

A08342 Summary:

BILL NO A08342

SAME AS No same as

SPONSOR Weinstein (MS)

COSPNSR

MLTSPNSR Braunstein, Bronson, Clark, Cook, Farrell, Glick, Jaffee, Mar
Millman, Otis, Sepulveda, Skartados

Amd SS70 & 240, Dom Rel L; amd SS251 & 651, Fam Ct Act

Relates to court ordered forensic evaluations and reports in child custody
visitation proceedings.**A08342 Memo:**

BILL NUMBER:A8342

TITLE OF BILL: An act to amend the domestic relations law and the
family court act, in relation to child custody forensic reports

PURPOSE OF BILL:

This legislation provides for uniform access to court ordered forensic
mental health evaluation reports and underlying data by litigants,
their counsels and the attorney for the child in child custody and
visitation cases.

SUMMARY OF PROVISIONS OF BILL:

Sections 1 and 2. Amend section 70 and subdivision 1 of section 240 of
the domestic relations law respectively, to provide that where a court
order is issued for an evaluation of the parties or a child by a
forensic mental health professional or any other person appointed by
the court to assist with the determination of child custody or
visitation, any report prepared by the forensic evaluator shall be
confidential and under seal except that all parties, their attorneys
and the attorney for the child shall have a right to a copy of the
forensic report as well as a copy of the forensic evaluator's file,
including supporting records and data, subject to the issuance of a
protective order pursuant to section 3103 of the civil practice law
and rules.

In addition, these sections provide that, upon application to the
court, any person retained to assist counsel or any party shall be
provided a copy of the forensic report and the court ordered
evaluator's file, also subject to the issuance of a protective order

pursuant to section 3103 of the civil practice law and rules.

Sections 1 and 2 also provide that the court is required to give notice to the parties and counsel, on the record, that a failure to comply with a court order conditioning or limiting disclosure of the forensic report or the forensic evaluator's file shall be contempt of court, which may include punishment of a fine or imprisonment or both.

Furthermore, these sections provide that the admissibility into evidence of the forensic report or the forensic evaluator's file shall be subject to the rules of evidence and subject to the right of cross-examination.

Sections 3 and 4. Amend subdivisions (c) and (d) of section 251 of the family court act and section 651 of the family court act respectively, to provide that notwithstanding section 165 of the family court act and section 408 of the civil practice law and rules, sections 3101 and 3103 of the civil practice law and rules shall apply to pre-trial discovery of court ordered. forensic evaluations in child custody and visitation cases.

In addition, these sections make conforming amendments identical to and consistent with sections 1 and 2 of the proposal.

Section 5. Effective date.

JUSTIFICATION:

Presently in New York State, courts can direct mental health evaluations of parties and their children by a court-appointed forensic evaluator in custody and visitation cases to aid the court in making a decision. Reports prepared by these evaluators are often referred to as forensic reports, and among other things contain information based on interviews with the parents, relatives, the subject children, and any other persons who may have information bearing on the mental health of the parties, their parenting and the parties' relationship with each other and their children. The forensic reports are sent directly to the court that has appointed the evaluator.

Under current case law and practice, access to forensic reports and pre-trial disclosure of forensic evaluator files, including underlying records and data for the report in child custody and visitation cases, is not Uniform and in many instances significantly limited, often resulting in disparate judicial determinations regarding access to these reports and data. The limitations on access to the reports and the underlying records and data raise serious due process concerns including the inability of parents to adequately and effectively challenge the quality and trustworthiness of forensic reports that play a critical and often decisive role in shaping a court's decision about parental access to their children. In addition, under existing

practice, forensic reports are often not subjected to the rigor of evidentiary laws and procedures.

Forensic reports are lengthy, complex and contain facts, scientific and/or other data and conclusions of the evaluator on the basis of the data. Thorough analysis of the reports requires a lot of time and even expert resources. These reports generally contain substantial hearsay and hearsay-within-hearsay. The reports also contain subjective information and may contain biased or inaccurate information. Since the parents are most familiar with the facts of their lives, they are best positioned to identify factual errors in the forensic report. The help of professionals with specific expertise in the areas covered by the forensic report is also important to properly evaluate the report and its conclusions. In order to challenge the accuracy of the report on the facts, data and on the conclusions, and to prepare for an effective cross-examination of the forensic evaluator, the parties and their counsel must have complete access to the report and underlying data with the ability to share the report and underlying records and data with professionals retained to assist them, including those with expertise to help analyze the report.

Under present practice, however, a parent's and his or her attorney's access to these critical evaluations is not uniformly provided for. Parents are frequently prevented from receiving copies of a forensic report in child custody and visitation cases. Further, in cases where they are given access to these reports, such as through permission to view the report at the court house or at counsel's office, where parties have counsel, the conditions of access may be so circumscribed that they inhibit the ability of parents and/or their counsel to adequately prepare for trial. In addition, some of the current procedures employed for access to forensic reports hamper the ability of parents to retain professionals with the expertise to assist them

with analyzing the contents of the forensic reports. Furthermore, parties and their attorneys are frequently not permitted access to the forensic evaluators' files related to the case including underlying records and data. Obtaining forensic reports without the ability to examine the data upon which the reports are based is inadequate for a complete assessment of the reports. Without the ability to thoroughly examine the report and challenge its contents if need be, a litigant's right to a fair trial is severely hampered.

A parent's interest in the care, custody and management of his or her children is one of the oldest and most fundamental liberty interests recognized by law. This right has also been recognized by the United States Supreme Court in its decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). In light of the significant parental interest at stake, it is important to afford parents and litigants in child custody and visitation cases with appropriate due process protections and evidentiary safeguards.

This proposal gives the litigants, their counsel, if any, and the attorney for the child in child custody and visitation cases the right to obtain a copy of the forensic report and the underlying data. In addition, this proposal enables a party to provide a copy of the forensic report and the underlying data to professionals retained to help with the case, including e.g. an expert to rebut the contents of a forensic report.

However, under the proposal, at each step, the court has the ability to issue a protective order limiting or conditioning access to the forensic report or the evaluator's file. In addition, the court has the authority to hold violators of their court orders directing such limitations or conditions in contempt of court. The court is also required to provide clear notice to the parties and counsel that a violation of a court order conditioning or limiting disclosure shall be contempt of court which may include punishment of a fine or imprisonment or both.

The proposal also provides that the admissibility into evidence of the forensic report must be subject to the rules of evidence and the right of cross-examination. This will help ensure that the contents of the forensic report can be fully challenged and are subject to the rigor required under the rules of evidence.

In sum, this proposal balances important due process rights of all litigants in custody and visitation actions against any countervailing concerns relating to a harmful impact upon subject children that may result from unfettered access to forensic reports and underlying data.

LEGISLATIVE HISTORY: New bill, 2013.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None.

EFFECTIVE DATE:

This act shall take effect on the ninetieth day after it shall have become a law, with the chief administrator of the courts authorized and directed to promulgate any rules necessary to implement the provisions of the act on or before the effective date.

A08342 Text:

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

8342

2013-2014 Regular Sessions

I N A S S E M B L Y

December 27, 2013

Introduced by M. of A. WEINSTEIN -- Multi-Sponsored by -- M
BRAUNSTEIN, BRONSON, CLARK, FARRELL, GLICK, JAFFEE, MARKEY, M
OTIS, SEPULVEDA, SKARTADOS -- read once and referred to the Co
on Judiciary

AN ACT to amend the domestic relations law and the family court a
relation to child custody forensic reports

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

1 Section 1. Section 70 of the domestic relations law is amer
2 adding a new subdivision (c) to read as follows:
3 (C) COURT ORDERED FORENSIC EVALUATIONS IN PROCEEDINGS INVOLVIN
4 CUSTODY AND VISITATION. WHERE A COURT ORDER IS ISSUED FOR AN EVA
5 OF THE PARTIES OR A CHILD BY A FORENSIC MENTAL HEALTH PROFESSI
6 ANY OTHER PERSON, BOTH OF WHOM SHALL BE CONSIDERED "COURT ORDERED
7 ATORS" FOR PURPOSES OF THIS SUBDIVISION, APPOINTED BY THE CC
8 ASSIST WITH THE DETERMINATION OF CHILD CUSTODY OR VISITATION PURS
9 THIS ARTICLE, FOR PURPOSES OF SUCH COURT ORDERED FORENSIC EVALUAT
10 (1) ANY REPORT OR EVALUATION PREPARED BY THE COURT ORDERED EVA
11 TO BE KNOWN AS A "FORENSIC REPORT" FOR THE PURPOSES OF THIS SUBDI
12 SHALL BE CONFIDENTIAL AND KEPT UNDER SEAL EXCEPT THAT, ALL F
13 THEIR ATTORNEYS AND THE ATTORNEY FOR THE CHILD SHALL HAVE A F
14 RECEIVE A COPY OF ANY SUCH FORENSIC REPORT UPON RECEIPT OF SUCH A
15 BY THE COURT, SUBJECT TO THE PROVISIONS OF SECTION THREE THOUSA
16 HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES. PROVIDED, HOWE
17 NO EVENT SHALL A PARTY OR HIS OR HER COUNSEL BE PREVENTED FROM AC
18 OR REVIEW OF A FORENSIC REPORT IN ADVANCE OF AND DURING TRIAL TC
19 COMPETENT REPRESENTATION AND TRIAL PREPARATION. ANY CONDITIONS OF
20 TATIONS IMPOSED BY THE COURT PURSUANT TO THIS SUBDIVISION RELA
21 DISCLOSURE OF THE FORENSIC REPORT SHALL ACCOMMODATE FOR LANGUAGE
22 AND DISABILITY. UPON APPLICATION BY COUNSEL OR A PARTY THE COUF
23 PERMIT A COPY OF THE FORENSIC REPORT AND A COPY OF THE COURT

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

LBD133

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1 EVALUATOR'S FILES AS PROVIDED FOR UNDER PARAGRAPH TWO OF THIS S
2 SION TO BE PROVIDED TO ANY PERSON RETAINED TO ASSIST COUNSEL
3 PARTY, SUBJECT TO THE PROVISIONS OF SECTION THREE THOUSAND ONE
4 THREE OF THE CIVIL PRACTICE LAW AND RULES; AND
5 (2) PURSUANT TO A DEMAND MADE UNDER RULE THREE THOUSAND ONE
6 TWENTY OF THE CIVIL PRACTICE LAW AND RULES, THE COURT ORDERED EV
7 SHALL PROVIDE TO A PARTY, HIS OR HER ATTORNEY OR THE ATTORNEY

8 CHILD THE ENTIRE FILE RELATED TO THE PROCEEDING INCLUDING BUT NOT
9 ED TO, ALL UNDERLYING NOTES, TEST DATA, RAW TEST MATERIALS, UNL
10 MATERIALS PROVIDED TO OR RELIED UPON BY THE COURT ORDERED EVALUA
11 ANY RECORDS, PHOTOGRAPHS OR OTHER EVIDENCE FOR INSPECTION AND PHC
12 ING. THERE SHALL BE A REBUTTABLE PRESUMPTION THAT THE COURT
13 EVALUATOR'S FILE RELATED TO HIS OR HER APPOINTMENT, INCLUDING
14 AFOREMENTIONED MATERIALS, IS DISCOVERABLE SUBJECT TO THE PROVISI
15 SECTION THREE THOUSAND ONE HUNDRED THREE OF THE CIVIL PRACTICE
16 RULES; AND

17 (3) A FAILURE TO COMPLY WITH A COURT ORDER CONDITIONING OR I
18 ACCESS TO A FORENSIC REPORT SHALL BE CONTEMPT OF COURT AND
19 PUNISHABLE AS SUCH. THE COURT SHALL NOTIFY THE PARTIES AND COUN
20 THE RECORD THAT A FAILURE TO COMPLY WITH THE COURT ORDER S
21 CONTEMPT OF COURT WHICH MAY INCLUDE PUNISHMENT OF A FINE OR IMPRI
22 OR BOTH; AND

23 (4) ADMISSIBILITY INTO EVIDENCE OF THE FORENSIC REPORT OR THE
24 ORDERED EVALUATOR'S FILE SHALL BE SUBJECT TO OBJECTION OF ANY PAF
25 OR HER ATTORNEY OR THE ATTORNEY FOR THE CHILD PURSUANT TO THE F
26 EVIDENCE AND SUBJECT TO THE RIGHT OF CROSS-EXAMINATION.

27 S 2. Subdivision 1 of section 240 of the domestic relations
28 amended by adding a new paragraph (a-3) to read as follows:

29 (A-3) COURT ORDERED FORENSIC EVALUATIONS IN PROCEEDINGS IN
30 CHILD CUSTODY AND VISITATION. WHERE A COURT ORDER IS ISSUED FOR A
31 UATION OF THE PARTIES OR A CHILD BY A FORENSIC MENTAL HEALTH
32 SIONAL OR ANY OTHER PERSON, BOTH OF WHOM SHALL BE CONSIDERE
33 ORDERED EVALUATORS" FOR PURPOSES OF THIS SUBDIVISION, APPOINTED
34 COURT TO ASSIST WITH THE DETERMINATION OF CHILD CUSTODY OR VIS
35 PURSUANT TO THIS SUBDIVISION, FOR PURPOSES OF SUCH COURT ORDERED
36 SIC EVALUATIONS:

37 (1) ANY REPORT OR EVALUATION PREPARED BY THE COURT ORDERED EVA
38 TO BE KNOWN AS A "FORENSIC REPORT" FOR THE PURPOSES OF THIS PAF
39 SHALL BE CONFIDENTIAL AND KEPT UNDER SEAL EXCEPT THAT, ALL P
40 THEIR ATTORNEYS AND THE ATTORNEY FOR THE CHILD SHALL HAVE A RI
41 RECEIVE A COPY OF ANY SUCH FORENSIC REPORT UPON RECEIPT OF SUCH A
42 BY THE COURT, SUBJECT TO THE PROVISIONS OF SECTION THREE THOUS
43 HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES. PROVIDED, HOWE
44 NO EVENT SHALL A PARTY OR HIS OR HER COUNSEL BE PREVENTED FROM AC
45 OR REVIEW OF A FORENSIC REPORT IN ADVANCE OF AND DURING TRIAL TO
46 COMPETENT REPRESENTATION AND TRIAL PREPARATION. ANY CONDITIONS C
47 TATIONS IMPOSED BY THE COURT PURSUANT TO THIS SUBDIVISION RELAT
48 DISCLOSURE OF THE FORENSIC REPORT SHALL ACCOMMODATE FOR LANGUAGE
49 AND DISABILITY. UPON APPLICATION BY COUNSEL OR A PARTY THE COURT
50 PERMIT A COPY OF THE FORENSIC REPORT AND A COPY OF THE COURT
51 EVALUATOR'S FILES AS PROVIDED FOR UNDER SUBPARAGRAPH TWO OF THIS
52 GRAPH TO BE PROVIDED TO ANY PERSON RETAINED TO ASSIST COUNSEL
53 PARTY, SUBJECT TO THE PROVISIONS OF SECTION THREE THOUSAND ONE
54 THREE OF THE CIVIL PRACTICE LAW AND RULES; AND

55 (2) PURSUANT TO A DEMAND MADE UNDER RULE THREE THOUSAND ONE
56 TWENTY OF THE CIVIL PRACTICE LAW AND RULES, THE COURT ORDERED EV
A. 8342

1 SHALL PROVIDE TO A PARTY, HIS OR HER ATTORNEY OR THE ATTORNEY

2 CHILD THE ENTIRE FILE RELATED TO THE PROCEEDING INCLUDING BUT NOT
3 ED TO, ALL UNDERLYING NOTES, TEST DATA, RAW TEST MATERIALS, UNCLERK
4 MATERIALS PROVIDED TO OR RELIED UPON BY THE COURT ORDERED EVALUATOR
5 ANY RECORDS, PHOTOGRAPHS OR OTHER EVIDENCE FOR INSPECTION AND PHOTOCOPYING.
6 ING. THERE SHALL BE A REBUTTABLE PRESUMPTION THAT THE COURT
7 EVALUATOR'S FILE RELATED TO HIS OR HER APPOINTMENT, INCLUDING
8 AFOREMENTIONED MATERIALS, IS DISCOVERABLE SUBJECT TO THE PROVISIONS OF
9 SECTION THREE THOUSAND ONE HUNDRED THREE OF THE CIVIL PRACTICE
10 RULES; AND

11 (3) A FAILURE TO COMPLY WITH A COURT ORDER CONDITIONING OR LIMITING
12 ACCESS TO A FORENSIC REPORT SHALL BE CONTEMPT OF COURT AND SHALL BE
13 PUNISHABLE AS SUCH. THE COURT SHALL NOTIFY THE PARTIES AND COUNSEL OF
14 THE RECORD THAT A FAILURE TO COMPLY WITH THE COURT ORDER SHALL BE
15 CONTEMPT OF COURT WHICH MAY INCLUDE PUNISHMENT OF A FINE OR IMPRISONMENT
16 OR BOTH; AND

17 (4) ADMISSIBILITY INTO EVIDENCE OF THE FORENSIC REPORT OR THE
18 ORDERED EVALUATOR'S FILE SHALL BE SUBJECT TO OBJECTION OF ANY PARTY
19 OR HER ATTORNEY OR THE ATTORNEY FOR THE CHILD PURSUANT TO THE PROVISIONS OF
20 EVIDENCE AND SUBJECT TO THE RIGHT OF CROSS-EXAMINATION.

21 S 3. Subdivision (c) of section 251 of the family court act is
22 amended to read as follows: (d) and a new subdivision (c) is added to
23 read as follows:

24 (C) COURT ORDERED FORENSIC EVALUATIONS IN CHILD CUSTODY AND VISITATION
25 PROCEEDINGS. NOTWITHSTANDING THE PROVISIONS OF THIS SECTION AND ANY
26 CONTRARY, WHERE A COURT ORDER IS ISSUED FOR AN EVALUATION OF THE
27 WELFARE OF A CHILD BY A FORENSIC MENTAL HEALTH PROFESSIONAL OR ANY OTHER
28 PERSON, BOTH OF WHOM SHALL BE CONSIDERED "COURT ORDERED EVALUATORS" FOR THE
29 PURPOSES OF THIS SUBDIVISION, APPOINTED BY THE COURT TO ASSIST WITH THE
30 ADMINISTRATION OF CHILD CUSTODY OR VISITATION PURSUANT TO ARTICLE FOUR OF
31 THIS ACT, FOR PURPOSES OF SUCH COURT ORDERED FORENSIC EVALUATIONS

32 (1) NOTWITHSTANDING SECTION ONE HUNDRED SIXTY-FIVE OF THIS ACT AND
33 SECTION FOUR HUNDRED EIGHT OF THE CIVIL PRACTICE LAW AND RULES, THE
34 PROVISIONS AND LIMITATIONS OF SECTIONS THREE THOUSAND ONE HUNDRED
35 AND THREE THOUSAND ONE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES
36 SHALL APPLY; AND

37 (2) ANY REPORT OR EVALUATION PREPARED BY THE COURT ORDERED EVALUATOR
38 TO BE KNOWN AS A "FORENSIC REPORT" FOR THE PURPOSES OF THIS SUBDIVISION
39 SHALL BE CONFIDENTIAL AND KEPT UNDER SEAL EXCEPT THAT, ALL PARTIES
40 AND THEIR ATTORNEYS AND THE ATTORNEY FOR THE CHILD SHALL HAVE A RIGHT TO
41 RECEIVE A COPY OF ANY SUCH FORENSIC REPORT UPON RECEIPT OF SUCH A COPY
42 BY THE COURT, SUBJECT TO THE PROVISIONS OF SECTION THREE THOUSAND
43 ONE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES. PROVIDED, HOWEVER,
44 NO EVENT SHALL A PARTY OR HIS OR HER COUNSEL BE PREVENTED FROM ACCESS TO
45 OR REVIEW OF A FORENSIC REPORT IN ADVANCE OF AND DURING TRIAL TO OBTAIN
46 COMPETENT REPRESENTATION AND TRIAL PREPARATION. ANY CONDITIONS OF
47 ACCESS IMPOSED BY THE COURT PURSUANT TO THIS SUBDIVISION SHALL RELATE TO
48 THE DISCLOSURE OF THE FORENSIC REPORT SHALL ACCOMMODATE FOR LANGUAGE
49 BARRIERS AND DISABILITY. UPON APPLICATION BY COUNSEL OR A PARTY THE COURT
50 SHALL PERMIT A COPY OF THE FORENSIC REPORT AND A COPY OF THE COURT
51 ORDERED EVALUATOR'S FILES AS PROVIDED FOR UNDER PARAGRAPH THREE OF THIS
52 SECTION TO BE PROVIDED TO ANY PERSON RETAINED TO ASSIST COUNSEL IN THE
53 REPRESENTATION OF A PARTY, SUBJECT TO THE PROVISIONS OF SECTION THREE THOUSAND ONE

54 THREE OF THE CIVIL PRACTICE LAW AND RULES; AND
55 (3) PURSUANT TO A DEMAND MADE UNDER RULE THREE THOUSAND ONE
56 TWENTY OF THE CIVIL PRACTICE LAW AND RULES, THE COURT ORDERED EV
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17 (5) ADMISSIBILITY INTO EVIDENCE OF THE FORENSIC REPORT OR THE
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19 OR HER ATTORNEY OR THE ATTORNEY FOR THE CHILD PURSUANT TO THE F
20 EVIDENCE AND SUBJECT TO THE RIGHT OF CROSS-EXAMINATION.

21 S 4. Section 651 of the family court act is amended by adding
22 subdivision (g) to read as follows:

23 (G) COURT ORDERED FORENSIC EVALUATIONS IN CHILD CUSTODY AND VIS
24 PROCEEDINGS. NOTWITHSTANDING THE PROVISIONS OF THIS SECTION
25 CONTRARY, WHERE A COURT ORDER IS ISSUED FOR AN EVALUATION OF THE
26 OR A CHILD BY A FORENSIC MENTAL HEALTH PROFESSIONAL OR ANY OTHER
27 BOTH OF WHOM SHALL BE CONSIDERED "COURT ORDERED EVALUATORS" FOR E
28 OF THIS SUBDIVISION, APPOINTED BY THE COURT TO ASSIST WITH THE I
29 NATION OF CHILD CUSTODY OR VISITATION PURSUANT TO THIS ARTICLE C
30 CLE FOUR OF THIS ACT, FOR PURPOSES OF SUCH COURT ORDERED FORENSIC
31 ATIONS:

32 (1) NOTWITHSTANDING SECTION ONE HUNDRED SIXTY-FIVE OF THIS A
33 SECTION FOUR HUNDRED EIGHT OF THE CIVIL PRACTICE LAW AND RUI
34 PROVISIONS AND LIMITATIONS OF SECTIONS THREE THOUSAND ONE HUNDF
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36 SHALL APPLY; AND

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56 TWENTY OF THE CIVIL PRACTICE LAW AND RULES, THE COURT ORDERED EV
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9 SAND ONE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES; AND

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11 ACCESS TO A FORENSIC REPORT SHALL BE CONTEMPT OF COURT AND
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19 EVIDENCE AND SUBJECT TO THE RIGHT OF CROSS-EXAMINATION.

20 S 5. This act shall take effect on the ninetieth day after it
21 have become a law, provided, however, that effective immediat
22 chief administrator of the courts, with the approval of the admi
23 tive board of the courts, is authorized and directed to promulg
24 rules necessary to implement the provisions of this act on or
25 such effective date.