

**Assessment of Public Comment received in response to Proposed new
9 NYCRR Part 6656: “Limits on Administrative Expenses and Executive Compensation”**

A Notice of Revised Rule Making was published in the *State Register* on October 31, 2012. The New York State Office for the Aging (NYSOFA) received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are set forth below. NYSOFA’s response is provided for each issue or concern.

Issue/Concern: The Internal Revenue Service (IRS) rules and the Executive Order No. 38 regulations are not necessarily compatible concerning the issue of executive compensation. For instance, an organization that provides executive compensation which is reasonable pursuant to IRS rules may suddenly be subjected to penalties under the regulations.

Response: The participating State agencies and the Division of the Budget (DOB) are aware that there are differences between the IRS rules and the revised regulations. The goal of these regulations is to implement Executive Order No. 38. Regarding the issue of penalties, the penalty provisions would not be applied “suddenly.” Instead the penalties section at 9 NYCRR § 6656.8 provides for notification of non-compliance, the submission of additional or clarifying information, a corrective action period, and the opportunity to appeal.

Issue/Concern: The revised regulations create complicated new definitions and reporting requirements. Implementing the revised regulations will add significantly to the providers’ administrative costs.

Response: The participating State agencies will maintain on-line guidance to assist providers in complying with the new regulations. The participating State agencies are developing with DOB a stream-lined reporting system that will be operational prior to the effective date of the regulations to ensure that the burden of reporting the information required by these regulations will be minimal.

Issue/Concern: The limits on administrative expenses, set forth in 9 NYCRR § 6656.4 (a), should require the Generally Accepted Accounting Principles (GAAP) as the allocation methodology for differentiating between administrative expenses and program expenses.

Response: The revised regulations set forth specific definitions for both administrative expenses and program services expenses, which are intended to be used for the purposes of implementing Executive Order No. 38.

Issue/Concern: The regulations may set a precedent for others to impose similar restrictions on the use of funds for administrative expenses. Covered providers may lose their ability to use their best judgment to determine how to operate effectively and efficiently.

Response: Executive Order No. 38 is encouraging the effective and efficient delivery of program services to New Yorkers by encouraging the redirection of funds from administrative expenses to service delivery.

Issue/Concern: Agencies should periodically re-evaluate the impact of the limitation on administrative expenses to ensure that organizations are not cutting back on key administrative functions in such a manner as to jeopardize their ability to deliver quality program services.

Response: The participating State agencies together with DOB plan to monitor the impact of the regulations and make periodic updates as needed.

Issue/Concern: A provision should be added to the regulations requiring agencies to reevaluate the limitations on administrative expenses every five years.

Response: Pursuant to State Administrative Procedure Act § 207, NYSOFA is required to complete a periodic review of existing regulations, which includes an analysis of the need for and the legal basis of the regulations and invites public comment on the continuation or modification of the regulations.

Issue/Concern: Providers may need to pay more than \$199,000 per annum to find the quality leaders needed to facilitate the growth of their organizations.

Response: The regulations take this concern into consideration in 9 NYCRR §§ 6656.5 (b) and 6656.6. Consideration is given to factors including, but not limited to, the compensation provided to comparable executives; the qualifications and experience possessed by or required of the covered executive; the provider's efforts to secure other comparable executives; and/or the nature, size and complexity of the covered provider's operations and program services.

Issue/Concern: Payments through municipal or county contracts should be excluded from "State-Authorized Payments" and "State Funds". Including indirect receipt of State funds through contracts with other government units will intrude on local contracting authority, burden local governments, and will confuse service providers that will have no way of calculating how much of any local government contract should be included as state funds or 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 payments. 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 depending upon whether their funding was received directly or indirectly from the State. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The regulations should cover only state-authorized payments and not other state funds. In contrast to state-authorized payments, when state funds are awarded the contracting agency has the opportunity to review, negotiate, and if appropriate reject a providers proposed compensation for its staff under the contract and that administrative expenses.

Response: The regulations cover both State funds and State-authorized payments to establish a baseline standard for the use of taxpayer funds distributed to providers for the performance of program services in the State of New York. The regulations provide room for the contracting

agency to incorporate additional safeguards by expressly stating that more stringent limits made applicable by any contract, grant, or other agreement shall control. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The use of “in-state revenue” for determining minimum state funding will result in confusion for providers in circumstances where philanthropic support is not dedicated to a specific program or activity. Minimum state funding should be based on total revenues and not “in-state revenues”.

Response: In such instances, the regulations provide that a provider’s method of calculating in-state revenues for purposes of determining tax liability or in connection with completion of its financial statements shall be deemed acceptable. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The 75th percentile stipulation for waiver exemptions creates an artificial and arbitrary line that will result in unintended consequences by encouraging organization to increase pay to the 75th percentage threshold and requiring providers paying above the threshold to hire less qualified staff because of the insecurity of obtaining a waiver.

Response: The 75th percentile, as applied to covered executives receiving compensation greater than \$199,000 per annum, provides a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation. It is anticipated that NYSOFA and the State will assess the impact on salaries, if any, on an ongoing basis and will make any necessary adjustments to the regulations accordingly. It should be noted, however, that where good cause may be shown in support of a specific covered executive’s executive compensation, the option of a waiver is made available by the regulations. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The definition of executive compensation should be amended to provide that the reporting of any of the non-cash benefits listed in this definition on a covered executive’s W-2 form should be equally applicable and included.

Response: The regulation provides that the non-cash benefits reportable on a covered executive’s W-2 Form would be equally applicable and included within the definition of executive compensation. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: With regard to compensation surveys, covered providers should be permitted to develop and maintain a record of their own comparable salary information or, at minimum, to explicitly allow the use of surveys based on information about compensation that has been reported for comparable positions at comparable organizations on the IRS Form 990.

Response: Covered providers may use compensation surveys that have been provided or identified by the State as valid for EO#38 purposes. To the extent a provider uses a compensation survey or data set not so identified or provided by the State, it is anticipated that the provider will be required to submit such survey or data set to the State for review and

possible acceptance/recognition, in connection with its submission of a required Disclosure Form or Waiver Application. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The requirement for board approval of executive compensation for covered providers should be clarified to expressly permit the delegation of compensation approval to a committee with specifically delegated authority.

Response: The regulations contemplate review and approval of executive compensation greater than \$199,000 per annum by the covered provider's board of directors or equivalent governing body (if such board or body exists) including at least two independent directors or voting members. It may be noted that the text of the regulation has been revised to include "board or body". No changes are necessary, however, in relation to this comment.

Issue/Concern: The words "or administrative" should be deleted from the first sentence of section 144.5(e) of the revised regulations in order to avoid any implication that the Revised Regulations apply to the executive compensation or administrative expenses of an "agent" providing purely administrative services and not the program services that are the subject of the contract when those services are paid out of state funds or state-authorized payments.

Response: The regulations provide, in section 6656.5(e), that the limitations on executive compensation apply to subcontractors and agents of covered providers "if and to the extent that" such a subcontractor or agent has received state funds or state-authorized payments from the covered provider to provide program or administrative services during the reporting period "and would otherwise meet the definition of a covered provider but for the fact that it has received State funds or State-authorized payments from the covered provider rather than directly from a governmental agency." Therefore, no additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The deadline for waiver applications, at least for the reporting period beginning April 1, 2013, should be moved back in time to March 1, 2013.

Response: The revised regulations permit NYSOFA to consider waiver applications that do not conform to the timeframes provided in the regulations where good cause can be demonstrated for not conforming to the requisite timeframes. In addition, the text of the revised regulation has been amended to permit waiver applications to be submitted no later than concurrent with the timely submission of the covered provider's EO #38 Disclosure Form required for the reporting period for which the waiver is requested.

Issue/Concern: With regard to review of executive compensation for which a waiver application is submitted, section 6656.6(a)(2)(iv) should be amended to expressly permit review and approval by a committee with specifically delegated authority.

Response: Section 6656.6(a)(2) of the regulation sets forth a non-exclusive list of factors for consideration in determining whether to grant a waiver application in regard to the executive compensation limitations. The subject factor is "the provider's review and approval process for

the executive compensation that is the subject of the waiver,” which will allow for consideration of processes involving committees with delegated authority from the Board. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The regulations should provide that if NYSOFA fails to render a decision on a timely submitted waiver application within 60 days, the waiver application shall be deemed to be granted.

Response: The regulations require action on a timely submitted waiver application within 60-days, but do not prescribe the remedy for a failure to render a decision within such timeframe. It is therefore anticipated that a failure to abide by 60-day timeframe may result in an Article 78 action in the nature of mandamus to compel action on an application.

Issue/Concern: Section 6656.6(c)(2) should be clarified to provide the meaning of the stay of “any action to enter into a contract or other agreement” that is triggered by a request for reconsideration of a waiver application made within 30 days of denial. In addition, the practical consequences of such a “stay” should be clarified.

Response: To ensure that the state does not commit additional resources to a provider that may devote such funds to excessive executive compensation or administrative expenses, in the event a waiver proposed for denial and reconsideration is requested any pending action to enter a contract or agreement may be stayed. Practically, this means that grounds to suspend the prompt contracting timeframes may be established during the period of reconsideration, and that the signing of a pending contract would not take place until the reconsideration is concluded. No additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: Executive Order 38 and the proposed regulations discriminate against nonprofit organizations. These standards should also be applied to people on state, county, city, and public authority payrolls as well as those on payrolls of private for-profit corporations.

Response: NYSOFA agrees that ensuring fiscal responsibility is critical at all levels of government. These regulations are intended to curb excessive and unjustified executive compensation and administrative expenditures at providers who benefit from the use of a significant amount of taxpayer funds. It should be noted that Executive Order 38 and the proposed regulations are not limited to nonprofit organizations. This comment does not relate to any changes to the original regulation text. No changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The proposed regulations are premised on the inaccurate notion that salaries at not-for-profit corporations receiving State funding are bloated.

Response: This comment does not relate to any changes to the original regulation text. No changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: A goal of lowering administrative overhead and minimizing compensation will not translate into better addressing the social problems that not-for-profit corporations combat.

The taxpaying public does not want arbitrary spending thresholds met. It wants complicated social problems solved.

Response: This comment does not relate to any changes to the original regulation text. No changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: Governor Cuomo should act to rescind Executive Order 38, as it is ill-conceived, duplicative, over-reaching, and counterproductive.

Response: This comment does not relate to any changes to the original regulation text. No changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The effective date of provisions in the proposed regulations requires clarification with regard to: (a) limits on executive compensation and limits on administrative expenses; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods. Clarification that the first fiscal year for which a waiver, if necessary, is required to be filed is the first full fiscal year commencing after April 1, 2013, i.e., the 2014 fiscal year for calendar year providers and the fiscal year commencing July 1, 2013 for providers with a July 1st fiscal year; and that in no event is a waiver required to be filed prior to April 1, 2013.

Response: Implementation of the limits imposed by the regulation is intended to begin with the start of a provider's first reporting period fully occurring following adoption of the regulation. The date certain of April 1, 2013, as initially provided has been modified for clarification. This change is not substantial as it does not increase the impact/burden on providers and more precisely affects the intent of the regulation.

Issue/Concern: The mechanism to be used by the state to for identifying, providing or recognizing compensation surveys should be clarified. It is recommended that the proposed regulations be amended to include provisions regarding how compensation surveys are "identified, provided or recognized" by the state.

Response: It is anticipated that guidance issued by the State will identify compensation surveys deemed to be acceptable as well as include criteria to be used by the State in evaluating any surveys or comparable data sets proposed for use by providers. No additional changes to the text of the regulation are necessary at this time in relation to this comment.

Issue/Concern: The proposed regulations should include a mechanism for identifying a "lead agency" that will receive any waiver applications. It is recommended that the regulations be amended to include a provision designating a "lead agency" that would receive waiver applications and whose decision would be binding for all state agencies subject to EO #38. Lead agency status could be easily determined by the state agency that provides the greatest amount of funding to a covered provider.

Response: The regulations provide that the waiver application "shall be transmitted in the manner and form specified by NYSOFA or its designee and the Director of the Division of the

Budget.” Guidance issued by the State will provide clarification on the process for submission of applications. No additional changes to the text of the regulation are required at this time in response to this comment.

Issue/Concern: The exemption for contracts for executive compensation agreed to prior to April 1, 2012 must be clarified with regard to the meaning of the caveat providing that a waiver may be required, however, “if such contracts or agreements extend beyond April 1, 2014.”

Response: The regulation provides an exemption for contracts or other agreements entered into before July 1, 2012, “except that” a waiver is required such contracts or other agreements extend beyond April 1, 2015. Therefore, agreements/contracts entered prior to July 1, 2012 but extending beyond April 1, 2015 are not exempt and a waiver is required for such executive compensation pursuant to the timeframes provided in the regulation. No additional changes to the text of the regulation are required at this time.

Issue/Concern: Assuming a contract entered into prior to April 1, 2012, and extending beyond April 1, 2014, is this contract exempt for the reporting period commencing after April 1, 2013, i.e., calendar year 2014 for July 1, 2013 for fiscal year providers? If it is not, under what circumstances will a contract be exempt under this subsection? What is considered acceptable to meet the definition of “other agreements”?

Response: The regulation provides that contracts or other agreements extending beyond April 1, 2014 are not exempt from the executive compensation limitations. “Other agreements” should be construed based on the plain meaning of the term as encompassing any mutual understanding pursuant to which executive compensation is provided to a covered executive. No additional changes to the text of the regulation are required at this time.

Issue/Concern: Please confirm that, when a provider is subject to a SED cap on executive compensation that is lower than \$199,000, then in such cases, (i) the SED cap is deemed “more stringent” than the EO #38 cap, (ii) the SED cap supersedes the EO #38 cap on executive compensation and thereby, (iii) the provider is not subject to the provisions of EO#38 regarding executive compensation or the requirement to obtain a waiver.

Response: This comment poses a hypothetical question which cannot be answered fully and properly based on the limited information provided in the letter of comment. The comment does not address the changes to the original text of the regulation. No additional changes to the regulatory text are required based on this comment.

Issue/Concern: The entire approach to executive compensation is flawed because the state retains the authority to deny waivers to all executive salary in excess of the 75th percentile thereby calling into question the integrity and reasonableness of the entire process of reviewing executive compensation.

Response: This comment does not pertain to the specific changes made to the original text of the regulation. The denial of a waiver does not prohibit a provider from giving its executives a significantly higher-than-standard compensation package; the regulation does, however, subject

a covered provider who chooses to provide such executive compensation without receiving a waiver to restrictions on its ability to receive and use of taxpayer funds and other penalties. No additional changes to the text of the regulation are required in response to this comment.

Issue/Concern: When a waiver is granted for an executive salary, the waiver should be applicable not only to the executive, but to the provider for that executive position. If an executive position becomes vacant during the period for which a waiver has been approved, then the waiver should also apply to the executive hired to fill the vacancy until the waiver expires.

Response: If a waiver is granted for an executive position, the waiver may apply to either the person or the position at the provider's option for that specified period of time.

Issue/Concern: Funds provided by SED or authorized by SED should be excluded entirely from the EO#38 regulations. Since SED is not subject to EO#38, funding provided or authorized by DED should not be considered as "state funds or state-authorized funds."

Response: This comment does not address any specific changes to the original text of the regulation. No additional changes to the text of the regulation are required at this time in response to this comment.

Issue/Concern: The definition of "subcontractors and agents of covered providers" should be amended to clarify "would otherwise meet the definition of a covered provider." This section should apply only if the subcontractor or agent meets that definition and at the same time is supplying a service which otherwise, and on its own merits, would otherwise be the recipient of State funds for that service.

Response: The regulations clarify, in section 6656.5(e), that the limitations on executive compensation apply to subcontractors and agents of covered providers "if and to the extent that" such a subcontractor or agent has received state funds or state-authorized payments from the covered provider to provide program or administrative services during the reporting period "and would otherwise meet the definition of a covered provider but for the fact that it has received State funds or State-authorized payments from the covered provider rather than directly from a governmental agency." Therefore, no additional changes to the text of the regulation are necessary in relation to this comment.

Issue/Concern: The definition of "covered employee" excludes "clinical and program personnel in a hospital or other entity providing program services, including chairs of departments, head of service, chief medical officers, directors of nursing, or similar types of personnel fulfilling administrative functions that are nevertheless directly attributable to and comprise program services." Each state agency subject to EO#38 should prepare a schedule identifying those employees who will be considered as program service employees and are thus, exempt from the cap on executive compensation.

Response: NYSOFA has considered this recommendation and has determined that no additional changes to the text of the regulation are required.

Issue/Concern: The proposed regulations should be amended to change “contributions by out-of-state individuals or entities for in-state activities” to “revenues from out-of-state individual or entities for in-state activities.” The word “contributions” could be misconstrued as charitable contributions and clearly is intended to refer to revenue derived from services provided to individuals or entities located outside of New York who receive such services within the state.

Response: Charitable contributions may be included in the provider’s calculation of its “in-state revenue,” so long such inclusion accords generally with the method of accounting used by the provider in preparing its annual financial statements or other required reporting to NYSOFA.