

Assessment of Public Comment

The New York Office for the Aging received in response to proposed new

9 NYCRR Part 6656:

“Limits on Administrative Expenses and Executive Compensation”

A Notice of Proposed Rule Making was published in the *State Register* on May 30, 2012. The New York Office for the Aging (NYSOFA) received several sets of comments during the public comment period associated with the proposed rulemaking. The issues and concerns raised in these comments are set forth below. Issues and concerns have been grouped according to the part of the proposed rule they address. Because many commenters addressed concerns that applied to all of the agencies that proposed regulations to implement executive order 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. NYSOFA’s response is provided for each issue or concern.

Applicability (Old Section 6656.2)

1. Issue/Concern: Through the Executive Order, the Governor has contravened the will of the State Legislature which has already specifically rejected, during budget negotiations, the same proposal that the Governor made through the Executive Order to limit compensation.

Response: The Legislature did not reject the proposal made in Executive Order #38. Rather, the Governor’s Office chose to proceed by regulation in part to ensure that the rules developed in this area could be monitored and revised as necessary over time.

2. Issue/Concern: The Proposed Rule is inconsistent with or contradicts rules issued by other agencies in terms of limits, definitions and goals. Keeping track of the rules promulgated under this Order, as well as the rules issued by the IRS, the federal government, and others, will be an administrative expense that will have to be absorbed by the very organizations regulated by the Executive Order.

Response: The participating agencies are developing with the Division of the Budget a streamlined reporting system that will be operational prior to the implementation date of the regulation to ensure that the burden of reporting the information required by these regulations will be minimal.

3. Issue/Concern: Pursuant to SAPA, a State agency must engage in both a Regulatory Flexibility Analysis for Small Business and Local Government and a Job Impact Analysis.

Response: These impacts were considered extensively in the development of the regulation. With respect to small businesses in particular, the thresholds in the regulations were expressly developed to exclude from coverage providers that are small businesses and organizations.

4. Issue/Concern: It is expected that the 75th percentile/board approval test could serve as a default waiver for entities that pay executive compensation in excess of the Executive Order's standard, which is only applicable to compensation derived from state proceeds. However, the proposed rule applies this test to compensation from all sources of revenues. Regulations cannot exceed the underlying grant of regulatory authority. As such, this 75th percentile/board approval test should be amended to provide an alternative compliance test for compensation derived from state payments, or it should be stricken from the rule prior to adoption.

Response: The regulations are fully within the agency's regulatory authority. The compensation requirements are applicable solely to those providers whose activities are heavily funded by the State or by State-approved funds and, in many cases, pursuant to agreements with the State or local government. As a result, the State's interest in regulating their operations is substantial, and the regulations are narrowly tailored to cover only such providers.

5. Issue/Concern: The Applicability section should be deleted because it provides a partial description of its criteria and employs terms whose meaning is unclear and potentially misleading.

Response: This section has been deleted.

6. Issue/Concern: Public companies that are subject to the requirements of the Securities and Exchange Commission having to do with executive compensation disclosures and shareholder advisory votes on executive compensation should be exempt from the executive compensation provisions of the Executive Order.

Response: The disclosure and shareholder advisory vote requirements applicable to public companies are complementary but not duplicative of the requirements of Executive Order 38. Accordingly, such an exemption is not appropriate.

Definitions (Section 6656.3)

Many commenters requested clarification of and changes to a variety of the definitions in the text, particularly administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, program services, program services expenses and related entity, State-authorized payments and State funds. Most of these definitions have been changed to reflect suggestions received during the public comment period and to address concerns expressed by providers or by their representatives.

1. Issue/Concern: With the new cap on administrative expenses, it is important to clearly define administrative costs as distinct from program costs and consider existing rate systems when doing so.

Response: NYSOFA agrees with this suggestion. The definition of administrative expenses has been developed with these considerations in mind.

2. Issue/Concern: Clarifying the definition of Covered Provider to be as clear as possible will facilitate compliance by those subject to the regulations. The lack of clarity in the definition of Covered Provider and the inclusion in the definition of funds administered through municipal and county governmental units is problematic.

Response: NYSOFA agrees with these comments. The definition of Covered Provider has been amended to address this concern.

3. Issue/Concern: The scope of the definition of Covered Providers should be narrowed by deleting the reference to state revenues, excluding State Funds (allow only State-authorized payments) and excluding funds administered through municipal or county contracts.

Response: The section of the regulation that identifies types of providers that shall not be considered covered providers has been amended to include several new types of providers.

4. Issue/Concern: Inclusion of funds administered through municipal and county governmental units is problematic because it would intrude on the contracting authority and unnecessarily burden such governmental units. Municipal and county governmental units have their own oversight processes for municipal and county contracts. Requiring such contracts to be subject to the Regulations would be duplicative and confusing.

Response: NYSOFA disagrees. The proposed regulation requires NYSOFA to be responsible for ensuring the necessary reporting and compliance by such covered providers, and shall issue guidance to affected county and local governments setting forth the procedures by which the NYSOFA or its designee shall do so. Accordingly, the proposed regulation expressly clarifies that it does not impose a new enforcement obligation upon county or local governments.

5. Issue/Concern: The definition of what constitutes State funds or State-authorized funds should be clarified.

Response: Clarifying changes have been made to both of these terms in the revised text.

6. Issue/Concern: All contracts let under the State Finance Law section 163 should be exempt from the Executive Order, not just contracts for program services awarded on a “lowest price” basis.

Response: The revised text expands the exemption for lowest price contracts. The exclusion of best value contracts would undermine the intent of the regulation because certain of those contracts may be for program services that should be regulated by this regulation.

Limits on administrative expenses (Section 6656.4)

1. Issue/Concern: If the benchmark for administrative expenses is based on historical expense data, it does not account for recent requirements that have inflated legitimate administrative overhead and created expense outliers, for example, new billing systems, electronic health

records and HITECH, and future infrastructure investments needed to comply with the Affordable Care Act and Medicaid redesign.

Response: The revised regulations address these concerns. First, many of the expenses mentioned, such as billing systems and electronic records, may be considered program services expenses under the revised definition. Second, expenses in excess of \$10,000 that would otherwise be administrative expenses are excluded from consideration as either administrative or program service expenses when they are non-recurring (no more frequent than once every five years) or unanticipated.

2. Issue/Concern: The limits on administrative expenses do not allow providers to save money in a given year for future investments into program expansion, new technology or other programmatic enhancements. The regulation should allow a provider to reserve funds which would otherwise be spent on program service expenses for program service expenses in a future year.

Response: The definition of administrative expenses has been changed to exclude non-recurring or unanticipated expenses over \$10,000 that would otherwise be administrative expenses.

Limits on Executive Compensation (Section 6656.5)

1. Issue/Concern: The regulation is confusing on whether all three conditions must apply for determining compensation of a covered executive.

Response: The requirements regarding executive compensation have been amended to clarify their scope.

2. It is expected that the 75th percentile/board approval test could serve as a default waiver for entities that pay executive compensation in excess of the Executive Order's standard, which is only applicable to compensation derived from state proceeds. However, the proposed rule applies this test to compensation from all sources of revenues. Regulations cannot exceed the underlying grant of regulatory authority. As such, this 75th percentile/board approval test should be amended to provide an alternative compliance test for compensation derived from state payments, or it should be stricken from the rule prior to adoption.

Response: The regulations are fully within the agency's regulatory authority. The compensation requirements are applicable solely to those providers whose activities are heavily funded by the State or by State-approved funds and, in many cases, pursuant to agreements with the State or local government. As a result, the State's interest in regulating their operations is substantial, and the regulations are narrowly tailored to cover only such providers.

3. Issue/Concern: Eliminate the 75th percentile cutoff on executive compensation and covered executive.

Response: Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. SOFA is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

4. Issue/Concern: Covered executives from related entities may be outside of New York.

Response: The scope of coverage of executives in related organizations has been clarified and further limited.

5. Issue/Concern: The definition of “compensation” should include only base salary, bonus, and similar incentive payments that are provided to an employee in return for services rendered and should not include dividends or any form of profit allocations or distributions to an individual by virtue of being an equity owner in a for-profit corporation.

Response: The definition of Executive Compensation has been amended to exclude certain distributions based upon comments received.

6. Issue/Concern: The terms “parent” and “subsidiary” are not defined for related entities.

Response: The term has been changed from “related entity” to “related organization” and has been defined using the definition of the same term in Schedule R of the Internal Revenue Service’s Form 990, except that for purposes of this regulation, a related organization must have received or be anticipated to receive State funds or State-authorized payments from a covered provider during the reporting period.

7. Issue/Concern: Nonprofit organizations are already subject to New York Attorney General oversight as well as Internal Revenue Service (“IRS”) regulations. Annual reports to the IRS (Form 990 Part VI) are required to provide not only salary data for top staff but also a description of how executive compensation is established. Payments through municipal or county contracts should not be considered for purposes of determining whether a provider is covered. Funds awarded or granted by county or local governmental units should be excluded from the

definitions of Covered Provider, State-Authorized Payments and State Funds. The regulations should cover only State-Authorized Payments.

Response: The regulations cover those funds that flow through a county or local government but which are either State funds or State-authorized funds. The regulations would not adequately address the targeted problems if only providers that contracted directly with a State agency were covered, and would create inequities among providers depending upon whether their funding was received directly or indirectly from the State.

8. Issue/Concern: The 75th percentile will drive salaries down as the large pool of outliers reduces salaries in order to comply with the regulation and eventually depress the maximum salary permitted under the regulations. Unless all executive compensation above the 75th percentile is granted a waiver, the 75th percentile limit will, over time, cause executive salaries that were at or near the 75th percentile to be at or near the 100th percentile.

Response: We anticipate that the agency will assess the impact on salaries, if any, on an ongoing basis and will make any necessary adjustments to the regulations accordingly.

9. Issue/Concern: The regulation should consider access to executive compensation and operating expenses data of for-profit entities that is not normally publicly available.

Response: This concern will be addressed further in the implementation process.

10. Issue/Concern: The proposed regulation provides no guidance on how organizations should handle existing commitments under legal contract where the agreement does not meet the Executive Order's proposed standards.

Response: Agreements with Covered Executives entered into prior to April 1, 2012, shall not be subject to the limits in this section during the term of the contract, except that Covered Providers must apply for a waiver for any contracts or agreements with Covered Executives for executive compensation that exceeds or otherwise fails to comply with these regulations if such contracts or agreements extend beyond April 1, 2014. Renewals of such contracts or agreements after the completion of their term must comply with these regulations.

Waivers (Section 6656)

1. Issue/Concern: There is not enough time to collect data to apply for waivers.

Response: The regulations have been revised to allow greater flexibility in the filing of a waiver applications and to extend the implementation date.

2. Issue/Concern: In both the definition and waiver subsections of the proposed regulation, any reference to days should specify whether they are business or calendar days.

Response: The language has been changed to clarify this distinction.

Reporting (Section 665.7)

1. Issue/Concern: The report due under the Regulations should contain financial information concerning a completed Reporting Period, instead of the pending or forthcoming one. Such reports should be due on a similar schedule as the IRS Form 990 or NYS CHAR 500.

Response: There were several questions and comments about the reporting system and what disclosure form would be used. NYSOFA is currently working to determine and prepare the reporting form and process and as a result, reporting dates and format will be provided separately prior to the implementation date.

2. Issue/Concern: Executive Order #38 will impose significant new recordkeeping and reporting requirements on many private and public sector entities. Reporting procedures and definitions should use existing financial data. It should be possible to submit reports electronically, and forms should be simple and consistent across agencies to leverage existing definitions and documentation.

Response: NYSOFA agrees with these comments, and is working with the Division of the Budget to create a streamlined reporting system that to the greatest extent possible uses data that many providers already maintain or report.

Penalties (Section 6656.8)

1. Issue/Concern: The regulation should allow 30 days for a non-profit to submit clarifying information as well as the submission of a corrective action plan.

Response: The timeframes for submitting both clarifying information and the corrective action plan have been changed to 30 days.