



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

TO: Professional Practice Committee
FROM: Douglas E. Lentivech
SUBJECT: Proposed Amendment to the Rules of the Board of Regents and the Regulations of the Commissioner of Education Relating to the Implementation of a Practice Privilege in Public Accountancy
DATE: December 30, 2011

AUTHORIZATION(S):

Summary

Issue for Decision

Should the Board of Regents amend subdivision (h) of section 29.10 of the Rules of the Board of Regents and amend sections 70.7 and 70.8 of the Regulations of the Commissioner of Education relating to establishing a practice privilege in public accountancy?

Reason(s) for Consideration

Required by law.

Proposed Handling

The proposed amendment is being presented for emergency adoption at the January 2012 Regents meeting. A statement of facts and circumstances which necessitate emergency action is attached.

Procedural History

Chapter 456 of the Laws of 2011 was signed by the Governor on August 17, 2011 with an effective date of November 15, 2011. On October 7, 2011, the Board of Regents adopted emergency rules and regulations to implement the new law. Subsequent to the October Regents meeting, the emergency regulations were revised in two areas. The revised proposed regulations are before the Professional Practice Committee and the Full Board for emergency action in January 2012 in order to maintain in effect the implementing rules and regulations during the required public comment period relating to the revisions made to the regulations adopted in October.

Background Information

The purpose of the proposed amendments to the Rules of the Board of Regents and the Regulations of the Commissioner of Education is to implement chapter 456 of the Laws of 2011. The new law repeals a statutory provision which enabled certain certified public accountants (CPAs) licensed in states other than New York to provide attest and compilation services in this state on a temporary and limited basis. It also repeals a provision which authorized certain out-of-state CPAs to provide non-attest services in New York. In lieu of these provisions, chapter 456 establishes a practice privilege provision to permit practice in New York by certain CPAs licensed in other states.

As amended by chapter 456 of the Laws of 2011, Education Law section 7406(2) provides that certain CPAs licensed and in good standing in another state may practice public accountancy in New York. In order to qualify for this practice privilege, the CPA must be licensed in a state that the Board of Regents has determined to have public accountant licensure requirements substantially equivalent to those of New York. Alternatively, an out-of-state CPA could qualify for the privilege if his or her individual licensure qualifications are verified by the Department to be substantially equivalent to New York's requirements. Additionally, the practice privilege would be available only if the CPA's principal place of business is in another state. Out-of-state licensed CPAs who provide services in New York would be subject to the regulatory and disciplinary authority of the Board of Regents as if the practice privilege were a license and the CPA were a licensee.

The new law also provides that an out-of-state licensed CPA who is authorized to practice public accountancy through a practice privilege may register a public accounting firm in this state.

Further, the new law provides that an out-of-state licensed CPA who has been subject to certain disciplinary action within the last seven years must provide notice to the Department and receive written permission from the Department before he/she is allowed to practice in New York.

The proposed amendment to section 29.10(h) of the Rules of the Board of Regents provides that anyone practicing public accountancy under a practice privilege will be subject to all applicable provisions of the Education Law, Rules of the Board of Regents, and Regulations of the Commissioner of Education relating to professional misconduct as if he or she is licensed to practice in New York. The proposal also defines as unprofessional conduct in the practice of public accountancy the failure to notify the Department of certain administrative, disciplinary, or judicial actions taken against an out-of-state CPA practicing in New York under the practice privilege.

The proposed amendment of section 70.7 of the Regulations of the Commissioner of Education repeals language relating to the issuance of a temporary practice permit and adds a new section that provides for practice by certain out-of-state individuals and firms under a practice privilege. An out-of-state firm that holds a valid license, registration or permit in another state must register with the Department if the

firm offers to engage or engages in attest or compilation services in New York. A firm may only register if: (1) at least one owner engaged in the practice of public accountancy is licensed and in good standing as a CPA within the United States, (2) the firm complies with the Department's mandatory quality review program, and (3) the services are performed by an individual who is licensed and in good standing in one or more states of the United States.

The proposed amendment also provides that an individual licensed and in good standing in another state and whose principal place of business is not New York may practice public accountancy in this state without obtaining a license if the Department has determined that the licensure requirements of the other state are substantially equivalent to or exceed the requirements of this state or that the Department has verified that the individual's licensure credentials are substantially equivalent to or exceed the requirements for licensure in this state. An individual who does not meet these requirements is subject to the full licensure requirements of Education Law. Please note, one of the two changes being made to the proposed emergency regulations occurs in this section. This is a minor change to ensure that the wording in the proposed regulation mirrors the language used in the law. Specifically, the original version of the emergency regulation indicated that the Department would "verify" that licensure requirements in another state were substantially equivalent to those in New York, while the law says the Department will "determine" this. The word in the proposed regulation has been changed from "verified" to "determined" to match the statute.

Under the proposed amendment, an out-of-state CPA who signs or authorizes someone to sign the accountant's report on the financial statements on behalf of the firm must meet competency requirements set out in professional standards and in the Rules of the Board of Regents. Further, an individual who performs any attest or compilation services must only do so through a firm registered with the Department.

As a condition of the exercise of a practice privilege, each CPA who practices in this state and the firm that employs such CPA agrees to the personal and subject matter jurisdiction and disciplinary authority of the Board of Regents as if the practice privilege were a license, to comply with Article 149 of Education Law and the Rules of the Board of Regents and Regulations of the Commissioner of Education relating to public accountancy, and to the appointment of the Secretary of State or other public official acceptable to the Department in the CPA's state of licensure or state of principal place of business as the agent upon whom process may be served.

Under the proposed amendment, in the event the license from the state of the CPA's principal place of business is no longer valid or in good standing or that the CPA has had certain types of disciplinary action taken by another licensing or disciplinary authority, the CPA must notify the Department and immediately cease offering to perform or perform services in New York until he or she has received written permission from the Department to do so. Any CPA who, within the immediately preceding seven years from the date he or she wishes to practice in New York, was subject to certain disciplinary action may not practice in New York until he or she has received written permission to do so from the Department. Anyone failing to provide the required notice will be subject to the personal and subject matter jurisdiction and disciplinary authority of the Board of Regents as if the practice privilege is a license, and an individual with a

practice privilege is a licensee, and may be deemed to be engaging in the unauthorized practice of the profession in violation of Education Law section 6512.

The amendment also provides that a CPA licensed by another state and in good standing who otherwise meets the practice privilege requirements under this section and files an application for licensure may continue to practice under such privilege for a period coterminous with the period during which his or her application for licensure remains pending with the Department, including any period after the CPA establishes a principal place of business in New York while his or her application is pending.

The proposed amendment of section 70.8(a) of the Regulations of the Commissioner of Education clarifies that, when non-attest services are provided in New York pursuant to the practice privilege, such services do not have to be provided through a firm registered in New York, even if the firm uses the title "CPA." This change is consistent with the provisions of new section 70.7(a)(2) of the proposed amendment.

The proposed amendment of section 70.8(d) of the Regulations of the Commissioner of Education approved by the Board of Regents in October 2011 related to fees to be paid by public accountancy firms registering in New York. As part of the registration fee, each firm would pay \$10 per firm owner who practices in New York. While the Department received no formal written comments on the proposed amendments approved in October, interested parties shared a concern, verbally, that the language in this particular section would require firms to pay \$10 for any partner who could potentially practice in NYS through the practice privilege provisions and would be onerous to larger firms. The proposal now before the Board of Regents includes a change in the language of section 70.8(a) of the Regulations of the Commissioner to clarify that firms need to pay \$10 strictly for those owners whose principal place of business in New York, or for NYS' licensees whose principal place of business is not in New York, but who sign or authorize someone else to sign off on New York State engagements. The language has also been changed to clarify that all firms must pay a minimum of \$10 for this component of the registration fee.

Recommendation

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

VOTED: That the emergency action taken at the October 17-18, 2011 meeting of the Board of Regents, which repealed subdivision (h) of section 29.10 of the Regents Rules and added a new subdivision (h), repealed section 70.7 of the Commissioner's Regulations and added a new section 70.7, and amended subdivision (a) and paragraph (2) of subdivision (d) of section 70.8 of the Commissioner's Regulations, is repealed, effective January 20, 2012, and it is further

VOTED: That subdivision (h) of section 29.10 of the Rules of the Board of Regents be repealed and a new subdivision (h) be added, that section 70.7 of the Regulations of the Commissioner of Education be repealed and a new section 70.7 be added, and that subdivision (a) and paragraph (2) of subdivision (d) of section 70.8 of the Regulations of the Commissioner of Education be amended, as submitted, effective January 20, 2012 as an emergency action upon a finding by the Board of Regents that

such action is necessary for the preservation of the public safety and general welfare in order to maintain in effect the rules and regulations implementing chapter 456 of the Laws of 2011, which became effective on November 15, 2011, during the required public comment period relating to revisions made to the regulations previously adopted.

Timetable for Implementation

If adopted at the January Regents meeting, the revised emergency rule will become effective on January 20, 2012. It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the March 2012 Regents meeting, after publication in the State Register and expiration of the 30-day public comment period for revised rule makings required under the State Administrative Procedure Act.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6501, 6502, 6504, 6506, 6507, 6508, 7406 and 7408 of the Education Law.

1. The emergency action taken at the October 17-18, 2011 meeting of the Board of Regents, which repealed subdivision (h) of section 29.10 of the Regents Rules and added a new subdivision (h), repealed section 70.7 of the Commissioner's Regulations and added a new section 70.7, and amended subdivision (a) and paragraph (2) of subdivision (d) of section 70.8 of the Commissioner's Regulations, is repealed, effective January 20, 2012.

2. Subdivision (h) of section 29.10 of the Rules of the Board of Regents is repealed and a new subdivision (h) is added, effective January 20, 2012 to read as follow:

(h) Practice privilege.

(1) Anyone practicing public accountancy under a practice privilege pursuant to subdivision 2 of section 7406 of the Education Law shall be subject to all applicable provisions of the Education Law and of this title relating to professional misconduct as if he or she is licensed to practice in New York.

(2) Unprofessional conduct in the practice of public accountancy shall include the failure to provide notice as required by paragraph (6) or paragraph (7) of subdivision (b) of section 70.7 of this title.

3. Section 70.7 of the Regulations of the Commissioner of Education is repealed and a new section 70.7 is added, effective January 20, 2012, to read as follows:

§70.7 Practice by certain out-of-state individuals and firms.

(a) Practice by certain out-of-state firms.

(1) A firm that holds a valid license, registration, or permit in another state shall register with the Department if the firm offers to engage or engages in the practice of public accountancy pursuant to subdivision 1 or 2 of section 7401 of the Education Law;

(2) A firm that holds a valid license, registration, or permit in another state that is not required to register with the Department pursuant to paragraph (1) of this subdivision, including those out-of-state firms that use the title “certified public accountant” or “certified public accountants” or the designation “CPA” or “CPAs” but do not have an office in New York, may practice in this state without a firm registration with the Department, if the firm’s practice is limited to the practice of public accountancy pursuant to subdivision 3 of section 7401 of the Education Law;

(3) A firm may register and perform services pursuant to this subdivision only if:

(i) at least one partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation or the sole proprietor is licensed as a certified public accountant engaged within the United States in the practice of public accountancy and is in good standing as a certified public accountant of one or more of the states of the United States;

(ii) the firm complies with the Department’s mandatory quality review program pursuant to section 7410 of the Education Law; and

(iii) the services are performed by an individual who is licensed and in good standing as a certified public accountant of one or more states of the United States.

(b) Practice by certain out-of-state individuals.

(1) An individual who holds a certificate or license as a certified public accountant issued by another state, who is in good standing in the state where certified or licensed, and whose principal place of business is not in this state may practice public

accountancy in this state without obtaining a license pursuant to section 7404 of the Education Law, if:

(i) the Department has determined that the other state has education, examination, and experience requirements for certification or licensure that are substantially equivalent to or exceed the requirements for licensure in this state; or

(ii) the Department has verified that the individual possesses licensure qualifications that are substantially equivalent to or exceed the requirements for licensure in this state.

(2) Except as otherwise provided in paragraph (6) or (7) of this subdivision, an individual who meets the requirements of paragraph (1) of this subdivision and who offers or renders professional services in person or by mail, telephone, or electronic means may practice public accountancy in this state without notice to the Department.

An individual who wishes to practice public accountancy in this state, but does not meet the requirements of paragraph (1) of this subdivision is subject to the full licensing and registration requirements of the education law and of this title.

(3) An individual licensee or individual practicing under this subdivision who signs or authorizes someone to sign the accountant's report on the financial statement on behalf of a firm shall meet the competency requirements set out in the professional standards for such services and as set out in paragraph (13) of subdivision (a) of section 29.10 of this title.

(4) An individual practicing under this section shall practice through a firm that is registered with the Department pursuant to section 7408 of the Education Law if the individual performs any attest or compilation service as defined in section 7401-a of the Education Law.

(5) Each certified public accountant who practices in this state pursuant to this section and each firm that employs such certified public accountant to provide services in New York consent to all of the following as a condition of the exercise of such practice privilege:

(i) to the personal and subject matter jurisdiction and disciplinary authority of the Board of Regents as if the practice privilege is a license and an individual with a practice privilege is a licensee;

(ii) to comply with Article 149 of the Education Law and the provisions of this Title relating to public accountancy; and

(iii) to the appointment of the Secretary of State or other public official acceptable to the Department, in the certified public accountant's state of licensure or the state in which the firm has its principal place of business, as the certified public accountant's or firm's agent upon whom process may be served in any action or proceeding by the Department against such certified public accountant or firm.

(6) In the event the license from the state of the certified public accountant's principal place of business is no longer valid or in good standing, or that the certified public accountant has had any final disciplinary action taken by the licensing or disciplinary authority of any other state concerning the practice of public accountancy that has resulted in any of the dispositions specified in subparagraphs (i) or (ii) of this paragraph, the certified public accountant shall so notify the Department, on a form prescribed by the Department, and shall immediately cease offering to perform or performing such services in this state individually and on behalf of his or her firm, until he or she has received from the Department written permission to do so:

(i) the suspension or revocation of his or her license; or

(ii) other disciplinary action against his or her license that arises from:

(a) gross negligence, recklessness or intentional wrongdoing relating to the practice of public accountancy; or

(b) fraud or misappropriation of funds relating to the practice of public accountancy; or

(c) preparation, publication, or dissemination of false, fraudulent, or materially incomplete or misleading financial statements, reports or information relating to the practice of public accountancy.

(7) Any certified public accountant who, within the seven years immediately preceding the date on which he or she wishes to practice in New York, has been subject to any of the actions specified in subparagraphs (i), (ii), (iii), or (iv) of this paragraph shall so notify the Department, on a form prescribed by the Department, and shall not practice public accountancy in this state pursuant to Education Law section 7406(2) and this section, until he or she has received from the Department written permission to do so. In determining whether the certified public accountant shall be allowed to practice in this state, the Department shall follow the procedure to determine whether an applicant for licensure is of good moral character. Anyone failing to provide the notice required by this paragraph shall be subject to the personal and subject matter jurisdiction and disciplinary authority of the Board of Regents as if the practice privilege is a license, and an individual with a practice privilege is a licensee, and may be deemed to be practicing in violation of Education Law section 6512:

(i) has been the subject of any final disciplinary action taken against him or her by the licensing or disciplinary authority of any other jurisdiction with respect to any professional license or has any charges of professional misconduct pending against him or her in any other jurisdiction; or

(ii) has had his or her license in another jurisdiction reinstated after a suspension or revocation of said license; or

(iii) has been denied issuance or renewal of a professional license or certificate in any other jurisdiction for any reason other than an inadvertent administrative error; or

(iv) has been convicted of a crime or is subject to pending criminal charges in any jurisdiction.

(8) Notwithstanding paragraph (1) of this subdivision or any other inconsistent law or rule to the contrary, a certified public accountant licensed by another state and in good standing, who otherwise meets the practice privilege requirements under this section and files an application for licensure under Education Law section 7404, may continue to practice under such privilege for a period coterminous with the period during which his or her application for licensure remains pending with the Department, including any period after the certified public accountant establishes a principal place of business in New York, while his or her application is pending.

4. Subdivision (a) of section 70.8 of the Regulations of the Commissioner of Education is amended, effective January 20, 2012, as follows:

(a) Pursuant to the provisions of Education Law section 7408, a firm shall register with the department if:

(1) ...

(2) except as otherwise provided in section 70.7(a)(2) of this Part, the firm uses the title "CPA" or "CPA firm" or the title "PA" or "PA firm."

5. Paragraph (2) of subdivision (d) of section 70.8 of the Regulations of the Commissioner of Education is amended, effective January 20, 2012, as follows:

(2) \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of

a professional service corporation whose principal place of business is located in New York [or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this part] and for each certified public accountant or public accountant licensed in New York State that signs or authorizes someone to sign an engagement on behalf of a New York State client but whose principal place of business is not located in New York State. Any firm that registers with the Department pursuant the provisions of Education Law section 7408, but does not have a sole proprietor or a general partner of a partnership or a partner of a limited liability partnership, or a member of a limited liability company or a shareholder of a professional service whose principal place of business is in NYS, shall pay \$10 for the firm.