

June 16, 2008

James Walsh, Commissioner
Douglas Kellner, Commissioner
Evelyn Aquila, Commissioner
Helena Moses Donohue, Commissioner
Todd Valentine, Co-Executive Director
Stanley Zalen, Co-Executive Director

New York State Board of Elections
40 Steuben Street
Albany, NY 12207

Dear Commissioners and Co-Executive Directors,

The New York State Board of Elections will soon vote on the proposed regulations (*Part 6210, Routine Maintenance and Testing of Voting Systems, Operational Procedures, and Standards for Determining Valid Votes, May 15 2008, Draft*). Section 6210.18 of this draft contains provisions for conducting audits required by New York State Election Law §§ 9-211 and 16-113 . But the proposed draft of the auditing regulations, if authorized in its current form, would be ineffective, inefficient, and would not provide New York State voters with confidence that their votes have been accurately counted.

Auditing regulations are not required for this year's elections in the state, but will first be implemented in 2009. *Therefore, the undersigned organizations and individuals urge the State Board of Elections not to approve Section 6210.18 in its current form.* Rather, we urge the Board to delay approval of Section 6210.18 until further analysis can be done, and to modify section 6210.18 of the regulations to reflect current research on election audits. Further, we urge the State Board of Elections to appoint an Auditing Task Force to include experts on election auditing and citizen representatives to study and propose auditing regulations that are efficient and effective. This Task Force should be appointed and begin work by August 15, 2008, so that consideration and possible adoption of its recommendations can be operative no later than 60 days prior to the 2009 elections.

Why We Must Get Audits Right

Post-election audits of election results are crucial because they verify election results and uncover discrepancies due to error, malfunction or fraud. Audits serve to identify problems which might otherwise be overlooked. Most importantly, audits serve to confirm the accuracy of the vote, which in turn gives voters confidence in the integrity of the results. Dependence on software alone cannot do so.

Electoral audits must be undertaken to avoid incorrect outcomes. Just as financial audits are an accepted and necessary practice used to uncover *accounting* errors and to prevent monetary fraud, election audits are equally necessary to uncover *counting* errors, and to avoid declaring someone the winner who in fact did not get the most votes.

In order to fulfill this vital purpose, audits must be designed and implemented so that voters have a high confidence that outcomes that are certified are in fact correct. New York State statute calls for an audit of 3% of voting machines in each county. But current research into election auditing concludes that this type of *percentage-based audit* is insufficient. The American Statistical Association notes this in an AMSTATNEWS article entitled "*Statistics Can Help Ensure Accurate Elections*":

“Taking a fixed percent of the total votes will not do the job. That produces too few cases for the desired accuracy in small jurisdictions and unnecessarily many cases in big ones.”¹

But it is possible, within the context of New York’s regulations Section 6210.18, to implement a form of the much preferred *risk-based audit*.

Risk-Based vs. Percentage-Based Audits

The problem with audits using fixed percentages is that they are unnecessarily large for many races, yet too small for others. Current and prior peer-reviewed research ^{2,3} indicates that fixed percentage-based audits are frequently *inefficient*, especially in statewide contests that involve thousands of machines or systems and that are not close (because the size of the audit is much *larger* than necessary to confirm the outcome). Fixed percentage audits are also *ineffective* (because the size of the audit is *too small* to confirm the outcomes of close races or those involving fewer machines or systems, or to gather enough evidence of miscounted votes to obtain a recount under § 16-113).

Nationally, the election integrity community has reached a consensus that the most effective way to conduct post-election audits is a *risk-based audit*. There are several models being developed that determine how the auditing targets, or *samples*, for a risk-based audit are selected. Currently, a sampling model gaining favor determines the size of the initial random sample based on a number of factors, including but not limited to the apparent margin of victory, the number of machines, the number of ballots cast in each machine, and a desired confidence level (e.g., 99%) that the winner of each audited contest has been correctly identified by the voting system.

Recommendations

The current proposed Section 6210.18, if approved, will not provide an adequate mechanism for conducting audits which confirm election results with an acceptable degree of confidence. Further, no provision is made to allow candidates to request specific machines or polling places be included in the audit, an important requirement.

It is possible, within the context of New York State’s Section 6210.18 auditing regulations and current state Election Law to implement a method of auditing which would go much further towards providing candidates and members of the public a high degree of confidence in electoral outcomes, while maintaining the statutory 3% minimum and the requirement that no contest be excluded from an audit.

The current draft regulations should not be approved in their current form. We can and should do better.

New York State’s elections are undergoing profound changes. In this new era it is vitally important that we get election audits right. We therefore urge the State Board of Elections to delay a vote on Section 6210.18, appoint an Auditing Task Force to study and propose state-of-

¹ Marker, Gardenier and Ash, AmStat News, President’s Invited Column, “Statistics Can Help Ensure Accurate Elections”, June 2007, <http://www.amstat.org/publications/amsn/index.cfm?fuseaction=pres062007>

² McCarthy, Stanislevic, Lindeman, Ash, Addona and Batchler “Percentage-Based versus Statistical-Power-Based Vote Tabulation Audits”, The American Statistician, Vol. 62, No. 1, Feb. 2008, pp. 11-16(6), http://verifiedvoting.org/downloads/TAS_paper.pdf

³ Aslam, Popa and Rivest, “On Auditing Elections When Precincts Have Different Sizes”, January 2008, <http://people.csail.mit.edu/rivest/AslamPopaRivest-OnAuditingElectionsWhenPrecinctsHaveDifferentSizes.pdf>

the-art auditing regulations, and finally, to adopt regulations that provide New York's candidates and voters with the confidence that their vote has been accurately counted.

Sincerely,

Asian American Legal Defense and Education Fund
Margaret Fung, Executive Director

Brennan Center for Justice *at NYU School of Law*
Lawrence Norden, Counsel Democracy Program

Citizens Union
Dick Dadey, Executive Director

Common Cause/New York
Susan Lerner, Executive Director

Gay Men's Health Crisis
Janet Weinberg, Senior Managing Director

Joint Public Affairs Committee for Older Adults (JPAC)
Molly Krakowski, Director

League of Women Voters of New York State
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New York Lawyers for the Public Interest
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Neal Rosenstein, Government Reform Coordinator

New York StateWide Senior Action Council
Pearl Reeves, Board Member

New Yorkers for Verified Voting, NYVV
Bo Lipari, Executive Director

Task Force on Election Integrity of Community Church of New York
Teresa Hommel, Chairwoman

Women's City Club of New York
Barbara Zucker, Vice President for Public Policy

Individuals:

Mark Lindeman
Assistant Professor of Political Studies, Bard College

Howard Stanislevic,
Founder, E-Voter Education Project, New York