



Despite Legal Challenges, NYS Implements Restrictions on Executive Compensation and Administrative Expenditures by Service Providers; Guidance Documents Updated

Over a year ago, pursuant to an Executive Order issued by the New York State Governor (EO 38), 13 State agencies promulgated regulations to limit the amount that for-profit and not-for-profit service providers could pay to executives, and the administrative expenses that these organizations could incur. The regulations were drafted with a July 1, 2013 effective date, but most organizations were not required to comply with the restrictions until the 2014 fiscal year. Additionally, most entities are not required to file any disclosure reports until late 2015. The State has now announced that – despite the legal challenges described below – the regulation is in full effect; new informational materials are available on the updated [EO 38 website](#); and affected entities will be required to use this website to file disclosure reports at the appropriate time. The State’s announcement, however, is not without controversy, and, despite the updated documents, major questions remain unanswered.

Since the final adoption of the regulations, for-profit and not-for-profit organizations filed lawsuits – in several different counties – challenging the validity of the promulgation and the underlying Executive Order. In April, a Nassau County Supreme Court judge issued a decision in one of these cases (*Agencies for Children’s Therapy Services, Inc. (“ACTS”) v. NYS Dept. of Health*). The Court held that the Department of Health (DOH) regulations, as well as the Governor’s Executive Order, “are invalid and may not be enforced.” Although the court struck down EO 38 as well as the DOH regulations, the Court did not directly address the validity of the 12 other agencies’ regulations. Thus, after the decision was issued,

there was some question as to whether the State would proceed with implementing all of the agency regulations or if this decision would cause the State to pause, pending further litigation and appeals.

On July 1, 2014, however, the State announced that it is enforcing all of the agencies' regulations, and that the EO 38 website had been updated. The EO 38 website includes an interactive "EO-38 Covered Provider Determination Worksheet," and all individuals and entities found to be "Covered Providers" are expected, at the appropriate time, to complete disclosure forms through the EO 38 website. Similarly, although not explicitly stated in the agencies' announcements about the updated website, the State expects that Covered Providers are complying with the executive compensation and administrative expense limitations. This compliance is expected despite the finding in *ACTS v. DOH*. In fact, the EO 38 website homepage now includes a "Legal Notice" which, in effect, advises that all Covered Providers, other than those that conduct business solely within Nassau County, are still subject to the regulations. Specifically, the notice states that:

Based upon the April 8, 2014 decision in *Agencies for Children's Therapy Services, Inc. v. New York State Department of Health, et al.* ("ACTS"), covered providers conducting business in Nassau County need not file Executive Order 38 disclosures. For purposes of this notice, "conducting business" means having a place of business within Nassau County, providing program services or administrative services involving the use or receipt of State funds or State-authorized payments within Nassau County, or otherwise conducting business within Nassau County in relation to which executive compensation is paid. Please note that the ACTS decision is under appeal. Those affected by the ACTS' decision should periodically check the EO 38 website for updates regarding any changes to this notice.

Some affected organizations have already questioned whether the State is misapplying the decision in *ACTS v. DOH* arguing that no aspect of the regulations should be enforced. A question has also been raised as to whether the decision should apply only to the named plaintiffs. Furthermore, as indicated above, there are other challenges to the regulations and EO 38 pending, most notably being lawsuits brought by several trade associations representing long term care providers and health plans, which are awaiting decision in Albany County. It is worth noting that some of the plaintiffs in the Albany County case just updated their submission to the Court to include materials from a recent Court of Appeals decision. In that case, the Court of Appeals held that the New York City Department of Health "exceeded the scope of its regulatory authority," by imposing limits on the sale of extra-large sized sugary drinks. The Court of Appeals found that the City agency had authority to regulate, not legislate, and that the determination to limit the size of sugary beverages that New Yorkers may consume was a legislative matter. A similar argument can be made about the EO 38 regulations: the agencies were acting in a legislative fashion when setting limitations on executive compensation and administrative expenses, and the legislature had not granted the agencies specific authority to do so. It is expected that regardless of what happens in the Albany County case, the matter will ultimately be determined by New York's highest court, and the June 2014 decision on sugary beverages should be particularly instructive.

Despite the pending challenges and the confusing status of the regulations, entities that are potentially deemed Covered Providers are encouraged to review the updated [EO 38 website](#). Notably, the website now includes an updated **Guidance Document**, a robust **Frequently Asked Questions (FAQs)** page, and a memorandum regarding **Acceptable Compensation Surveys**. The new FAQs provide better insight in to a variety of issues, particularly how to calculate "Executive Compensation." Moreover, the last document is relevant for the many entities that are: (i) determining whether the compensation provided to the

organization's Covered Executives is permissive because it is no greater than the 75th percentile of compensation paid by comparable providers, or (ii) otherwise interested in obtaining a waiver from the \$199,000 Executive Compensation limit. Both scenarios require the Covered Provider to submit information from a satisfactory compensation survey.

Prior to the issuance of this document, it was unclear what the agencies and the Division of Budget (DOB) would consider to be an acceptable survey. The State has now expressed that it "believe[s] it is in the best interest of impacted providers to provide them maximum flexibility to utilize compensation surveys that they deem appropriate to meet the requirements of the regulations." As such, the agencies and DOB will now accept any survey that:

1. is consistent with all relevant Internal Revenue Service requirements, including actions needed to avoid Intermediate Sanctions;
2. is consistent with the 17 points "Factors of Comparability" contained in the **Preliminary Guidance Document**; AND
3. either:
 - a. utilizes recognized and publicly available databases that are updated regularly, such as Guide Star or ERI's (Economic Research Institute) Non Profit Survey; OR
 - b. utilizes applicable provider organization surveys that are comprehensive, regularly updated and provide sufficient program/location information such as Non Profit Coordinating Committee of New York Salary Survey Results; OR
 - c. is conducted on behalf of the covered provider by other entities that have the capacity and regularly provide such salary surveys, including CPA or consulting firms.

Finally, potentially affected entities may benefit from reviewing one of the training guides now available on the EO 38 website, or participating in one of the training webinars.

Greenberg Traurig continues to closely monitor all of the EO 38 developments, including the new guidance materials and the pending litigation. If you have any questions about the application of the regulations or have concerns as to whether your organization may be subject to the executive compensation and administrative expense limitations, please contact us.

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