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**TO: Memo Distribution List**

LeadingAge New York

**FROM: Hinman Straub P.C.**

**RE: Executive Order 38 Guidance**

**DATE: July 19, 2019**

**NATURE OF THIS INFORMATION:** This is information explaining new requirements you need to be aware of or implement.

**DATE FOR RESPONSE OR IMPLEMENTATION:** Immediately.

**HINMAN STRAUB CONTACT PEOPLE:** Sean Doolan and Matthew Leonardo

**THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:**

<b>Category:</b>	#4 Regulatory Process	<b>Suggested Key Word(s):</b>
	#5 Litigation	
	#8 Uninsured Programs	
	#9 Medicaid and Medicare	

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## **EO 38 Guidance**

### **Background:**

On October 18, 2018, the New York State Court of Appeals issued an Opinion in the *LeadingAge v. Shah, et al.* The Court's decision upheld the Hard Cap and Administrative Expense Cap, while striking down the Soft Cap. The Hard Cap prohibits the use of State funds or State authorized payments (SF/SAP) in excess of \$199,000 for "executive compensation," which is defined in regulation. The Administrative Expense Cap prohibits providers from applying more than 15% of State funds or State-authorized payments towards administrative expenses. Guidance on calculating executive compensation for the Hard Cap and administrative expenses for the Administrative Expenses Cap are below.

The Soft Cap has been struck down. The Soft Cap prohibited executive compensation in excess of \$199,000 from all sources of revenue unless the compensation in question is within the 75<sup>th</sup> percentile of comparable providers and has been approved by the provider's governing board, including at least two independent directors or voting members. These provisions are no longer in effect.

The Department of Health has not updated guidance or amended its EO 38 regulations since the Court of Appeals decision.

### **Submissions of EO 38 disclosures:**

Submissions of EO 38 disclosures must be done [here](#). In order to submit an EO 38 disclosure, a covered provider must first register with Grants Gateway. The username and password for Grants Gateway is used for EO 38 disclosures.

Due to the number of steps/calculations that must be performed for EO 38 compliance, the Governor's Office has published worksheets to assist covered providers in completing disclosures:

A worksheet for determining whether a provider meets the requisite threshold for State Funds/State Authorized Payments can be found [here](#).

A worksheet for determining compliance with the Administrative Expenses Cap can be found [here](#).

A worksheet for determining Executive Compensation can be found [here](#).

Please be advised that the worksheets are not required for submission of an EO 38 disclosure, but rather are meant to help providers determine compliance with the Hard Cap and Administrative Expenses Cap.

A step-by-step guide for completing an EO 38 disclosure can be found [here](#).

Overall guidance on EO 38 may be found [here](#).

**Deadline:**

Pursuant to 10 NYCRR 1002.1(k) the reporting period means the calendar year or, at the provider's option, the fiscal year used by a provider. However

For Nursing Homes and Certified Home Health Agencies (CHHA), the deadline for submission of EO 38 disclosures is the date on which the facility/agency cost report is due. That means for Nursing Homes and CHHAs **EO 38 disclosures are due on July 29, 2019.**

For Assisted Living Program (ALP) providers, the deadline for submission is 180 days after the calendar year (June 30 for 2018) or their fiscal year.

For Adult Care Facilities (ACF), the deadline for submission is 180 days after the calendar year (June 30 for 2018) or their fiscal year.

For Home and Community Based Services providers, the deadline for submission is 180 days after the calendar year (June 30 for 2018) or their fiscal year.

**Calculation of Executive Compensation:**

Under the Hard Cap, executive compensation of covered executives may not exceed \$199,000 from any source of SF/SAP. That is to say, the Hard Cap applies to the total amount of SF/SAP received by the provider through all sources of revenue (e.g., ownership of multiple nursing homes, mltc revenues from Medicaid, etc.).

There is no mandated or prescribed method for providers to determine compliance with executive compensation limits. Despite the flexibility afforded providers, we recommend utilizing a proportional approach in determining compliance:

For example, if 60% of provider X's revenue is derived from NY SF/SAP funds and 40% is attributable to other sources (e.g. Medicare, private pay, investment income etc.), such provider would allocate 60% of executive compensation to NY SF/SAP. If executive Z is compensated \$250,000, a proportionate allocation would result in executive Z compliance with the "hard cap" because the proportional share of his/her compensation attributable to NY SF/SAP is \$150,000 (250,000 x 60%).

Please note that program services rendered by covered executives may also be used to reduce compensation attributable to SF/SAP. Under the Department's EO 38 regulations, "Documentation of such program services rendered shall be used by the covered provider to determine that percentage, if any, of the covered executive's compensation that is attributable to program services and that compensation shall not be considered in the calculation of his or her executive compensation." 10 NYCRR 1002.3(c). Additionally, although SF/SAP may not be used to compensate executives above \$199,000, other revenue sources may be used for such purposes.

**Waivers for Hard Cap:**

Applications for a waiver from the cap on executive compensation must be made concurrent with the provider's timely EO 38 disclosure submission or it will be considered untimely. See, 10 NYCRR 1002.4(a)(1). Applicants that are denied a waiver may request reconsideration within thirty (30) days of the proposed denial. Requests for reconsideration must be in writing and signed by the owner or chief executive officer of the applicant and include any information the applicant wishes to be considered. DOH or DOB will issue a final written determination.

In order to secure a waiver from the limitation on executive compensation, a covered provider must demonstrate good cause. Good cause will be determined through the following factors:

- (i) the extent to which the executive compensation that is the subject of the waiver is comparable to that given to comparable executives in other providers of the same size and within the same program service sector and the same or comparable geographic area;
- (ii) the extent to which the covered provider would be unable to provide the program services reimbursed with State funds or State-authorized payments at the same levels of quality and availability without obtaining reimbursement for executive compensation given to a covered executive in excess of the limits in 10 NYCRR 1002.3;
- (iii) the nature, size, and complexity of the covered provider's operations and the program services provided;
- (iv) the provider's review and approval process for the executive compensation that is the subject of the waiver, including whether such process involved a review and approval by the board of directors or other governing body (if such a board or body exists), whether such review was conducted by at least two independent directors or independent members of the governing body, whether such review included an assessment of comparability data including a compensation survey, and contemporaneous substantiation of the deliberation and decision to approve such executive compensation;
- (v) the qualifications and experience possessed by or required for the covered executive(s) or position(s), respectively; and
- (vi) the provider's efforts, if any, to secure executives with the same levels of experience, expertise, and skills for the positions of covered executives at lower levels of compensation.

10 NYCRR 1002.4(a)

Waiver requests are made through the EO 38 website found [here](#). A step-by-step guide for waiver submissions may be found [here](#).

**Calculation of Administrative Expenses:**

In order to determine total covered operating expenses and compliance with limits on administrative expenses, a provider must add program services expenses to administrative expenses and divide administrative expenses by such sum (covered operating expenses).

Step 1. Determine program expenses. Program expenses are defined as expenses incurred by a covered provider or its agent in direct connection with the provision of program services. 10 NYCRR § 1002.1(i). Common program expenses include salaries and benefits of direct care workers, direct care supplies, quality assurance programs, outreach, direct care training, etc.

Step 2. Determine administrative expenses. Administrative expenses are expenses incurred in connection with the covered provider's overall management and necessary overhead that cannot be attributed directly to the provision of program services. 10 NYCRR § 1002.1(a). Common administrative expenses include office supplies, licenses, salaries and benefits of executives, audit services, etc.

Step 3. Add program expenses to administrative expenses to determine "covered operating expenses."

Step 4. Divide administrative expenses (sum from step 2) by covered operating expenses (sum from step 3) to determine an administrative expenses percentage. Such percentage cannot exceed 15% of covered operating expenses. If administrative expenses exceed 15% of covered operating expenses, a provider may seek a waiver.

Please note that all salaries may be apportioned between program and administrative expenses, depending on allocations of time to the delivery of program services. Insofar as an executive or administrative personnel perform program services, including supervisory services performed to facilitate the covered provider's program services, wages attributable to such supervision or the like may be expensed as program services.

### **Waivers for Administrative Expenses Cap:**

Applications for a waiver from the cap on administrative expenses must be made concurrent with the provider's timely EO 38 disclosure submission or it will be considered untimely. See, 10 NYCRR 1002.4(b)(1). Applicants that are denied a waiver may request reconsideration within thirty (30) days of the proposed denial. Requests for reconsideration must be in writing and signed by the owner or chief executive officer of the applicant and include any information the applicant wishes to be considered. DOH or DOB will issue a final written determination.

To receive a waiver from limitations on administrative expenses, a covered provider must demonstrate good cause through the following factors:

- (i) the extent to which the administrative expenses that are the subject of the waiver are necessary or avoidable;
- (ii) evidence that a failure to reimburse specific administrative expenses that are the subject of the waiver would negatively affect the availability or quality of program services in the covered provider's geographic area;
- (iii) the nature, size, and complexity of the covered provider's operations and the program services provided;
- (iv) the provider's efforts to monitor and control administrative expenses and to limit requests for reimbursement for such costs; and

(v) the provider's efforts, if any, to find other sources of funding to support its administrative expenses and the nature and extent of such efforts and funding sources.

10 NYCRR 1002(b)(2)

Waiver requests are made through the EO 38 website found [here](#). A step-by-step guide for waiver submissions may be found [here](#).

**Penalties for noncompliance:**

Failure to comply with the Hard Cap or Administrative Cap will subject a covered provider to penalties under 10 NYCRR 1002.6.

The penalty process begins with a written notification by DOH advising the provider of its noncompliance. A provider may contest a finding of noncompliance within thirty (30) days of receipt of such notice. If the provider fails to contest the notice, such notice becomes final.

If the provider contests the notice, DOH will consider additional or clarifying information submitted by the provider. DOH will issue a final determination of noncompliance or deem the provider in compliance.

Upon a final determination of noncompliance, the provider will receive notice of such determination and a notice to cure. The notice to cure will require a provider to submit, within thirty (30) days of receipt of the notice to cure, a corrective action plan.

DOH has thirty (30) days from the receipt of a corrective action plan to either approve such plan or request clarifications or alterations. After a corrective action plan has been approved by DOH, the provider has six (6) months to complete the plan, which results in the provider's compliance.

Failure to complete the plan or otherwise cure violations authorizes DOH to, upon written notice of noncompliance and intent to sanction:

- (1) At its sole discretion, modify the CAP and/or extend the time for the provider to complete implementation.
- (2) Issue a final determination of non-compliance, together with a notice of the sanctions which the department seeks to impose. Such sanctions may include:
  - (i) Redirection of State funds or State-authorized payments to be used to provide program services, where possible and consistent with Federal and State laws;
  - (ii) Suspension, modification, limitation, or revocation of the provider's license(s) to operate program(s) for the delivery of program services;
  - (iii) Suspension, modification or termination of contracts or other agreements with the covered provider; and
  - (iv) Any other lawful actions or penalties deemed appropriate by the department or its designee.

10 NYCRR 1002.6(d).

Within thirty (30) days of receipt of a notice of noncompliance and notice of proposed sanctions, a provider may request an administrative appeal. Such appeal must be in writing and offer legal and factual defenses to DOH's determinations.