S T A T E O F N E W Y O R K

S. 8426 A. 11626

S E N A T E - A S S E M B L Y

July 6, 2010

IN SENATE -- Introduced by Sens. HASSELL-THOMPSON, PARKER -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- (at request of M. of A. Peoples-Stokes) -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law, in relation to enacting the New York state agency MWBE asset management and financial institution strategy

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. This act shall be known and may be cited as the "New York state agency MWBE asset management and financial institution strategy act".

S 2. Legislative findings. 1. The New York state agency minority and women-owned business enterprise (MWBE) asset management and financial institution strategy is hereby established to codify and replicate across certain entities established by New York state law, best practices with respect to the inclusion of minority and women-owned business enterprises that are asset managers, investment banks, and financial and professional service firms in the opportunity to provide services to such New York state entities. Certain New York state entities such as the common retirement fund, the New York state teachers' retirement system and the New York state insurance fund, have recently adopted emerging manager programs to increase opportunities for firms that include small, disadvantaged or minority and women-owned business enterprises. These programs and similar programs in other states have shown that there is a growing pool of minority and women-owned asset managers, investment banks and financial and professional services firms that are qualified to provide investment management, investment banking, underwriting and other financial and professional services to New York state entities. It is the intent of the legislature to institutionalize access to opportunities for MWBE firms in New York state across New York state

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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entities that use such services, to create reasonable objectives for conducting business with such firms, and to facilitate transparency by creating a regime of public reporting about the use of such firms for such services. Nothing in this act shall be deemed to preempt or affect in any way existing laws regarding legal investments by New York state entities covered by this act, to conflict with the fiduciary obligations of the fiduciaries, board members or executive officers of any of such controlled entities, as applicable, to create quotas or other unlawful preferences, or to diminish the ability of any entity covered by this act to make decisions consistent with best practices for procuring the services covered by this act.

2. In 2006, the New York state department of economic development or "NYSDEC" commissioned a study to assist the state in evaluating whether the state's minority and women-owned business enterprise or MWBE initiatives were still necessary to remedy discrimination in state contracting programs. On May 5, 2010, the study was presented to NYSDEC, members of the legislature and other stakeholders. The study's findings indicated that: (a) there is both statistical and anecdotal evidence of business discrimination against MWBEs in the private sector of the New York state market area; (b) there is evidence of discrimination against MWBEs in the New York state market area in the small business credit market; (c) MWBEs in the state's market area report suffering business related discrimination in large numbers and with statistically significant greater frequency than non-MWBEs; and (d) in general, minorities and women reported that race- and gender-conscious contracting programs are needed to ensure full and fair access to government contracts because being certified created opportunities that otherwise would not have presented themselves.

3. As a result of such findings, the governor and the legislature are considering amendments to article 15-A of the executive law and certain provisions of the public authorities law that cover MWBE procurement programs to improve outreach to MWBEs by state agencies and state authorities, to increase transparency and public reporting on direct and indirect expenditures with MWBEs, to generally eliminate artificial barriers to entry for MWBE firms and to strengthen the efficacy of the state's MWBE programs.

4. On December 11, 2009, the public authorities reform bill was signed into law by the governor, which among other things, expanded the contracting areas covered under article 15-A of the executive law to include financial and professional services, which previously had been specifically excluded from article 15-A of the executive law. This act is an effort to apply the principles inherent to other New York state MWBE programs to the New York state entities covered hereby as it relates to certain financial and professional services. The legislature deems it necessary to codify certain practices by such New York entities to broaden the adoption of such practices by other New York state entities and to facilitate uniformity with respect to the operation of such programs, identification of qualified firms, and transparency with respect to public reporting on meeting the objectives of such programs.

5. New York state has historically held a competitive advantage as the center of the worldwide financial services industry. New York state financial service firms have been key providers of employment opportunities for New York residents and critical generators of tax revenue both for New York state and its local governments. As an economic development matter, fostering a strong financial services industry that includes meaningful participation by MWBE firms is an important objec-

tive. In addition, the legislature anticipates that increasing state contracting opportunities and increasing capital access to underserved regions and to underserved groups such as minority and women-owned business enterprises, will increase employment opportunities for New York state residents.

6. New York state shall establish goals that encourage New York state entities to identify minority and women-owned business enterprises that are financial services or professional service firms. The legislature intends to optimize competition for financial and professional services, diversify investments among a larger pool of asset managers and other financial services firms and to support job creation and economic development.

S 3. Section 136-b of the state finance law, as added by chapter 261 of the laws of 1988, is amended to read as follows:

S 136-b. [Selection of underwriters by state agencies. Whenever a state agency, as defined in article fifteen-A of the executive law, sells its bonds, notes or other securities at a private sale, in selecting one or more underwriters to purchase such securities the state agency shall consider, among other things, the participation of firms certified pursuant to such article as minority or women-owned firms and the ability of other firms under consideration to work with minority and women-owned business enterprises so as to promote and assist participation by such enterprises.] NEW YORK STATE AGENCY AND AUTHORITY MWBE ASSET MANAGEMENT AND FINANCIAL INSTITUTION STRATEGY.

1. DEFINITIONS. FOR THE PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

A. "MWBE ASSET MANAGER" SHALL MEAN AN ASSET MANAGER IN ANY OF THE FOLLOWING ASSET CLASSES: PUBLIC EQUITY OR FIXED INCOME SECURITIES, HEDGE FUNDS, FUND OF HEDGE FUNDS, PRIVATE EQUITY (INCLUDING VENTURE CAPITAL), FUND OF PRIVATE EQUITY FUNDS, REAL ESTATE INVESTMENT FUNDS, FUND OF REAL ESTATE INVESTMENT FUNDS, OR ANY OTHER ASSET CLASS FOR WHICH THE APPLICABLE NEW YORK STATE AGENCY ENGAGES EXTERNAL ASSET MANAGERS THAT ARE: (I) A MWBE AND (II) A REGISTERED INVESTMENT ADVISOR OR EXEMPT FROM SUCH REGISTRATION.

B. "MWBE FINANCIAL INSTITUTION" SHALL MEAN: (I) AS IT RELATES TO BROKERAGE SERVICES, A REGISTERED BROKER DEALER THAT IS A MWBE, OR (II) AS IT RELATES TO ANY OTHER FINANCIAL OR PROFESSIONAL SERVICES, A MWBE THAT PROVIDES BANKING, FINANCIAL ADVISORY, INSURANCE, FINANCIAL RESEARCH, VALUATION, UNDERWRITING OR OTHER FINANCIAL SERVICES AND HAS ALL REQUISITE LICENSES TO CONDUCT SUCH ACTIVITIES.

C. "MINORITY GROUP MEMBER" SHALL MEAN A UNITED STATES CITIZEN OR PERMANENT RESIDENT ALIEN WHO IS AND CAN DEMONSTRATE MEMBERSHIP IN ONE OF THE FOLLOWING GROUPS:

(I) BLACK PERSONS HAVING ORIGINS IN ANY OF THE BLACK AFRICAN RACIAL GROUPS;

(II) HISPANIC PERSONS OF MEXICAN, PUERTO RICAN, DOMINICAN, CUBAN, CENTRAL OR SOUTH AMERICAN OF EITHER INDIAN OR HISPANIC ORIGIN, REGARDLESS OF RACE;

(III) NATIVE AMERICAN OR ALASKAN NATIVE PERSONS HAVING ORIGINS IN ANY OF THE ORIGINAL PEOPLES OF NORTH AMERICA; AND

(IV) ASIAN AND PACIFIC ISLANDER PERSONS HAVING ORIGINS IN ANY OF THE FAR EAST COUNTRIES, SOUTH EAST ASIA, THE INDIAN SUBCONTINENT OR THE PACIFIC ISLANDS.

D. "MWBE" SHALL MEAN A BUSINESS ENTERPRISE WITH SIGNIFICANT PRESENCE OR INVESTMENTS IN NEW YORK STATE, INCLUDING WITHOUT LIMITATION, A SOLE PROPRIETORSHIP, PARTNERSHIP, LIMITED PARTNERSHIP, LIMITED LIABILITY

PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR OTHER SIMILAR ENTITY WHETHER DOMESTIC OR FOREIGN, THAT IS:

(I) (A) AT LEAST FIFTY-ONE PERCENT OWNED BY: (1) ONE OR MORE MINORITY GROUP MEMBERS, OR (2) ONE OR MORE WOMEN, IN EACH CASE, WHO HAVE SIGNIFICANT EXPERIENCE IN ASSET MANAGEMENT, BROKERAGE, OTHER FINANCIAL SERVICES OR RELATED PROFESSIONAL SERVICES SUCH AS ACCOUNTING, VALUATION OR LEGAL SERVICES, OR (B) SUBSTANTIALLY OWNED BY: (1) ONE OR MORE MINORITY GROUP MEMBERS, OR (2) ONE OR MORE WOMEN, IN EACH CASE, WHO HAVE SIGNIFICANT EXPERIENCE IN ASSET MANAGEMENT, BROKERAGE, OTHER FINANCIAL SERVICES OR RELATED PROFESSIONAL SERVICES SUCH AS ACCOUNTING, VALUATION OR LEGAL SERVICES. WITH RESPECT TO A BUSINESS ENTERPRISE SUBSTANTIALLY OWNED BY ONE OR MORE MINORITY GROUP MEMBERS, OR ONE OR MORE WOMEN, SUCH ENTITY MUST BE CERTIFIED BY THE OFFICE OF THE STATE COMPTROLLER PURSUANT TO SECTION FOUR HUNDRED TWENTY-THREE OF THE RETIREMENT AND SOCIAL SECURITY LAW;

(II) AN ENTERPRISE IN WHICH SUCH MINORITY OWNERSHIP OR OWNERSHIP BY WOMEN, AS APPLICABLE, IS REAL, SUBSTANTIAL AND CONTINUING;

(III) AN ENTERPRISE IN WHICH SUCH MINORITY OWNERSHIP OR WOMEN OWNERSHIP, AS APPLICABLE, HAS AND EXERCISES THE AUTHORITY TO CONTROL INDEPENDENTLY THE DAY-TO-DAY BUSINESS DECISIONS OF THE ENTERPRISE;

(IV) AN ENTERPRISE AUTHORIZED TO DO BUSINESS IN THIS STATE AND INDEPENDENTLY OWNED AND OPERATED; AND

(V) AN ENTERPRISE CERTIFIED BY THE DEPARTMENT OF ECONOMIC DEVELOPMENT'S DIVISION OF WOMEN AND MINORITY OWNED BUSINESS DEVELOPMENT OR BY THE OFFICE OF THE STATE COMPTROLLER PURSUANT TO SECTION FOUR HUNDRED TWENTY-THREE OF THE RETIREMENT AND SOCIAL SECURITY LAW AS A "FINANCIAL/PROFESSIONAL MWBE".

E. "STATE AGENCY" SHALL MEAN:

(I) (A) ANY STATE DEPARTMENT, OR (B) ANY DIVISION, BOARD, COMMISSION OR BUREAU OF ANY STATE DEPARTMENT, OR (C) THE STATE UNIVERSITY OF NEW YORK AND THE CITY UNIVERSITY OF NEW YORK, INCLUDING ALL THEIR CONSTITUENT UNITS EXCEPT COMMUNITY COLLEGES AND THE INDEPENDENT INSTITUTIONS OPERATING STATUTORY OR CONTRACT COLLEGES ON BEHALF OF THE STATE, OR (D) A BOARD, A MAJORITY OF WHOSE MEMBERS ARE APPOINTED BY THE GOVERNOR OR WHO SERVE BY VIRTUE OF BEING STATE OFFICERS OR EMPLOYEES AS DEFINED IN SUBPARAGRAPHS (I), (II) OR (III) OF PARAGRAPH (I) OF SUBDIVISION ONE OF SECTION SEVENTY-THREE OF THE PUBLIC OFFICERS LAW;

(II) THE FOLLOWING:

ALBANY COUNTY AIRPORT AUTHORITY;
ALBANY PORT DISTRICT COMMISSION;
ALFRED, ALMOND, HORNELLSVILLE SEWER AUTHORITY;
BATTERY PARK CITY AUTHORITY;
CAYUGA COUNTY WATER AND SEWER AUTHORITY;
(NELSON A. ROCKEFELLER) EMPIRE STATE PLAZA PERFORMING ARTS CENTER CORPORATION;
INDUSTRIAL EXHIBIT AUTHORITY;
LIVINGSTON COUNTY WATER AND SEWER AUTHORITY;
LONG ISLAND POWER AUTHORITY;
LONG ISLAND RAIL ROAD;
LONG ISLAND MARKET AUTHORITY;
MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY;
METRO-NORTH COMMUTER RAILROAD;
METROPOLITAN SUBURBAN BUS AUTHORITY;
METROPOLITAN TRANSPORTATION AUTHORITY;
NATURAL HERITAGE TRUST;
NEW YORK CITY TRANSIT AUTHORITY;

NEW YORK CONVENTION CENTER OPERATING CORPORATION;
NEW YORK STATE BRIDGE AUTHORITY;
NEW YORK STATE OLYMPIC REGIONAL DEVELOPMENT AUTHORITY;
NEW YORK STATE THRUWAY AUTHORITY;
NIAGARA FALLS PUBLIC WATER AUTHORITY;
NIAGARA FALLS WATER BOARD;
PORT OF OSWEGO AUTHORITY;
POWER AUTHORITY OF THE STATE OF NEW YORK;
ROOSEVELT ISLAND OPERATING CORPORATION;
SCHENECTADY METROPLEX DEVELOPMENT AUTHORITY;
STATE INSURANCE FUND;
STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY;
STATE UNIVERSITY CONSTRUCTION FUND;
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY;
UPPER MOHAWK VALLEY REGIONAL WATER BOARD;
UPPER MOHAWK VALLEY REGIONAL WATER FINANCE AUTHORITY;
UPPER MOHAWK VALLEY MEMORIAL AUDITORIUM AUTHORITY;
URBAN DEVELOPMENT CORPORATION AND ITS SUBSIDIARY CORPORATION;

(III) THE FOLLOWING ONLY TO THE EXTENT OF STATE CONTRACTS ENTERED INTO FOR ITS OWN ACCOUNT OR FOR THE BENEFIT OF A STATE AGENCY AS DEFINED IN SUBPARAGRAPH (I) OR (II) OF THIS PARAGRAPH:

DORMITORY AUTHORITY OF THE STATE OF NEW YORK;
FACILITIES DEVELOPMENT CORPORATION;
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY;
NEW YORK STATE SCIENCE AND TECHNOLOGY FOUNDATION.

2. TO THE EXTENT THAT ANY STATE AGENCY ENGAGES OR PLANS TO ENGAGE THIRD-PARTIES TO:

A. MANAGE CASH ASSETS OR INVESTMENT SECURITIES HELD BY SUCH STATE AGENCY IN EXCESS OF ONE HUNDRED MILLION DOLLARS IN THE AGGREGATE,

B. PROVIDE BROKER-DEALER SERVICES TO SUCH STATE AGENCY RESULTING OR LIKELY TO RESULT IN COMMISSION IN EXCESS OF TWO MILLION FIVE HUNDRED THOUSAND DOLLARS IN THE AGGREGATE IN A FISCAL YEAR OR TRADES OF FIXED INCOME SECURITIES WITH VOLUME IN EXCESS OF TWENTY-FIVE MILLION DOLLARS IN A FISCAL YEAR, OR

C. PROVIDE OTHER FINANCIAL OR PROFESSIONAL SERVICES TO SUCH STATE AGENCY RESULTING IN FEES FOR SERVICES EQUAL TO OR EXCEEDING TWO MILLION FIVE HUNDRED THOUSAND DOLLARS IN THE AGGREGATE IN A FISCAL YEAR OR TWO HUNDRED FIFTY THOUSAND DOLLARS IN A SINGLE TRANSACTION, SUCH STATE AGENCY SHALL COMPLY WITH THE REQUIREMENTS OF THIS SECTION.

3. A. IN THE EVENT THAT ANY STATE AGENCY CONDUCTS OR HAS CONDUCTED TRANSACTIONS FALLING WITHIN THE SCOPE OF THE TRANSACTIONS DESCRIBED IN SUBDIVISION TWO OF THIS SECTION, SUCH STATE AGENCY SHALL ESTABLISH A MWBE ASSET MANAGEMENT AND FINANCIAL INSTITUTION STRATEGY INCLUDING REASONABLE GOALS FOR UTILIZATION OF MWBE ASSET MANAGERS, MWBE FINANCIAL INSTITUTIONS AND MWBE FINANCIAL AND PROFESSIONAL SERVICE FIRMS, WHICH STRATEGY SHALL INCLUDE THE FOLLOWING OBJECTIVES:

(I) WITH RESPECT TO EACH ASSET CLASS IN WHICH THE APPLICABLE NEW YORK STATE AGENCY ENGAGES EXTERNAL ASSET MANAGERS, INVESTING ASSETS OF SUCH STATE AGENCY WITH MWBE ASSET MANAGERS TO THE GREATEST EXTENT FEASIBLE, GIVEN MARKET AVAILABILITY OF MWBE ASSET MANAGERS THAT FULFILL SUCH STATE AGENCY'S SELECTION CRITERIA WITH RESPECT TO EACH SUCH CLASS, IN EACH YEAR THROUGH THE FIFTH FULL FISCAL YEAR AFTER THE DATE OF ENACTMENT;

(II) SUBJECT TO BEST EXECUTION, WITH RESPECT TO EXTERNALLY MANAGED SECURITIES: (A) CONDUCTING TRADES OF FIXED INCOME SECURITIES AND (B) CONDUCTING TRADES OF PUBLIC EQUITY SECURITIES THROUGH MWBE FINANCIAL INSTITUTIONS TO THE GREATEST EXTENT FEASIBLE, GIVEN MARKET AVAILABILITY

OF MWBE FINANCIAL INSTITUTIONS THAT FULFILL SUCH STATE AGENCY'S SELECTION CRITERIA WITH RESPECT TO SUCH TRADING ACTIVITY, IN EACH FISCAL YEAR THROUGH THE FIFTH FULL FISCAL YEAR FOLLOWING THE DATE OF ENACTMENT; AND

(III) INCREASING EXPENDITURES ON CONTRACTS FOR ACCOUNTING, BANKING, FINANCIAL ADVISORY, INSURANCE, LEGAL, RESEARCH, VALUATION, UNDERWRITING AND OTHER PROFESSIONAL AND FINANCIAL SERVICES WITH MWBE FINANCIAL INSTITUTIONS AND OTHER MWBE FINANCIAL AND PROFESSIONAL SERVICE FIRMS TO THE GREATEST EXTENT FEASIBLE PROVIDED SUCH TRANSACTIONS FULFILL THE FIDUCIARY DUTIES AND OBLIGATIONS OF MANAGEMENT OF THE STATE AGENCIES.

NOTHING IN THIS SUBDIVISION SHALL BE DEEMED AS REQUIRING OR PERMITTING ANY STATE AGENCY TO TAKE ANY ACTION CONTRARY TO THE FIDUCIARY DUTY OF THE MANAGEMENT OF SUCH STATE AGENCY, LAW OR SOUND INDUSTRY PRACTICES.

B. BY THE LATER OF ONE YEAR FROM THE EFFECTIVE DATE OF THIS SUBDIVISION OR ONE YEAR FOLLOWING THE DATE THAT THE REQUIREMENTS OF THIS SECTION SHALL APPLY TO A STATE AGENCY AS A RESULT OF THE EVENTS DESCRIBED IN SUBDIVISION TWO OF THIS SECTION, THE CHIEF EXECUTIVE OFFICER AND/OR MANAGING BODY OF SUCH STATE AGENCY SHALL DEVELOP AND IMPLEMENT A PLAN TO ACHIEVE THE OBJECTIVES SET FORTH IN PARAGRAPH A OF THIS SUBDIVISION, INCLUDING, WITHOUT LIMITATION:

(I) A METHODOLOGY SUFFICIENT TO ENSURE THAT MWBE ASSET MANAGERS, MWBE FINANCIAL INSTITUTIONS AND MWBE SERVICE PROVIDERS ARE MADE AWARE OF THE OPPORTUNITIES MADE AVAILABLE PURSUANT TO THE STRATEGY UNDERTAKEN BY THE MANAGERS OF THE APPLICABLE STATE AGENCY ESTABLISHED TO MEET THE GOALS SET FORTH IN SUBDIVISION ONE OF THIS SECTION;

(II) REQUIREMENTS RELATED TO ANNUAL PUBLIC REPORTING, WITHIN SIXTY DAYS OF THE END OF EACH FISCAL YEAR, REGARDING: (A) INVESTMENTS WITH MWBE ASSET MANAGERS, COMMISSIONS WITH MWBE FINANCIAL INSTITUTIONS, AND ANNUAL NON-COMMISSION EXPENDITURES (EXCLUDING INVESTMENT ALLOCATIONS) WITH OR FEES PAID TO OTHER MWBE FINANCIAL INSTITUTIONS AND OTHER MWBE FIRMS THAT PROVIDE FINANCIAL SERVICES OR OTHER PROFESSIONAL SERVICES TO THE STATE AGENCY, AS APPLICABLE, AS A PERCENTAGE OF TOTAL INVESTMENTS, COMMISSIONS OR EXPENDITURES, AS APPLICABLE, FOR SUCH SERVICES BY SUCH STATE AGENCY, AND (B) EFFORTS UNDERTAKEN DURING SUCH PERIOD TO SUPPORT ITS MWBE ASSET MANAGEMENT AND FINANCIAL INSTITUTION STRATEGY; AND

(III) PROVISIONS FOR COORDINATING WITH THE DIVISION OF MINORITY AND WOMEN-OWNED BUSINESS DEVELOPMENT AND THE STATE COMPTROLLER TO IDENTIFY MWBE ASSET MANAGERS AND MWBE FINANCIAL INSTITUTIONS AND OTHER MWBE FINANCE AND PROFESSIONAL SERVICE FIRMS TO CREATE A DATABASE OF SUCH ENTITIES. SUCH COORDINATION SHALL INCLUDE AN ANNUAL CONFERENCE TO PROMOTE THE MWBE ASSET MANAGEMENT AND FINANCIAL INSTITUTION STRATEGY.

PROVIDED, HOWEVER, THAT IF SUCH CHIEF EXECUTIVE OFFICER OR MANAGING BODY DETERMINES THAT THE FACTS GIVING RISE TO THE OBLIGATIONS OF THIS SECTION ARE NOT REASONABLY LIKELY TO CAUSE THE STATE AGENCY TO HAVE A RECURRING NEED FOR THE SERVICES COVERED IN THIS SECTION, SUCH CHIEF EXECUTIVE OFFICER OR GOVERNING BODY MAY BY WRITTEN APPLICATION SEEK A WAIVER FROM THE DIVISION OF MINORITY AND WOMEN-OWNED BUSINESS DEVELOPMENT REGARDING THE REQUIREMENTS TO COMPLY WITH THE PROVISIONS OF THIS SECTION. UPON A DETERMINATION THAT SUCH WAIVER REQUEST IS REASONABLY REQUESTED BECAUSE SUCH CONDITIONS ARE NOT REASONABLY LIKELY TO RECUR, THE DIRECTOR OF THE DIVISION OF MINORITY AND WOMEN-OWNED BUSINESS DEVELOPMENT MAY GRANT SUCH WAIVER.

S 4. The provisions of this act are severable, and if any part or provision hereof, or the application thereof to any person or circumstance, shall be adjudged by any court of competent jurisdiction to be invalid or unenforceable, such judgment shall not affect, impair or

invalidate the remaining provisions to any person or circumstance, but shall be confined in its operation to the provision, person or circumstance directly involved in the controversy in which such judgment shall have been rendered.

S 5. This act shall take effect on the ninetieth day after it shall have become a law; provided, however that the amendments to section 136-b of the state finance law made by section three of this act shall not affect the expiration of such section and shall be deemed to expire therewith.