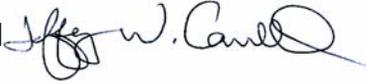




THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** The Honorable the Members of the Board of Education

**FROM:** Jeffrey W. Cannell 

**SUBJECT:** Emergency Amendment of Regents Rule §3.27, Relating to Museum Collections Management Policies

**DATE:** December 3, 2009

**STRATEGIC GOAL:** Goals 2 and 4

**AUTHORIZATION(S):**

### Summary

#### Issue for Decision (Consent Agenda)

Should the Regents adopt as a seventh emergency action, effective for 60 days, the amendment of §3.27 of the Rules of the Board of Regents, relating to museum collections management policies?

#### Reason for Consideration

Implementation of Regents policy.

#### Proposed Handling

The proposed amendment will be presented to the Full Board for emergency action at the December Regents meeting.

#### Procedural History

The proposed amendment was discussed by the Cultural Education Committee and adopted by the Full Board as an emergency action at the December 2008 Regents meeting, effective December 19, 2008, and was readopted as emergency actions at the March, April, June, July and October 2009 Regents meetings.

## Background Information

The proposed amendment has been recommended by the State Education Department and State Museum management to protect collections held by museums and historical societies. State Education Department staff have worked with the Legislature and with museum constituents to develop revised standards for museum deaccessioning. Legislation incorporating those standards has been introduced in the Assembly and Senate, and is pending (A.6959-A and S.3078-A).

Regents Rule §3.27 provides standards for chartered museums and historical societies. Sections 3.27 and 3.30 were first promulgated effective March 1971, and the Regents added a collections management policy requirement effective July 1998. The March 2006 amendment greatly expanded the standards by providing increased oversight for collections and resources held in the public trust.

In the current financial downturn, museums face deficits that threaten the ownership or integrity of their collections. Museum constituents have asked for specific criteria and guidance relating to deaccessioning and use of collections proceeds. We believe current Regents Rules on collections need to be more explicit on acceptable criteria for deaccessioning collections. In addition, we seek to remove the option to use collections proceeds for improving a historic structure since such use of funds has been criticized and widely debated. Even if a museum fails, we want to keep collections in the public trust and not lose them to debt or insolvency.

The proposed amendment would apply to chartered museums and historical societies authorized to own and hold collections under Rule §3.27, and would:

- Enumerate four specific criteria under which an institution may deaccession an item or material in its collection.
- Remove the option allowing an institution to designate a structure as a collections item; but keep intact any such designation made by vote of a board of trustees prior to December 19, 2008.
- Specify that no proceeds from deaccessioning may be used for payment of outstanding debt or for capital expenses, except to preserve, protect or care for an historic building previously designated as part of the institution's collection, as above.

In November and December 2008 we informed constituents of the original emergency amendment through a mailing with cover memo, announcements on web sites, and copies sent to listservs and electronic mailing lists. We received about 30 written comments which we provided to the Regents prior to the December vote.

On August 26, 2009, a Notice of Revised Rule Making was published in the State Register. Among the proposed revisions was an amendment to Regents Rule

§3.27(a)(7) to provide a January 15, 2010 sunset date on the prohibition against adding a historic structure to a collection. Under this proposed revised rule, which was published but not adopted, historic structures owned by an institution shall be considered as part of a collection only when so designated by the board of trustees of the institution by vote conducted on or before December 19, 2008, or on or after January 15, 2010. It is anticipated that a second Notice of Revised Rule Making will be published in the State Register no later than January 6, 2010 to delete the January 15, 2010 sunset date and thereby provide time for the Department to further study the question as to whether the prohibition should continue or lapse. While the Department discussed this question with legislators, institutions and constituents during the Fall of 2009, a consensus has not been reached and additional time is needed to resolve this issue.

The proposed amendment is being presented for adoption as an emergency action. A Statement of Facts and Circumstances Which Necessitate Emergency Action is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

### Recommendation

#### Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That paragraph (7) of subdivision (a), and paragraphs (6) and (7) of subdivision (c), of section 3.27 of the Rules of the Board of Regents be amended, as submitted, effective January 13, 2010, as an emergency action to expire and be deemed repealed March 13, 2010, upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to protect the public's interest in collections held by a museum or historical society by enumerating the specific criteria under which an institution may deaccession an item or material in its collection, remove the option allowing an institution to designate a structure as a collections item but keep intact any such designation made by vote of a board of trustees prior to December 19, 2008, and specify that no proceeds from deaccessioning may be used for capital expenses, except to preserve, protect or care for an historic building previously designated as part of the institution's collection, as above. Emergency action is also necessary to ensure that the emergency rule remains continuously in effect until it can be adopted and made effective as a permanent rule.

### Timetable for Implementation

If adopted by the Board of Regents at the December meeting, this emergency action will become effective on January 13, 2010. It is anticipated that the proposed revised rule will be presented for permanent adoption at a subsequent Regents meeting, after publication of a Notice of Revised Rule Making in the State Register and

expiration of the 30-day public comment period prescribed for revised rule makings in the State Administrative Procedure Act.

PROPOSED AMENDMENT OF SECTION 3.27 OF THE RULES OF THE BOARD OF REGENTS PURSUANT TO EDUCATION LAW SECTIONS 101, 207, 215, 216, 217 AND 233-aa AND CHAPTER 220 OF THE LAWS OF 2008, RELATING TO MUSEUM COLLECTIONS MANAGEMENT

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

In the current financial downturn, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. Currently, some 37 institutions in New York in 2006 reported deficits of \$100,000 or more. The Department is concerned that, in the absence of an express prohibition in Regents rule section 3.27, museums and historical societies in financial distress will deaccession items or materials for purposes of paying their outstanding debt. Consistent with generally accepted professional and ethical standards within the museum and historical society communities, the proposed amendment would expressly prohibit proceeds from deaccessioning from being used for the payment of outstanding debt or capital expenses. The proposed amendment would also restrict when an institution may deaccession its collections to the instances listed in (1) through (4)

above. This specific language was added in response to museums which sought clarity on what constitutes proper and acceptable grounds for deaccessioning.

The proposed amendment was adopted as an emergency rule at the December 2008 Regents meeting, and readopted as an emergency rule at the March, April, June, July and October 2009 Regents meetings. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on January 7, 2009.

The proposed amendment is consistent with generally accepted professional and ethical standards within the museum and historical society communities. Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to protect the public's interest in collections held by a chartered museum or historical society. State Education Department staff have worked with the Legislature and with museum constituents to develop revised standards for museum deaccessioning that have been incorporated into legislation (A.6959-A and S.3078-A) pending in both houses which would be applicable to all museums.

On August 26, 2009, a Notice of Revised Rule Making was published in the State Register. Among the proposed revisions was an amendment to Regents Rule §3.27(a)(7) to provide a January 15, 2010 sunset date on the prohibition against adding a historic structure to a collection. Under this proposed revised rule, historic structures owned by an institution shall be considered as part of a collection only when so designated by the board of trustees of the institution by vote conducted on or before December 19, 2008, or on or after January 15, 2010.

It is anticipated that a second Notice of Revised Rule Making will be published in the State Register no later than January 6, 2010 to delete the January 15, 2010 sunset

date and thereby provide time for the Department to further study the question as to whether the prohibition should continue or lapse. While the Department discussed this question with legislators, institutions and constituents during the Fall of 2009, a consensus has not been reached and additional time is needed to resolve this issue.

Pursuant to the State Administrative Procedure Act, a revised rule cannot be permanently adopted until after publication of a Notice of Revised Rule Making and expiration of a 30-day public comment period. Because the Board of Regents meets at fixed intervals, the earliest the proposed revised rule could be presented for permanent adoption, after publication of the Notice and expiration of the 30-day public comment period, would be the February 8-9, 2010 Regents meeting. However, the emergency rule adopted at the October Regents meeting is only effective for 60 days and will expire on January 12, 2010. If the rule were to lapse, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. To avoid the adverse effects of a lapse in the emergency rule, another emergency action is necessary at the December Regents meeting to readopt the rule, effective January 13, 2009 so that it may remain continuously in effect until it can be adopted and made effective as a permanent rule.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to protect the public's interest in collections held by a museum or historical society by enumerating the specific criteria under which an institution may deaccession an item or material in its collection, remove the option allowing an institution to designate a structure as a collections item but keep intact any such designation made by vote of a board of trustees prior to December 19, 2008, and

specify that no proceeds from deaccessioning may be used for capital expenses, except to preserve, protect or care for an historic building previously designated as part of the institution's collection, as above. Emergency action is also necessary to ensure that the emergency rule remains continuously in effect until it can be adopted and made effective as a permanent rule.

It is anticipated that the proposed revised rule will be presented for permanent adoption at a subsequent Regents meeting, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period prescribed for revised rule makings in the State Administrative Procedure Act.

#### AMENDMENT OF THE RULES OF THE BOARD OF REGENTS

Pursuant to sections 101, 207, 215, 216, 217 and 233-aa of the Education Law and Chapter 220 of the Laws of 2008

1. Paragraph (7) of subdivision (a) of section 3.27 of the Rules of the Board of Regents is amended, effective January 13, 2010, to read as follows, provided that such amendment shall expire and be deemed repealed March 13, 2010:

(7) Collection means one or more original tangible objects, artifacts, records or specimens, including art generated by video, computer or similar means of projection and display, that have intrinsic historical, artistic, cultural, scientific, natural history or other value that share like characteristics or a common base of association and are accessioned; for purposes of this section, historic structures owned by an institution

shall be considered as part of a collection only when so designated by the board of trustees of the institution by vote conducted on or before December 19, 2008;

2. Paragraphs (6) and (7) of subdivision (c) of section 3.27 of the Rules of the Board of Regents are amended, effective January 13, 2010, to read as follows, provided that such amendment shall expire and be deemed repealed March 13, 2010:

(6) Collections Care and Management. The institution shall:

(i) own, maintain and/or exhibit original tangible objects, artifacts, records, specimens, buildings, archeological remains, properties, lands and/or other tangible and intrinsically valuable resources that are appropriate to its mission;

(ii) ensure that the acquisition and deaccessioning of its collection is consistent with its corporate purposes and mission statement, including that deaccessioning of items or material in its collection is limited to the circumstances prescribed in paragraph (7) of this subdivision;

(iii) have a written collections management policy providing clear standards to guide institutional decisions regarding the collection, that is in regular use, available to the public upon request, filed with the commissioner for inspection by anyone wishing to examine it; and which, at a minimum, satisfactorily addresses the following subject areas:

(a) acquisition. The criteria and processes used for determining what items are added to the collections;

(b) loans. The criteria and processes used for borrowing items owned by other institutions and individuals, and for lending items from the collections;

(c) preservation. A statement of intent to ensure the adequate care and preservation of collections;

(d) access. A statement indicating intent to allow reasonable access to the collections by persons with legitimate reasons to access them; and

(e) deaccession. The criteria and process (including levels of permission) used for determining what items are to be removed from the collections, which shall be consistent with paragraph (7) of this subdivision, and a statement limiting the use of any funds derived therefrom in accordance with subparagraph [(vii)] (vi) of this paragraph;

(iv) ensure that collections or any individual part thereof and the proceeds derived therefrom shall not be used as collateral for a loan;

(v) ensure that collections shall not be capitalized; and

(vi) ensure that proceeds derived from the deaccessioning of any property from the institution's collection be restricted in a separate fund to be used only for the acquisition, preservation, protection or care of collections. In no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses, for the payment of outstanding debt, or for capital expenses other than such expenses incurred to preserve, protect or care for an historic building which has been designated part of its collections in accordance with paragraph (7) of subdivision (a) of this section, or for any purposes other than the acquisition, preservation, protection or care of collections.

(7) Deaccessioning of collections. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

(i) the item or material is not relevant to the mission of the institution;

(ii) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;

(iii) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or

(iv) the institution is unable to conserve the item or material in a responsible manner.

(8) Education and Interpretation. The institution shall offer programmatic accommodation for individuals with disabilities to the extent required by law.