,000 for failing to file three or more reports in an election cycle, as well as penalties for persons who accept an overcontribution and for independent spenders.⁶⁷

There are, however, no defined penalties for filing a late report, even though, as noted above, hundreds of reports are regularly filed months after reporting deadlines. While there may be mitigating circumstances that cut against penalizing a late filer, as it stands now, there is simply no consequence for late filing, which renders reporting deadlines nearly meaningless. By contrast, the Federal Election Commission (“FEC”) enforces rules that distinguish between late reports and unfiled reports. Generally, a federal report will be considered late if it is filed not later than 30 days after the due date and will be considered not filed if the report is filed more than 30 days after the due date.⁶⁸ Similarly, the New York City Campaign Finance Board (“CFB”) can impose a late filing fine on a person who files a report after the reporting deadline but before the *next* reporting deadline; anyone who files a report after the next reporting deadline is considered a non-filer and is subject to fines for failing to file a report.⁶⁹

There are also no defined civil penalties for disclosure reports that are inaccurate, incomplete, or untruthful, conduct which the CEC was explicitly authorized to pursue.⁷⁰ The Election Law provision relating to the judicial proceeding for enforcing violations distinguishes between a person who “fails to file a statement” and a person who files one that does not conform to the statutory requirements “in respect to its truth, sufficiency in detail and otherwise.”⁷¹ Yet civil penalties are only available against the non-filer.⁷² With deficient or false filings, the judicial proceeding is available simply to compel correction of the filing.⁷³

Finally, the Election Law has long prohibited the conversion of campaign contributions to a personal use “unrelated to a political campaign or the holding of a public office.”⁷⁴ Nonetheless,

⁶⁷ See generally Election Law § 14-126.

⁶⁸ FEC, Calculating Administrative Fines, <https://www.fec.gov/legal-resources/enforcement/administrative-fines/calculating-administrative-fines/>.

⁶⁹ New York City Campaign Finance Board, Penalty Schedule, 8, <https://www.nycffb.info/law/penalty-guidelines/>.

⁷⁰ See Election Law § 3-104-a(2).

⁷¹ *Id.* § 16-114(1) and (2).

⁷² *Id.* § 14-126(1)(a) (“Any person who *fails to file a statement* required to be filed by this article shall be subject to a civil penalty, not in excess of one thousand dollars...”) (emphasis added).

⁷³ Although we note that the CEC has sought penalties against entities that failed to disclose specific contributions in a disclosure report or failed to file political communications with filed disclosure reports on the basis that such entities failed to file a statement.

⁷⁴ Election Law § 14-130(1).

the Moreland Commission found that elected officials were using their campaign accounts as personal “piggy banks” and thus recommended that the law be amended to provide more detail as to what constitutes an unlawful conversion of campaign funds to personal use.⁷⁵ In 2015, the state Legislature drew on the federal rules in a misguided attempt to do just that.⁷⁶ The Legislature adopted language that could be read to permit *more* personal use of campaign contributions.⁷⁷ Additionally, although acknowledging the role the CEC could play in enforcing this prohibition, the Legislature failed to provide any civil penalties for the CEC to adequately fulfill such role.⁷⁸ While federal election law sets forth catch-all civil penalties that could encompass this and other unlawful conduct, the New York Election Law is notably silent.⁷⁹

VI. RECOMMENDATIONS

The effectiveness of election law enforcement depends on a range of tools and the ability to increase financial costs when the regulated party refuses to cooperate.⁸⁰ Here, the CEC can employ a range of tools but the CEC’s ability to impose any financial costs for violations is limited and overly cumbersome. We recommend the following:

- 1. Revise the administrative hearing process.** In lieu of the two-step process for imposing civil penalties (administrative hearing, followed by court proceeding), the Legislature should empower a hearing officer or, upon the hearing officer’s recommendation, SBOE, to make a final determination as to the violation and proper penalty, subject to CPLR Article 78 review. This approach is not only consistent with other agency adjudications in New York, including by the New York City Campaign Finance Board, but also provides a fair and efficient process to all parties. Additionally, the three-part threshold analysis for screening out violations is overly broad and blunt and should be narrowed by, for example, requiring only a *de minimis* analysis. Alternatively, the three-part analysis could be replaced by a bright-line rule, whereby the hearing officer is directed not to impose fines if the fines for such violations fall below a threshold dollar amount.⁸¹ At a minimum, SBOE should explicitly require by

⁷⁵ Thomas Kaplan, *After Ethics Panel’s Shutdown, Loopholes Live On in Albany*, NY TIMES (December 8, 2014), <https://www.nytimes.com/2014/12/08/nyregion/after-moreland-commission-shutdown-by-gov-cuomo-loopholes-live-on-in-albany.html>; see also *Preliminary Report, supra*, at 25-7.

⁷⁶ See Chapter 56, Part CC, § 9 (2015).

⁷⁷ Report by the New York City Bar Association Government Ethics and State Affairs Committee, *Moving Backwards on Reform: How The Latest Amendments to Restrictions on Personal Use of Campaign Funds May Exacerbate the Problem of Misuse* (April 2016), <https://www2.nycbar.org/pdf/report/uploads/20072971-RestrictionsPersonalUseofCampaignFundsGovtEthicsReportFINAL4.12.16.pdf>.

⁷⁸ See Election Law § 14-130(6).

⁷⁹ See 52 U.S.C. § 30109(a)(5); 11 C.F.R. § 111.24 (setting maximum penalties for violations, as well as enhanced maximum penalties for “knowing and willful” violations).

⁸⁰ Todd Lochner and Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations* (2000)

⁸¹ For example, if after applying the non-exhaustive list of factors for assessing penalties, a hearing officer determines that the civil penalties do not exceed \$250, the hearing officer will not impose the penalty, but specific violations would be publicly reported, as discussed below, as a deterrence tool. See fn. 86, *infra*; see also NYC CFB

rule that the hearing officer recommend a specific penalty to facilitate a more expeditious settlement.

2. **Establish streamlined procedures for enforcing routine violations.** The Legislature should adopt a streamlined process for enforcing more routine violations, similar to FEC's Administrative Fines Program.⁸² Under the program, if the FEC has reason to believe a person committed a violation, it will notify the subject of its finding and the amount of a proposed civil penalty. The subject may either pay the civil penalty or submit a written response. Upon payment, the FEC issues a final determination that the violation has been committed and the case is ended. If the subject submits a written response, it is reviewed by a reviewing officer who makes a recommendation to the FEC with notice to and opportunity to be heard by the subject. The FEC then issues a final determination, which the subject can challenge in court. As noted by the Brennan Center, this process helps ensure that “violations carry predictable and relatively swift consequences without consuming a disproportionate amount of [] time and resources.”⁸³
3. **Establish comprehensive civil penalties.** The Legislature should expand on the limited number of civil penalties provided for in the Election Law, or where possible or subject to additional authorization, SBOE should fill in the interstices, so that there are meaningful consequences for unlawful activity.⁸⁴
4. **Require more transparency of enforcement activities.** SBOE should publicly report candidate and committee violations of the Election Law. Regular reporting of election enforcement activity is common at the local,⁸⁵ state,⁸⁶ and federal level.⁸⁷ The reporting requirements that SBOE adopted are a good start, but more specific reporting of candidate and committee violations should be required, not simply as a check on the CEC's exercise of enforcement authority but also as an additional tool to deter unlawful activity. The efficacy of monetary penalties, alone, to deter campaign finance

Guidelines for Staff Recommendations for Penalty Assessments for Certain Violations, 4, https://www.nycffb.info/pdf/2017_Penalty_Guidelines.pdf.

⁸² See FEC Administrative Fines, <https://www.fec.gov/legal-resources/enforcement/administrative-fines/>.

⁸³ Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Center for Justice (April 2019), 9 https://www.brennancenter.org/sites/default/files/publications/2019_04_FECV_Final.pdf. California also has streamlined procedures. See 2 CCR § 18360.1.

⁸⁴ SBOE is empowered to promulgate rules relating to “campaign financing practices consistent with the provisions of law.” Election Law § 3-102(1). SBOE is further empowered to promulgate rules to effectuate enforcement provisions. *Id.* § 3-104(8).

⁸⁵ See New York City Campaign Finance Board, *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, 133-40, https://www.nycffb.info/pdf/2017_Post-Election_Report_2.pdf.

⁸⁶ The California Fair Political Practices Commission publishes enforcement case resolutions, including resolutions without a fine. See <http://www.fppc.ca.gov/enforcement/EnfDivCaseResults/administrative-fines-and-penalties.html>. The Connecticut State Elections Enforcement Commission publishes docketed case resolutions. See <https://seec.ct.gov/Portal/CommDecisions/Landing?seecNav=%7C>.

⁸⁷ See FEC Enforcement Query System, <https://eqs.fec.gov/eqs/searcheqs>.

violations has been questioned, as fines can simply be “internalized [by campaigns] as the ‘cost of doing business.’”⁸⁸ Thus, reporting of violations may play an important role in bringing about compliance.⁸⁹

VII. PUBLIC FINANCING AND ENFORCEMENT

In April 2019, the State established a commission to recommend how to implement a public campaign financing system for state legislative and statewide public offices.⁹⁰ The commission must issue a report by December 1, 2019, and the report will have the full effect of law unless modified or abrogated by statute prior to December 22, 2019.⁹¹ The commission is required to determine, among other things, “an appropriate state agency to oversee administration and enforcement of the program” or if appropriate, to “recommend[] a new agency.”⁹²

This development necessitates reconsideration of the Moreland Commission’s recommendation that the State create a “structurally independent enforcement agency.” The New York City Bar Association has advocated for non-partisan administration of elections,⁹³ as well as for the creation of a single ethics body that would oversee campaign finance regulation.⁹⁴ We would thus support a recommendation by the Public Campaign Financing Commission for a new non-partisan agency, one that would ultimately regulate all aspects of campaign finance, not simply the public financing system. With respect to enforcement, specifically, the financing commission may be able to adopt the above-recommended reforms as “reasonably related to the administration of a public campaign finance program”⁹⁵ and so improve enforcement measures against not only participating state candidates, but also independent spenders, political parties, and local candidates. However, to the extent it cannot, the commission must devise procedures for more robust enforcement than what currently exists. Yet absent a recommendation by the commission for a new agency, the state Legislature can simply sit idle while the commission’s recommendation for placing administration of the public financing system in an existing agency, likely SBOE, becomes law, and a two-tiered enforcement system inexplicably takes hold. The establishment of a new non-partisan agency, we hope, would not only best safeguard taxpayer

⁸⁸ The Enforcement Blues, at 650-651.

⁸⁹ *Id.*

⁹⁰ See Chapter 59 of 2019, Part XXX.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Report of the New York City Bar Association Task Force on the New York State Constitutional Convention (June 2017), 8, https://s3.amazonaws.com/documents.nycbar.org/files/2017129-ConstitutionalConventionTF_FINAL_6.14.17.pdf; Report of the Task Force on the New York State Constitutional Convention (June 1997), 571-2, <https://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

⁹⁴ New York City Bar Association Government Ethics and State Affairs Committee Report on Establishing a State Integrity Commission (April 2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2017378-CommissionPublicIntegrity.pdf>.

⁹⁵ Chapter 59 of 2019, Part XXX, § 2.

dollars, but also encourage development of a more coherent and consistent enforcement of the campaign finance rules against all regulated parties.

VIII. CONCLUSION

At a time when democratic elections are being undermined by threats near and far, from dark money to foreign influence campaigns, more robust and transparent enforcement of the state Election Law than what currently exists is a necessity. Under the current statutory scheme, with its many holes and hurdles, such enforcement is simply not feasible. Thus, we encourage broad review of the statutory scheme and specifically the adoption of comprehensive civil penalties and streamlined enforcement procedures, as well as more reporting of enforcement activity. We also recommend the creation of a single non-partisan agency to regulate all aspects of campaign finance. These reforms, and others recommended herein, when paired with adequate resources and a bulwark against political meddling, can bring a greater measure of integrity and public trust to the electoral process.

Election Law Committee
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Edward L. Murray, Subcommittee Chair

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