

**Assessment of Public Comments**  
**OMH received in response to its revised rule to add 14 NYCRR Part 513**  
**“Limits on Administrative Expenses and Executive Compensation”**

A Notice of Revised Rule Making was published in the *State Register* on October 31, 2012. The Office of Mental Health (OMH) received comments associated with the revised rule making during the public comment period. The issues and concerns raised in the comments are set forth below and have been grouped according to the part of the revised 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 “Participating Agencies”), the responses to comments provided by each of those agencies are incorporated by reference into these responses. OMH’s response is provided for each issue or concern.

**14 NYCRR Part 513**

**Applicability**

**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:** OMH 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 penalties, the penalty provisions would not be applied “suddenly.” The regulation, which applies prospectively only, is being promulgated in accordance with the State Administrative Procedure Act, providing prior notice and the opportunity for comment. Once promulgated, the regulation provides for a waiver process and the opportunity for appeal. Penalties would be imposed pursuant to Section 513.8, which 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 regulations should cover only State-authorized payments, and not other State funds. When State funds are awarded through a State agency contract, that State agency has multiple opportunities to review the contractor’s use of the funds.

**Response:** The regulations cover those funds that are either State funds or State-authorized payments. The regulations would not adequately address the targeted problems of excessive administrative costs and inflated compensation and would create inequities if only State-authorized payments were covered.

**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 State-authorized payments and State funds.

**Response:** The regulations cover those funds that are awarded through a county or local government contract and are either State funds or State-authorized funds. The regulations would not adequately address the targeted problems of excessive administrative costs and inflated compensation if only providers that contracted directly with State agencies were covered. This would create inequities among providers depending upon whether their funding was received directly or indirectly from the State.

**Issue/Concern:** It is discriminatory that not-for-profit human service providers are subject to these regulations, but for profit corporations are not.

**Response:** For profit organizations that meet the definition of “covered provider” pursuant to Section 513.3(d) may be subject to these regulations.

**Issue/Concern:** It is wrong that the regulations do not apply to State agencies that pay their employees large salaries.

**Response:** The regulations have been developed to implement Executive Order No. 38, which addresses contracts to render program services.

### **513.3 Definitions**

**Issue/Concern:** The definition of “covered provider” at 513.3 (d) (1) (ii) should be based on total revenues, and not in-State revenues. The explanation of “in-State revenues” does not resolve the inherent complications that arise from the receipt of contributed revenue from outside New York State.

**Response:** The regulations focus on New York State with the goal of identifying contractors providing program services in New York State who receive a significant portion of their funds to provide such services from State funds or State-authorized payments.

**Issue/Concern:** The definition of “reporting period” needs to be clarified to determine if the first full fiscal year commencing after April 1, 2013 is the 2014 fiscal year for calendar year providers and the fiscal year commencing July 1, 2013 for providers with a July 1<sup>st</sup> fiscal year.

**Response:** A new definition for “covered reporting period” has been added to clarify this issue.

**Issue/Concern:** The definition of “executive compensation” at 513.3 (e) [now (f)] should be revised to clarify that the qualifying phrase “reportable on a covered executive’s W-2 form” is applicable not only to the personal use of the organization’s property, but also to other non-salary benefits.

**Response:** This technical revision will be made to §513.3 (f).

**Issue/Concern:** The definition of “program services expenses” at 513.3 (h) (2) (ii) [now 513.3(i)(2)(ii)] should allow property rental, mortgage and maintenance expenses to be allocated between “program services” and “administrative expenses” based on the actual use of the property.

**Response:** With the noted exception of providing housing to members of the public receiving program services, Participating Agencies maintain that for purposes of Executive Order No. 38, property rental, mortgage and maintenance expenses are not “program services expenses.”

**Issue/Concern:** Each participating State agency should prepare a list identifying those employees who will be considered “program service employees” and therefore will be exempt from the cap on executive compensation.

**Response:** OMH is not planning to create such a list. The regulations provide the necessary guidance for covered providers to assess their employees’ responsibilities and make such determinations.

**Issue/Concern:** DOB and the participating State agencies should provide exhaustive lists of what monies fall under “State funds” and “State-authorized payments” so that nonprofits can easily ascertain whether they are subject to these regulations.

**Response:** The Participating Agencies are developing with DOB lists of government programs whose funds will be considered State-authorized payments or State funds. These lists shall be published prior to the effective date of the regulations. A reporting system also is being developed to assist providers in determining whether they are covered providers pursuant to 14 NYCRR Part 513.

**Issue/Concern:** The definitions of “State-authorized payments” and “State funds” should exclude funds provided by the State Education Department (SED) or authorized by the SED, because the SED is not subject to Executive Order No. 38.

**Response:** SED is currently not one of the agencies participating in E.O. 38. It is the intent of the Participating Agencies and DOB to include on the lists of government programs whose funds will be considered State-authorized payments and State funds only funds provided or authorized by Participating Agencies.

### **513.4 Limits on Administrative Expenses**

**Issue/Concern:** The regulations at 513.4 and 513.5 applying Executive Order No. 38 restrictions to subcontractors and agents of covered providers should be amended to remove “or administrative” from the following language: “...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 receive State funds or State-authorized payments from the covered provider rather than directly from a governmental

agency.” This language makes it unclear whether a subcontractor or agent providing purely administrative services would be subject to the limitations.

**Response:** The language “or administrative” does not need to be removed. As stated in the quote above, to be subject to the regulatory limitations, a subcontractor or agent would need to meet the definition of a “covered provider.” The definition of “covered provider” requires a contract or other agreement to render program services.

**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 Agencies will maintain online guidance to assist providers in complying with the new regulations.

**Issue/Concern:** The regulations should clarify that the allocation methodology used for purposes of the Form 990 and audited financial statements, which employed generally accepted accounting principles (GAAP), will also satisfy the requirements of the regulation. This will alleviate any potential confusion and make clear that nonprofits are not required to recalculate their allocations for purposes of the regulations and in contravention of GAAP.

**Response:** OMH and DOB are aware that there are differences between what may be allocated to administrative and program expenses under the IRS rules and the revised regulations. The fact that certain expenses are excluded under the regulations from one or the other category does not violate GAAP. The calculation is being done for the specific purpose of determining compliance with the regulations in order to promote the overall goals of E.O. 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 implementation of the regulations to ensure they are fulfilling the goal of E.O. 38 and not creating a duplicative layer of compliance on providers; and 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 Agencies together with DOB plan to monitor the impact of the regulations and make periodic updates as needed.

**Issue/Concern:** The limits on administrative expenses do not allow for program expansion and will result in an underinvestment in organizational growth.

**Response:** The definition of administrative expenses at §513.3 addresses this concern. Expenses in excess of \$10,000 that would otherwise be administrative expenses are excluded from consideration as either administrative expenses or program service expenses when they are either non-recurring (no more frequent than once every five years) or not anticipated by a covered provider.

### **513.5 Limits on Executive Compensation**

**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 §§ 513.5 and 513.6 by permitting consideration of such factors such as 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:** A provider wanted confirmation that if it is subject to a State regulatory cap on executive compensation that is lower than \$199,000 per annum, then in that situation, (i) the "lower State regulatory cap" is deemed "more stringent" than the Executive Order No. 38 cap; (ii) the "lower State regulatory cap" supersedes the Executive Order No. 38 cap on executive compensation; and (iii) thereby, the provider is not subject to the provisions of Executive Order No. 38 regarding executive compensation or the requirement to obtain a waiver.

**Response:** The language concerning other limits on executive compensation at 14 NYCRR § 513.5 (g) states, "If the contract, grant, or other agreement is subject to more stringent limits on executive compensation, whether through law or contract, such limits shall control and shall not be affected by the less stringent limits imposed by these regulations." To determine if another limit is more stringent, consideration would need to be given not only to the dollar amount of the annual limit, but also to what payments or benefits are counted as executive compensation.

**Issue/Concern:** The regulations should eliminate the 75th percentile cutoff on executive compensation.

**Response:** Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: 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 New York State 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.

**Issue/Concern:** The 75th percentile will drive salaries down as the outliers reduce salaries in order to comply with the regulations. Eventually this will depress the maximum salary permitted under the regulations. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation.

**Response:** The Participating Agencies periodically will assess the impact of the revised regulations on executive salaries and will propose any necessary adjustments to the regulations accordingly. The agencies will maintain the integrity and the reasonableness of the process.

**Issue/Concern:** The revised regulations relating to executive compensation at §§ 513.5 and 513.6 should be revised to allow for the delegation of the approval of executive compensation by a committee of the Board of Directors, such as a compensation committee.

**Response:** The goal of EO No. 38 is to safeguard taxpayer dollars; it is appropriate that the required review and approval of executive compensation be at the level of the Board of Directors or an equivalent governing body (if such body exists).

**Issue/Concern:** The regulation at 513.5 should clarify by what mechanism compensation surveys will be "identified, provided or recognized." Also the participating State agencies need to approve their compensation surveys as soon as possible in order to allow providers sufficient time to review the surveys.

**Response:** The implementation process will address these issues. It is anticipated that a website will provide organizations guidance regarding acceptable compensation surveys and additional information regarding how compensation surveys will be identified, provided or recognized.

**Issue/Concern:** The State should have a list of surveys and other resources that are free to access. Providers should not need to hire outside consultants, at considerable cost, to complete salary comparability studies.

**Response:** The Participating Agencies are developing with DOB a list of compensation surveys. It is noted that acceptable compensation surveys available to providers at no cost would be beneficial.

**Issue/Concern:** Instead of compensation surveys, a better approach would be to permit covered providers to develop and maintain a record of their own comparable salary information or, at a 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:** The revised regulations allow for new surveys to be developed. Consistent with the regulations at § 513.5, the new surveys would need to be identified, provided, or recognized by OMH and the Director of DOB.

**Issue/Concern:** The definitions of "executive compensation" under Form 990 and the regulations vary. Because the regulations use a definition of executive compensation that

includes only a portion of the benefits generally reported on Form 990, the comparability data necessary to assess compensation under the regulations may not be available.

**Response:** The Participating Agencies are developing with DOB a list of acceptable compensation surveys.

**Issue/Concern:** The “grandfathering” provision for executive contracts prior to the effective date of the regulation is good but too short; concerns that it may still interfere with existing contractual obligations.

**Response:** This period has been extended in Section 513.5(h) to exempt contracts entered into prior to July 1, 2012 unless the term of the contract extends beyond April 1, 2015, in which case the covered provider must apply for a waiver.

### 513.6 Waivers

**Issue/Concern:** The effective date of the revised regulations requires clarification. Providers should not be required to file waivers prior to April 1, 2013.

**Response:** The effective date of the revised regulations has been changed to July 1, 2013. The revised regulations will not require waivers to be filed prior to this date. Pursuant to revised Sections 513.6(a)(1) and 513.6(b)(1), an application for a waiver must be filed no later than concurrent with the timely submission of the covered provider’s E.O. 38 Disclosure Form for the reporting period for which the waiver is requested. Pursuant to revised Section 513.7, the E.O. 38 Disclosure Form for each reporting period is due no later than one hundred eighty (180) days following the reporting period, unless otherwise authorized.

**Issue/Concern:** Submission of a waiver 90 days before the reporting period (and in the case of new hires, before the position is filled) is unworkable. Covered providers will not even know whether they may be required to file for a waiver until OMH provides sufficient information on the state-authorized “comparability” survey.

**Response:** The due date for submission of waiver applications has been changed. Pursuant to revised Sections 513.6(a)(1) and 513.6(b)(1), an application for a waiver must be filed no later than concurrent with the timely submission of the covered provider’s E.O. 38 Disclosure Form for the reporting period for which the waiver is requested. Pursuant to revised Section 513.7, the E.O. 38 Disclosure Form for each reporting period is due no later than one hundred eighty (180) days following the reporting period, unless otherwise authorized. The Participating Agencies are developing with DOB a list of compensation surveys.

**Issue/Concern:** Waiver applications should be made expressly confidential and not subject to FOIL.

**Response:** This issue has been addressed in the revised regulation.

**Issue/Concern:** The revised regulations at § 513.6 provide that a decision on a timely and complete waiver application shall be provided no later than 60 calendar days after submission of the application. This section should further state that such waiver applications shall be deemed to be granted in the event that a decision is not rendered within the 60 day deadline.

**Response:** The regulations will not be revised to make this requested change. The implementation process will address waiver issues further.

**Issue/Concern:** It is unrealistic to ask large organizations that have historically compensated their executives at levels which would necessitate a waiver to spend time and resources in an effort to hire qualified executives at lower rates and to document those efforts, in order to qualify for a waiver.

**Response:** The goal of Executive Order No. 38 is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

**Issue/Concern:** After the proposed denial of a waiver, the revised regulation at § 513.6 provides, “Submission of a request for reconsideration within thirty (30) calendar days shall stay any action to deny an applicant’s request for a waiver, pending a decision regarding such request for reconsideration, and shall stay any action to enter into a contract or other agreement.” The meaning of this latter statement concerning a “stay” is unclear.

**Response:** OMH submits that the plain meaning of the word “stay” in the context of this regulation is sufficiently clear.