Assessment of Public Comment

In response to this proposed rulemaking, the Board received comments from The Legal Aid Society of New York City, #LessIsMoreNY Campaign, and Member of the New York State Assembly Dan Quart, and received approximately 68 form letters/emails with the same or substantially similar contents. The comments provided are extensive.

Section 8002.6(b)

Comments: One comment, addressing paragraph (1) of this subdivision, discussed that allowing for a time assessment to be set in months is inflexible, and does not allow, for example, a 15-day time assessment for non-technical violations, and "month" is not described in Executive Law § 259-i(3)(f)(xii). Another comment discussed that part of paragraph (2) which provides that time assessments "will not be credited with any time in which the releasee is not within the convenience and practical control of the department." It is suggested that this disallows credit for time spent in custody out of state "but still subject to remand due to their detainer/warrant" and that this amendment is in violation of Penal Law § 70.30(3).

Response: Neither the Executive Law nor the regulatory provision were materially changed as detailed in the comment, however this comment remains under review for final adoption of the regulations.

Section 8003.2(3)

Comment: This section contains the standard conditions of release and subdivision (3) is the prohibition on absconding from supervision. A comment on this rule objects to requirement

to cooperate with reengagement efforts by the parole officer, which the commenter characterizes as nonsensical. The comment suggests the wording of the new condition is inconsistent with the recent legislation, writing that it makes intentionally avoiding supervision or failing to notify of a change in residence separate absconding violations and creates an additional absconding violation for failing to cooperate with efforts to reengage.

Response: Regarding cooperation with efforts to re-engage, this provision provides notice to releasees of the otherwise implicit principle that evading contact or avoiding normal avenues of communication with the parole officer is not acceptable and will not nullify an officer's otherwise reasonable efforts to reengage. However, this comment remains under review for final adoption of the regulations.

Section 8003.2(14)

Comment: Subdivision (14) is an added standard condition including a requirement that releasees appear at, for example, all final revocation hearing appearances for which they are the subject. One commentor writes that this is an “unnecessary and gratuitous” “special condition”. The commentor writes that “the purpose of the Less Is More Act is to reduce conditions by which people on supervision are subject to violations and incarceration for violations of technical conditions.” It’s alleged to be “also unnecessary” because the “forfeiture of such right” is an established precept.

Response: Subdivision (14) is a standard condition that provides notification to releasees of their expected cooperation with appearances related to the parole revocation process. However, this comment remains under review for final adoption of the regulations.

Section 8004.1(f)

Comments: A number of comments suggest that subdivision (f) of section 8004.1 "improperly incorporates the violative policy against multiplicity of counts by allowing 'multiple charges that in aggregate form such conduct as a single course of absconding.'" Commentors also wrote: "the Department holds that evidence that the reasonable efforts requirement of the parole officer to re-engage the releasee to charge absconding does not have to be written into the charges of absconding. However, the Department still has a responsibility under Executive Law §259-i(3)(c)(iii) and in the new Section 8004.4 to provide in the notice of violation 'what conditions of community supervision are alleged to have been violated, and in what manner.' By eliminating the requirement that re-engagement efforts be noted or contained within the charges, the Department is violating the Executive Law's notice requirement and their own new regulation; hence it is a confusing and contrary clause that should be removed." Lastly, there were also comments that suggest "illegal incursion into the hearing process" by this part: "Evidence that the releasee has voluntarily surrendered to custody or that they have at some point re-engaged with the parole officer shall not in itself preclude a finding of absconding."

Response: This comment is currently under review, and a more detailed response will be provided shortly. The comment remains under consideration for final adoption of the regulations.

Section 8004.1(g)

Comment: A comment was received describing its "inclusion in this Section 8004.1 is improper expansion of the grounds for the issuance of a warrant under the executive law."

Response: The Board notes that this comment is incorrect to state that the provision provides an "improper expansion of the grounds for issuance of a warrant under the" Executive Law. The subdivision makes clear that the issuance of a warrant may be related to the subject's violative conduct and must be consistent with further provisions of the regulations or as ordered by a court.

Section 8004.1(h)

Comment: A comment on this rule suggests adding a requirement that conditions prohibiting contacts with specific persons or groups be reasonable and include a written statement of reasons for the prohibition.

Response: The statute contains no requirement that reasons be detailed for such a condition. All conditions of release must bear at least a rational connection to a legitimate purpose. This comment remains under review for final adoption of the regulations.

Section 8004.1(i)

Comments: One commenter writes that the stated presumption in this subdivision that a condition prohibiting cannabis was properly imposed (i.e., its appropriateness established by clear

and convincing evidence), making it "unreviewable". Another commenter similarly writes that the provision conflicts with the Less is More Act and the Marihuana Regulation and Taxation Act by foreclosing administrative review of the propriety of the condition restricting cannabis use. They submit that "By singling out lawful use of cannabis for special adverse treatment, the provisions of subdivision (i) seem to undercut the stated policies established by the Legislature and Governor in these two enactments. This subdivision should be repealed or revised to ensure that the Department's regulations comply with the letter and intent of these laws."

Response: The Marihuana Regulation and Taxation Act states that "[a] person's use of cannabis or conduct under this chapter shall not be prohibited unless it has been shown by clear and convincing evidence that the prohibition is reasonably related to the underlying crime." The imposition of a relevant condition must meet the stated standard. As with other conditions, avenues remain available to every releasee for appropriately challenging such conditions at the time they are imposed, including informal requests, utilization of the formal grievance process, or commencement of an article 78 proceeding. However, this comment remains under consideration for final adoption of the rules.

Section 8004.1(k)

Comment: A comment on paragraph (1) of subdivision (k) stated concerns with the language providing that where a releasee is found mentally unfit, no notice of violation or warrant will be issued at that time, claiming inclusion of the words "at that time" is contrary to "the plain intent" of the recent Less is More legislation. Comments were also received on paragraph (2) of subdivision (k) raising concerns that it "would permit DOCCS to resume revocation proceedings

after the releasee has been found to be an incapacitated person following a referral at the recognizance hearing for a CPL 730 examination… [in] conflict with Executive Law 259-i(3)(f)(xv)". One comment also suggested a change to the rule to that would require permanent dismissal of violation charges based on a finding of incapacity after a referral from a recognizance hearing.

Response: As to paragraph (1) the comment correctly adds that this rule is based on Executive Law § 259-i(3)(a)(i), and the Board notes that, consistent with the law, (k)(1) suffices to indicate that a notice of violation or warrant is not to be issued against a releasee who lacks the required mental capacity. The relevant part of § 259-i(3)(a)(i) does not operate as a prohibition on issuance of a notice of violation or warrant concerning a releasee who currently possesses mental capacity. The Board agrees that a court of law has authority to direct a mental capacity evaluation concerning a releasee's capacity to participate in a "recognizance proceeding". See, Executive Law § 259-i(3)(a)(vii). However, Executive Law § 259-i(3)(f)(xv), cited in the comment, does not concern recognizance hearings, and instead very explicitly concerns revocation proceedings, which are presided over by hearing officers appointed by the Board. This comment remains under review for final adoption of the regulations.

Section 8004.2(b)

Comment: One comment raises concerns that the rule allows probable cause to be founded on hearsay, and suggests a prohibition on the use of hearsay.

Response: We are reviewing this comment to determine whether there is any legal basis for the objection and suggested prohibition. Prohibiting the use of hearsay would be restrictive

and contrary to the current well-established principles of parole revocation matters and administrative proceedings generally. The comment remains under review pending final adoption of the regulations.

Section 8004.2(d)

Comment: A comment on subdivision (d) of section 8004.2 suggests adding explicit prohibition on issuance of a parole warrant for technical violations, including absconding violations.

Response: The reference within this subdivision to other provisions in the regulations addressing the circumstances in which warrants may be issued is sufficient to address the concerns raised by this comment. However, the comment remains under consideration pending the final adoption of the regulations.

Section 8004.3

Comments: One comment, based upon a quote of subdivision (a) this section, states the "Board's discretion to designate someone a sex offender absent a conviction of a sex offense should be challenged." With reference to subdivisions (a), (b) and (c), another comment argues that subdivision (c) "seems to circumvent and dilute the legal requirement set out in EL 259-i(3)(a)(i) that any reporting to the Board of an alleged violation and subsequently be based on probable cause, which necessarily for purposes of Section 8004.3(a) and (b) includes the ability of the state to proceed on the alleged designated criminal conduct upon which the authority to report to the Board emanates. Subdivision (c) as a regulation is contrary to the relevant executive law

provision, is confusing and likely to be end up resulting in excessive and unwarranted prosecutions and incarceration…."

Response: Subdivision (a) of section 8004.3 does not refer to the Board "designating" someone a sex offender and, at this time, no revision is necessary. Regarding the comment concerning subdivision (c), the Board notes that this rule is currently under review pending final adoption of the regulations.

Section 8004.4(c)

Comment: Section 8004.4 discusses the notice of violation, violation of release report and related issues. There is a comment, with reference to paragraph (6) of subdivision (c), that "the Department has provided that this notice of violation to be issued to the accused only guarantees the client to right to present mitigating evidence relevant to the restoration to supervision at the final hearing. The executive law, however, provides no such evidentiary restriction at the preliminary final hearing, and it is a violation of the statutory right to the preliminary hearing and to present evidence to attempt to curtail the presentation of defense evidence in such a manner through regulation".

Response: The comment misinterprets the Executive Law as requiring that the releasee be given the ability to present, at the preliminary revocation hearing, mitigating evidence that the appropriate sanction in their case would be restoration to supervision. The purpose of the preliminary hearing is to determine whether there is a preponderance of the evidence to believe the releasee violated a condition of release in an important respect, and if such burden is met, a final hearing is then required. If this burden is not met at the preliminary hearing, then the case

must be dismissed. Evidence as to what the appropriate sanction should be upon an ultimate finding of guilt is inapt at a preliminary hearing. It is proper, however, for the notice to inform the releasee that such mitigating evidence may be presented at the final hearing. Executive Law § 259-i(3)(f)(iv) and (xii); See also, 9 N.Y.C.R.R. § 8005.20(g).

Section 8004.4(d)

Comment: A comment objects to the notice of violation procedure not including a mandate that the name and contact details for every releasee who is the subject of a notice of violation be provided to the institutional defender or assigned counsel program.

Response: The rule as drafted is consistent with the law, which does not direct the Board or the Department to provide the notification suggested. However, this comment is under review pending the final adoption of the regulations.

Section 8004.4(e)

Comment: There is a comment regarding subdivision (e) of section 8004.4, including remarks repeating comments from other sections, and a remark characterizing paragraph (3) as unnecessary.

Response: The paragraph is not inconsistent with the Executive Law and is an appropriate and reasonable part of this section. However, this comment is under review pending the final adoption of the regulations.

Section 8004.4(f)

Comment: There is a comment that part of the rule stating "[p]roper and prompt service of the notice of violation occurs when the releasee is served within a reasonable amount of time under the totality of the circumstances at the discretion of the Board or department…" to be, according to the comment, "a meaningless standard that contains two consecutive, vague and undefinable clauses that leaves it's meaning indecipherable."

Response: There is an explicit requirement that service be in reasonable advance of the preliminary hearing and "not less than twenty-four hours prior to" it. However, this comment is under review pending the final adoption of the regulations.

Section 8004.4(h)

Comment: A comment on subdivision (h) is that in this subdivision the agency "improperly and illegally relieves itself of their statutory mandate in the service of a notice of violation for those known to be in local federal custody."

Response: The Executive Law does not contain any requirement for the "prompt" service of a notice of violation on individuals while they are in federal custody. However, this comment remains under consideration pending final adoption of the rules.

Section 8004.4(i)

Comment: The comment received on this subdivision is quoted in full: “Section 8004.4(i) is contrary to law. Exec. Law 259-i(3)(c)(iii) requires, in so far as it is practicable, that evidence relating to the charges be delivered to the releasee at the time of service of the notice of violation. Your proposed rule, however, is directly contrary to the law, which only allows for later disclosure in so far it is impracticable at the time of service. The proposed rule is also deeply concerning given your policy, custom, and practice of refusing to follow Exec. Law 259-i(3)(c)(iii), which has always required at least some disclosure of evidence at the time of service.”

Response: Subdivision (i) is consistent with Executive Law § 259-i(3)(c)(iii). However, this comment remains under review pending final adoption of the rules.

Section 8004.4(j)

Comment: One comment objected to language allowing amendment of charges without notice if there would be no prejudice, stating that it is not up to the Department to make such determinations.

Response: Preliminary and final hearings are presided over by Board-appointed hearing officers who, like the Board itself, are statutorily independent from the Department with regard to decision making. However, this comment is under consideration pending final adoption of the regulations.

Section 8004.5(b)

Comment: One comment objects to general reference within this subdivision to other provisions on warrant issuance rather than specifically listing all limitations in this subdivision.

Response: The suggested specific listing would be unduly duplicative as the regulations are consistent with the Executive Law on this subject. However, this comment is under consideration pending final adoption of the regulations.

Section 8004.5(e)

Comments: There were comments on subdivision (e) of section 8004.5. One commentor wrote that the rule lacks reference to the Executive Law statement that the releasee be presented for a recognizance hearing within 24 hours of the warrant execution. Another comment addresses parts of paragraph (2) of subdivision (e) in section 8004.5, which paragraph discusses authorized detention following a recognizance hearing in which the court had ordered release. In those remarks, they write that (e)(2)(ii) "defines conduct that would independently provide basis for the issuance of a parole warrant as 'including, but not limited to conduct such as absconding or the commission of a misdemeanor or felony.'" They continue with respect to (e)(2)(iv), writing that it "attempts to subvert the authority of judges" and the limits of Less is More "by allowing the Department to solely determine that a warrant can be issued if 'the conduct is of such a character or quantity as to be substantially likely, if the recognizance court had been aware of it at the time of the recognizance hearing…'".

Response: There is no need to repeat the contents of the Executive Law and section 8004.9 within 8004.5(e). Subdivision (e) is consistent with the law. The Executive Law does not account for circumstances in which a released alleged violator engages in significant violative conduct after the recognizance hearing but prior to the completion of the still-pending revocation case. With reference to the authority of the originally issued warrant in the case, this paragraph appropriately balances the need to address through regulation the significant gap left by the Executive Law with the import of § 259-i(3)(a).

Paragraph (4) of subdivision (e) also comports with the statute, which does not "convert" a parole warrant to the order issued by a court following a recognizance hearing. However, this comment remains under review pending full adoption of the regulations.

Section 8004.7(a)

Comments: One comment was received as to paragraph (1) of subdivision (a), contending it is illegal to include clarification that a failure to notify the parole officer of the releasee's criminal arrest is not a violation that is exempt from reincarceration. A comment on paragraph (4) of subdivision (a) was that it "creates a new type of technical violation not approved or sanctioned by the legislative scheme of Less Is More".

Response: Within § 259-i(3)(f)(xii) is a list of specific technical violations exempt from the potential for reincarceration. Among the violations listed is failing to notify the parole officer of "contact with any law enforcement agency". A criminal arrest is substantively and legally different than a "contact" with a "law enforcement agency", with additional repercussions under

Less Is More. However, this comment remains under review pending full adoption of the regulations.

Section 8004.7(b)

Comment: Citing Executive Law § 259-i(3)(f)(xii), there was a comment complaining of subdivision (b) as "audaciously and illegally creat[ing] a sentencing enhancement scheme to increase penalties for technical violations based on prior violation history".

Response: This comment remains under review pending full adoption of the regulations.

Section 8004.8(a)

Comments: There were comments on (a)(2) of section 8004.8. Subdivision (a) of this section begins: "'Non-technical violation' means:", and (2) of this subdivision states (emphasis added): "for a releasee who is serving a sentence for an offense defined in article 130 of the Penal Law or section 255.26 or 255.27 of such law, conduct violating a specific condition reasonably related to such offense and efforts to protect the public from the commission of a repeat of such offense, *provided that for purposes of this Part all conditions imposed upon such a releasee are presumed to be reasonably related to such offense and efforts to protect the public from the commission of a repeat of such offense*." Comments were to the effect that the inclusion of the emphasized language exceeded the scope of the Board's authority and Executive Law § 259(7) requires as conditions for this prong of non-technical violations, that the subject condition for an offender serving a sentence for a Penal Law Article 130 or section 255.26 or 255.27 offense be reasonably related to such offense and efforts to protect the public from the commission of a repeat

of such offense. One comment further notes that "[i]t may not be possible to promulgate precise criteria for when the reasonable relationship requirement is satisfied" but there must nevertheless be a "nexus between the condition imposed and the underlying sex offense conviction that goes beyond the nexus between that condition and other underlying convictions".

Response: This comment remains under review pending full adoption of the regulations.

Section 8004.9(a)

Comment: Section 8004.9 addresses issues related to recognizance hearings, which are a new right and requirement of the Executive Law added by the t legislation. One comment suggests that subdivision (a) of this section should say court of "record" rather than court of "law".

Response: The use of the term "court of law" is appropriate and parts of subdivision (b) of section 8004.9 contain verbatim reiterations of Executive Law § 259-i(3)(a)(iv), including the term court of "record". However, this comment remains under review pending full adoption of the regulations.

Section 8004.9(b)

Comments: One comment addressed paragraph (3) of subdivision (b) of this section, which is taken from Executive Law § 259-i(3)(a)(viii). The comment suggests additions to paragraph (3) of subdivision (b), including reference to release under CPL §§ 30.30, 180.80, 190.80, or writs of habeas corpus. Another commenter discussed section 8004.9, contending it creates loopholes and shortcuts that curtail the new right, degrading and undermining the intent of the Legislature. With respect to subdivision (b) that commenter took issue with paragraphs (5), (6) and (7) and urged

their deletion. The comment complains of (b)(5) as invading the province of the Legislature. The comments are also critical of (b)(6), which currently provides in part that "Where the releasee's custody is pursuant to the parole warrant and they are not detained in the county within which the violations are alleged to have occurred, execution of the warrant shall not be deemed completed within the meaning of this section until their known reception in the appropriate county…." The comment says that this creates a situation where a recognizance hearing could be delayed indefinitely. Further, (b)(7) provides: "The failure of the authorized officer to present the releasee within the periods set forth in this paragraph shall have no effect on the validity of the parole warrant or the parole violation charges and shall not in itself require release, but may provide basis for an application to a court of law, on notice to the department and Board of Parole, for an order compelling the appropriate production." The comment remarks that this part of the rule "renders the statutory time limits… irrelevant and abrogates the authority of the judiciary."

Response: Paragraphs (1) and (2) of subdivision (b) reiterate Executive Law § 259-i(3)(a)(iv), which directs that presumptively the authorized officer is to present the alleged violator to the appropriate court for a recognizance hearing within 24-hours of the execution of a parole warrant. (b)(5) indicates that the time within which the authorized officer must present the releasee "shall be extended where reasonable to ensure that such releasee is presented to the appropriate court as identified in paragraphs (1) and (2) of this subdivision." In regard to the comment on paragraph (3), as indicated, the language in this paragraph is also directly from Executive Law § 259-i(3)(a)(viii).. Paragraph (5) of subdivision (b) is intended to assist in effectuating the intent of the Legislature, which was that an appropriate court consider the issue of recognizance. This comment is under review, pending full adoption of the regulations. Regarding paragraph (6), the

Board notes that the language in is this paragraph is currently under review pending full adoption of the regulations. The remark on paragraph (7) is also under review pending full adoption of the regulations.

Section 8004.9(e)

Comment: Subdivision (e) reflects that where the recognizance court makes the findings required to underlay the issuance of any detention order, the releasee is to be ordered detained until the conclusion of the revocation case. One comment writes that this contradicts Executive Law § 259-i(3)(a)(viii). The comment also states: "Thus the legislation makes clear that when there is a pending criminal case connected to the parole violation, release on that case will lead to release on the parole warrant."

Response: This comment is currently under review pending full adoption of the regulations.

Section 8004.9(i)

Comment: Subdivision (i) of section 8004.9 in parts states that the Department is to "[a]t the time of the hearing… serve the releasee with the notice of violation if they were not previously served with such notice". The comment takes issue with a claimed omission of "mandatory" language that "as far as practical or feasible, any additional documents having been collected or prepared that are relevant to the charge shall be delivered to the alleged violator."

Response: Subdivision (i) is consistent with Executive Law § 259-i(3)(c)(iii). However, this comment is currently under review pending full adoption of the regulations.

Section 8004.9(j)

Comment: One comment suggests that the last sentence of this subdivision should be moved to subdivision (e).

Response: The Board believes this location is appropriate, but this comment is under review pending full adoption of the regulations.

Section 8004.9(l)

Comment: One commenter urges the deletion of subdivision (l), writing it contradicts significant parts of the legislation and abrogates the authority of the courts "to review central due process issues related to the issuance and service of parole warrants". The first sentence of the subdivision is suggested to contradict Executive Law § 259-i(3)(a)(v). The second sentence is suggested to be "extremely concerning" and allowing a DOCCS employee to "make a baseless claim at a recognizance hearing".

Response: This comment is currently under review pending a full adoption of the regulations.

Section 8004.10(f)

Comment: Subdivision (f) of section 8004.10 concerns the final declaration of delinquency issued as associated with a releasee's new felony committed while on supervision and sentencing on such conviction. The comment is extensive as to that part of subdivision (f) indicating that the date for such delinquency "may be either the date of the commission of the new felony offense or

the date of sentencing for such offense". Among other remarks in the comment, is that the cited language "violates the sentenced person's statutory right to jail time credit on a new offense guaranteed to them by New York State Penal Law 70.30 (3)".

Response: The proposed rule is not new and was previously in Section 8004.3, as amended effective in 2020. The rule codifies a longstanding practice, the lawfulness of which was confirmed by the Appellate Division. (*see, Matter of Brown v. Stanford*, 163 A.D.3d 1337, 1339, 82 N.Y.S.3d 622, 624 (2018); *see also, Matter of Lewis v. Holford*, 168 A.D.3d 1303, 92 N.Y.S.3d 462 (3d Dept. 2019)). There is no requirement that the Board provide additional information to individuals contemplating pleas to new felony offenses committed while on community supervision. Recent legislation has not changed the propriety of this rule. However, this comment remains under consideration pending the full adoption of the regulations.

Section 8004.11(b)

Comments: Section 8004.11 concerns discretionary cancellation of the revocation process. Subdivision (b) explains that the cancellation of a revocation case prior to a preliminary hearing or the waiver of such, may be without prejudice to the recommencement of the case or commencement of a new case based upon the same charges. A couple of comments were received objecting to this subdivision as improper and creating the potential for arbitrary and capricious decisions.

Response: This comment remains under consideration pending full adoption of the regulations.

Section 8005.4(b)

Comment: One comment refers to this rule, which indicates that the preliminary hearing officer must have no prior supervisory involvement with the alleged violator whose case they are presiding over, as having vague wording, and offers a specific revised version as a replacement.

Response: This comment remains under consideration pending full adoption of the regulations.

Section 8005.6(a)

Comments: Section 8005.6 concerns scheduling of the preliminary revocation hearing. One comment urges removal of "as may be relevant to reasonably ensure substantial compliance" with the law from subdivision (a), characterizing it as a lackadaisical standard. 8005.6(a)(2)(iii) provides: "Nothing within this paragraph shall be construed as prohibiting the conduct of a preliminary hearing in absentia." One comment states that this must be struck because the statute does not provide for preliminary hearings to be held in absentia.

Response: . As to comment concerning (a)(2)(iii), hearings in absentia were not explicitly authorized by statute prior to the recent legislation but were nonetheless upheld by reviewing courts. See e.g., People ex rel. Herrera v. Eastmond, 290 A.D.2d 365, 366 (1st Dept. 2002). Nothing in the current law contradicts the notion that an in absentia hearing may be appropriate under certain circumstances. However, this comment remains under review pending the final adoption of regulations.

Section 8005.6(b)

Comment: One comment argued that paragraph (2) of subdivision (b), by stating that subsequent changes in custodial or residential status permit a "reasonable extension of time for scheduling or rescheduling at another appropriate location", is violative of the Executive Law.

Response: This comment remains under review pending the final adoption of the regulations.

Section 8005.6(c)

Comment: A comment stated that subdivision (c) of section 8005.6 encourages violations of due process and the Executive Law by allowing for the waiver of the right to a preliminary revocation hearing without the presence of counsel.

Response: This comment remains under review pending the final adoption of the regulations.

Section 8005.7

Comment: One comment contends that as currently written, subdivision (d) "improperly and illegally holds that proof of a conviction of a crime while on supervision shall constitute preponderance of evidence", in contrast with Executive Law § 259-i(3)(c)(iv).

Response: This rule is currently under review pending final adoption of the regulations.

Section 8005.17(a)

Comments: Several comments were received on section 8005.17, which is entitled "Scheduling of the final revocation hearing." Similar to a comment with respect to subdivision (a) of section 8005.6, a comment takes a partial quote from subdivision (a) of section 8005.17 and complains that "substantial compliance" is an unacceptable "standard". Another comment, citing certain language in (a)(1) ("notice of violation", "issuance of the notice"), also contends that as to scheduling of the final hearing the rule is unreasonably vague. There were also comments contending that this section allows for the arbitrary extension of statutorily defined speedy trial limits. It is claimed that (a)(2) is contrary to the Executive Law and permits the agency to arbitrarily restart the 45-day period. The language in (a)(4) was discussed in two comments, basically for allegedly authorizing the holding of a final hearing beyond the statutory period.

Response: This comment is under review pending final adoption of the regulations.

Section 8005.17(b)

Comment: A comment discusses paragraph (2) of subdivision (b), which provides that where the alleged violator is in custody in a state or local correctional facility, the final revocation hearing may be held there. The comment agrees that this rule "is consistent with the letter of the statute", but asserts the statute permits it only due to a drafting error.

Response: As noted in the comment, the rule is consistent with the Executive Law, and its provision for final hearings to be held in a jail for releasees in custody is rational.

Section 8005.17(c)

Comment: There is a comment discussing 8005.17(c) and alleging it will allow for "unfair practices".

Response: This comment remains under review pending the final adoption of regulations.

Section 8005.17(d)

Comments: Comments were received concerning subdivision (d) ("Adjournments") of section 8005.17. One remark suggests that (d) fails to "address the statutory obligation to provide discovery", and another suggests it should be included specifically in (d)(2)(ii). One of the comments, remarks extensively on the "absence of a K Calendar". The commenter writes that the specific reason the K calendar had previously existed was to mitigate the "loss of time credit" against the potential new felony sentence. They write that its absence now prejudices releasees with pending felonies, that such releasees should be "entitled to adjournments at their request", and that indefinite adjournments would allow releasees to benefit from Executive Law § 259-i(3)(f)(viii).

Response: Regarding discovery, this comment remains under review pending full adoption of the regulations.

Regarding the K calendar, this was a term used for many years to refer to an indefinite adjournment of a parole revocation case that might be provided upon request of, and chargeable, to the releasee, where they were also the subject of a pending felony charge. The text of the legislation does not include any language suggesting that final revocation hearings could be delayed indefinitely upon demand by a releasee or their attorney. Section 8005.17 allows for proper adjournments of a final revocation hearing on good cause. However, this comment remains under review pending the full adoption of the regulations.

Section 8005.18(a)

Comment: There is a comment that subdivision (a) of section 8005.18 is insufficient in its direction to provide proper and timely notice, possesses a "meaningless" standard, and the section fails to state the proper scope of discovery mandated by Executive Law § 259-i(3)(c)(iii).

Response: Subdivision (a) of section 8005.18 contains language similar to that in 8005.17(c) in their current forms. However, this comment remains under review pending the full adoption of the regulations.

Section 8005.19(e)

Comment: One comment, referring to the new "clear and convincing evidence" standard of proof at the final revocation hearing and citing subdivision (e) of section 8005.19, suggests that

for findings of guilt on a misdemeanor or felony, a finding on each element of the crime must be reflected in the notice of decision.

Response: Subdivision (e) was amended to reflect the new clear and convincing evidence standard of proof at the final hearing per Executive Law § 259-i(3)(f)(viii) through (x). Additionally, this is covered in the subdivision (h) ("Decision") of section 8005.20, which is consistent with Executive Law § 259-i(3)(f)(xiv). However, this comment remains under consideration pending full adoption of the regulations.

Section 8005.19(f)

Comment: Executive Law § 259-i(3)(f)(viii), subdivision (f) of section 5005.19 provides: "Conduct that formed the basis of a criminal arrest shall not form a basis of a sustained parole violation if a court has, prior to the final hearing, adjudicated that criminal matter with an acquittal, adjournment in contemplation of dismissal, or violation." One comment complained that "prior to the final hearing" is language not in the statute.

Response: The cited provision here appears within paragraph (f) of Executive Law § 259-i(3), which details parameters and requirements related to final revocation hearings. However, this comment remains under consideration pending full adoption of the regulations.

Section 8005.20

Comments: Comments were received with respect to parts of section 8005.20. One comment is that (e)(2) is "plainly contrary to the law" by including all sustained technical

violations in the current revocation case in the determination of the potentially applicable time assessment consistent with Executive Law § 259-i(3)(f)(xii). The comment states that the law only "sets up graduated sanctions for successive technical violations" (emphasis in original). A remark alleges that (e)(2)(iv) removes discretion from the presiding officer in stating that there is a presumption the applicable maximum time assessment for technical violation cases will be applied in the event a time assessment is imposed. Potential time assessments regarding non-technical violations are also addressed in section 8005.20, and a comment takes issue with an "increase[s] in maximum sanctions", by comparison with the prior version of this section, and with reference to non-violent felonies and examples given.

Response: The law does not explicitly mandate that the sustained charges relevant to the counts required by § 259-i(3)(f)(xii) be successive. However, this comment remains under review pending final adoption of the regulations.

Section 8005.21

Comment: A comment writes that section 8005.21 fails to enact Executive Law § 259-i(9).

Response: In compliance with Executive Law § 259-i(9), the Board promulgated rules to facilitate the presence of non-profit service providers. New section 8005.21 specifically affords for a qualified nonprofit service providers participation in the process. However, this comment remains under review pending full adoption of the regulations.

Job Impact Statement

Comment: One commenter writes that the Board's determination that the regulation will not have substantial adverse impact on job and employment opportunities. It further asserts that a Job Impact Statement is required under SAPA § 201-a(2)(a). The commenter writes that incarceration reduces a releasee's chances of future employment, that the proposed regulations will increase incarceration.

Response: The Board disagrees with this interpretation of the requirements of the State Administrative Procedures Act (SAPA).