

## Assessment of Public Comment

### The Office of Mental Health received in response to proposed new 14 NYCRR Part 513:

#### “Limits on Administrative Expenses and Executive Compensation”

A Notice of Proposed Rule Making was published in the *State Register* on May 30, 2012. The Office of Mental Health 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. The Office of Mental Health’s response is provided for each issue or concern.

#### 14 NYCRR Part 513

#### General

**1. Issue/Concern:** There is no legal authority to issue this regulation. An Executive Order is not sufficient. There is no statutory authority to limit executive compensation in non-profit or for-profit organizations or to control sources of non-State revenue.

**Response:** The regulation and the executive order are fully within the authority of the agency and the Governor respectively. The regulations address requirements for a narrow universe of providers whose activities are heavily reliant upon public funds received in most cases pursuant to contract or licensing by the State. For those providers, these new requirements reasonably demand that both administrative expenses and executive compensation do not unduly draw those public funds away from their core purpose to provide program services, at the expense of both service recipients and taxpayers. Because funding is in many cases fungible, regulation of excessive compensation regardless of its source is necessary in certain cases to avoid the abuse of limited public funds.

**2. Issue/Concern:** Several commenters suggested that there be a lead agency to eliminate the burden on providers of responding to requests for information from multiple agencies or facing inconsistent requirements from different agencies. The regulations are silent on whether a provider that receives funding from more than one state agency must seek waivers from each state agency or if they may seek a waiver from one State agency that will satisfy the others.

**Response:** The agency is working with the Division of the Budget to develop and provide guidance on the implementation structure prior to the implementation date. A key objective of that structure’s design is to avoid requiring providers to interact with more than one agency with respect to these regulations.

**3. Issue/Concern:** The regulations place an unfair and disproportionate burden on “safety net” providers who serve the neediest population (e.g., Medicaid, uninsured). The regulations create incentives to eliminate or reduce services to those who need it most in order to avoid meeting the definition of a “covered provider.”

**Response:** The universe of providers that are covered by these regulations is both narrow and expressly focused upon those providers whose activities are heavily funded by State funds or State-authorized payments. It is anticipated that the burdens imposed by these regulations will be minimal and will not affect choices regarding the populations served once the narrow scope and reach of the regulations becomes clear.

### **Former 513.3 Applicability**

**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 effective 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:** 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. If the State is concerned about providers spending too much on executive compensation and not enough on program administration, the State has numerous mechanisms under the three offices of the Department of Mental Hygiene, the State Office of the Medicaid Inspector, the Department of Health and the Office of the State Comptroller to address these issues.

**Response:** The requirements in this regulation are complementary to those contained in the IRS reporting regime, but not duplicative of any existing requirements. The substantive requirements in this regulation provide a new benchmark for both executive compensation and administrative expenses that, for the first time, will help providers and State agencies ensure that clear rules govern both areas.

**6. Issue/Concern:** The Applicability section provides a partial description of its criteria and employs terms whose meaning is unclear and potentially misleading.

**Response:** This section has been deleted.

**7. 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.

### **513.3 (formerly 513.4) Definitions**

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

**2. Issue/Concern:** If the categories of administrative expenses in the Consolidated Fiscal Report (CFR) are different from the categories used for purposes of this regulation, providers will have to keep two sets of books. This would further increase administrative expenses. The definition of administrative expenses for CFR purposes should be reconciled to the definition of administrative expenses for Executive Order 38 purposes.

**Response:** While there are some differences in the CFR definition of administrative expenses and the definition in Executive Order 38, there are no inconsistencies in the definitions that would require maintaining two sets of records or which are reasonably expected to affect administrative expenses in maintaining the required information.

**3. Issue/Concern:** Consideration should be given to exempting expenses that are beyond the provider's capacity to realistically control, e.g., health insurance premiums, licensing fees, permit fees or expenses that may appear to be administrative but are geared in part to delivery of services (e.g., staff development geared toward improving quality services). Consideration should also be given to excluding costs associated with unfunded mandates such as e-prescribing, incident review, Justice Center, I-stop, APGs.

**Response:** Numerous expenses have been expressly added to the definition of program services expenses to address this concern. In addition, the regulation makes clear that, to the extent an expense may be attributed to providing program services even if it has an administrative nature or component, it may and should be counted as a program services expense by a covered provider.

**4. Issue/Concern:** Children's day treatment services are funded by the State Education Department (NYSED), in addition to OMH. NYSED's reimbursement methodology distinguishes direct service cost from indirect services, as compared to administrative costs.

**Response:** NYSED providers already capture costs in a manner compatible with Executive Order 38.

**5. Issue/Concern:** The applicability threshold for covered providers should be \$1 million rather than \$500,000. Such a low threshold will disproportionately affect providers serving needy populations and reliant upon Medicaid disbursement.

**Response:** The \$500,000 threshold is that already used by the Office of the Medicaid Inspector General for reporting purposes, so most providers in the Medicaid area will not face such reporting requirements for the first time. In addition, that threshold is only one of several that a provider must satisfy to be considered a covered provider under this regulation.

**6. Issue/Concern:** The scope of the definition of covered provider 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.

**7. Comment:** We support the exclusion of local governmental units from the definition of covered provider, and the exemption for local governmental units from these regulations, because local governmental units often provide services to persons with developmental disabilities where non-profits do not provide services, and because local governmental units are themselves administrative and oversight bodies.

**Response:** OMH appreciates the support for this aspect of the regulation.

**8. Comment:** The regulation should not exempt state and local government employees.

**Response:** It is appropriate to exempt State and local government employee compensation which is determined by collective bargaining or statutory provisions in many cases and such information is readily available to the public.

**9. Issue/Concern:** 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.

**10. 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:** OMH disagrees. The proposed regulation requires OMH to be responsible for ensuring the necessary reporting and compliance by such covered providers and to issue guidance to affected county and local governments setting forth the procedures by which the OMH 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.

**11. Issue/Concern:** Expenses for residential and housing programs directly related to recipient care should be included as program services.

**Response:** The amended regulations address this concern.

**12. Issue/Concern:** The definition of executive compensation should conform to federal definitions (IRS 990 filings). State definitions matching federal definitions will ease the burden on providers.

**Response:** The amended regulation more closely ties this and other definitions to those used by the IRS in its Form 990 reporting requirements.

**13. Issue/Concern:** Deferred income for retirement and one-time retirement packages at the time of retirement should be classified separately.

**Response:** The regulation has been amended to address this issue by excluding retirement contributions for benefits as long as those benefits are consistent with those provided to other employees of the covered provider, and by providing for a prorating of deferred executive compensation over the course of the period during which it is earned.

#### **513.4 (formerly 513.5) Limits on administrative expenses**

**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. This change will facilitate the type of planning for future expenses that providers should undertake.

## 513.5 (formerly 513.6) Limits on executive compensation

**1. Issue/Concern:** Eliminate the 75th percentile cutoff on executive compensation.

**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. OMH 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.

**2. 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.

**3. Issue/Concern:** The \$199,000 cap is arbitrary. The cap has no relationship to the salaries necessary to recruit people who can operate complex health care operations, particularly those administering safety net providers, jeopardizing the Governor's efforts for behavioral care reform and Medicaid redesign. The cap is inconsistent with the April 2010 report issued by the Commission on Quality of Care and Advocacy for Persons with Disabilities that reported 2004-06 median salaries that were higher than the cap at that time.

**Response:** Based upon the available compensation surveys, the thresholds contained in the regulation are fully consistent with the compensation paid by most providers in most fields. When the numerous definitional requirements are applied to determine which providers are covered by the regulation, very few providers in each field will in fact be covered and even fewer will face potential non-compliance with those thresholds. In those cases where a covered provider may not be in compliance, a waiver may be appropriate and the agencies will ensure that such waivers are provided.

**4. Issue/Concern:** The regulation does not 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.

**5. 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.

**6. Issue/Concern:** Without knowledge in advance of increases in base pay, cost of living adjustments and vacation buy-backs, how can providers include them in total compensation?

**Response:** The regulations now provide that untimely waiver applications shall be considered where a reasonable cause for such delay is shown.

**7. Issue/Concern:** Any single executive compensation comparability survey will not be an adequate representation of a region, sector or size organization. It is doubtful that a survey will be able to be found that will work for all industries across all geographic areas, experience, performance and organizational size.

**Response:** A list of approved surveys will be published by the agencies prior to the implementation date and accommodations will be made for those providers, if any, whose circumstances do not lend themselves to the use of such publicly available surveys.

**8. 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.

**9. 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.

**10. 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.

**11. 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.

**12. 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.

**13. 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.

### **513.6 (formerly 513.7) Waivers**

**1. Issue/Concern:** There is not enough time to collect data to apply for waivers before the limits become effective.

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

**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.

**3. Issue/Concern:** The waiver process imposes a significant administrative burden, and thus expense, on providers.

**Response:** The waiver process will be stream-lined for providers and will be set forth in detail prior to the implementation date.

**4. Issue/Concern:** The factors for consideration of waivers are vague, subjective and discretionary.

**Response:** The factors for consideration of waivers address directly relevant concerns and provide a clear basis upon which providers may base their applications for a waiver.

**5. Issue/Concern:** During the waiver process, withholding funds from one provider receiving State authorized funds via a local governmental unit could negatively impact distribution of monies to other providers.

**Response:** OMH agrees with this. Accordingly, the regulation was amended to make this an option available at the discretion of the Office.

**6. Issue/Concern:** The documentation of efforts to find other sources of funding for administrative expenses should not be a factor in the decision to grant a waiver.

**Response:** The generation of other revenues is a relevant and proper factor in the evaluation of a waiver.

### **513.7 (formerly 513.8) Reporting**

**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. OMH 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 effective date.

**2. Issue/Concern:** Executive Order No. 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:** OMH 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. Guidance for completing the EO 38 Disclosure Form will be provided.

### **513.8 (formerly 513.9) Penalties**

**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.

**2. Issue/Concern:** The regulations do not afford adequate due process to a covered provider who is alleged to be in violation of its requirements. There are inadequate opportunities to contest a waiver denial and no opportunity for an administrative hearing. When a provider is charged with non-compliance, there are inadequate time frames for the provider's submissions and if there is a final determination of non-compliance, the provider is limited to an administrative appeal (except if the agency seeks to impose a sanction for which an administrative hearing is otherwise required by statute or regulation).

**Response:** The procedures set forth in the regulations include extensive due process protections for covered providers and further guidance will be provided prior to the implementation date.

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