



STATE OF NEW YORK  
**EXECUTIVE DEPARTMENT**  
DIVISION OF THE BUDGET  
STATE CAPITOL  
ALBANY, NEW YORK 12224

Andrew M. Cuomo  
Governor

Robert L. Megna  
Director of the Budget

<b>BUDGET BULLETIN</b>	<b>B-1208</b>	<b>July 3, 2013</b>
------------------------	---------------	---------------------

**TO: ALL DEPARTMENT AND AGENCY HEADS**

**FROM: Robert L. Megna** *Robert L. Megna*

**SUBJECT: Executive Order 38 (EO 38)**

### **BACKGROUND**

[Executive Order 38](#) was issued by Governor Andrew Cuomo and is designed to address excessive administrative expenses and executive compensation levels for certain providers receiving State funds/State-authorized payments (hereinafter "SF/SAP").

Regulations to ensure that executive compensation and administrative expenses do not exceed certain limits were published by 13 state agencies ([see attached listing](#)), and are effective July 1, 2013.

A summary of EO 38 and initial agency responsibilities for all 13 agencies impacted by the order is provided below. Additional guidance and information is also available at the following public website ([executiveorder38.ny.gov](http://executiveorder38.ny.gov)).

### **OVERVIEW**

The restrictions on administrative expenses and executive compensation will take effect for reporting periods beginning on or after July 1, 2013. In summary, EO 38:

- Prohibits providers covered under EO 38 from using more than \$199,000 in State funds/State-authorized payments ("SF/SAP") for the compensation of a covered executive.
- Provides that if a covered executive makes more than the \$199,000 threshold because of funding from sources other than SF/SAP, the compensation level must not exceed the 75th percentile of compensation levels provided to executives in comparable entities and must be approved by the covered providers governing body.

- Limits administrative expenses to no more than 25 percent of overall spending in the reporting period beginning between July 1, 2013 and June 30, 2014. Further, administrative expenses must not exceed 20 percent in the reporting period beginning between July 1, 2014 and June 30, 2015, and must decrease to 15 percent in the reporting period beginning July 1, 2015 or thereafter.

Detailed guidance for EO 38 implementation is available on the EO 38 website, including a detailed Preliminary Guidance document. This document provides step-by-step information to help agencies and providers implement EO 38, including determining covered providers, covered executives, the appropriate reporting periods, calculation of SF/SAP, executive compensation, administrative and program expenses, lead agency determination, and the waiver application process.

Beginning in July 2013, providers will be able to submit, via the EO 38 website, requests for a waiver from the EO 38 limitations as well as the agency they believe should be considering the waiver request (the “lead agency”).

### **LEAD AGENCY**

In order to effectively manage the implementation of EO 38, a “lead agency” will be designated for each provider by the State. The lead agency will facilitate the EO 38 process and serve as a single point of contact for the provider, which is important where there are multiple agencies that provide funding to a provider. The lead agency, acting on behalf of all the other agencies providing State funds to the provider, will be responsible for all contact on EO 38 with the covered provider. That agency will also be responsible for ensuring that all required EO 38 forms are submitted and reviewed on time.

More information on this process will be provided separately, but the lead agency will generally be the State agency that provides the most funding to the provider. The lead agency determination will also consider other factors, including the overall knowledge of, and experience with, the covered provider by the involved State agencies, and other factors deemed relevant by the involved State agencies. The final lead agency determination will be subject to the review and approval of the Division of the Budget.

### **THE WAIVER PROCESS**

A waiver process will be available for those covered providers that do not expect to meet the EO 38 limits on either executive compensation or administrative expenses. A separate waiver will be submitted for exemption from the administrative expense limitations and for each covered executive seeking an exemption from the executive compensation limitations.

The lead agency must issue a notification of either approval or denial of a waiver application to the provider no later than 60 calendar days after it is initially submitted. (The 60-day clock will be stopped whenever additional information is requested by the agency from the applicant provider.)

There are strict criteria for approval of a waiver, and it is anticipated that approval of waiver applications will be limited. The following factors (as detailed in the appropriate agency regulations), shall be considered in the determination of whether to grant a waiver from the limits on executive compensation and administrative costs.

Executive compensation waiver criteria include:

- For covered executives whose compensation is solely derived from SF/SAP and is above \$199,000, the rationale for why a compensation level above \$199,000 is needed to deliver quality services.
- For covered executives whose compensation is above the \$199,000 threshold but who receive funding from other sources, the rationale for why a compensation level above the 75<sup>th</sup> percentile of comparable executives is needed to deliver quality services.
- Explanation of how a reduction in the current level of compensation would have a deleterious effect on the amount and quality of services provided, and why the covered provider could not provide the program services at the same levels of quality and availability if executive compensation were reduced to the threshold.
- Description of the unique nature, size, and/or complexity of the covered provider's operations to warrant compensation levels above the threshold.
- Evidence of the provider's executive compensation review and approval process, including factors such as an independent review, approval by the agency board of directors, an assessment of comparability data including a compensation survey, and contemporaneous substantiation of the deliberation and decision to approve such executive compensation above the threshold.
- A listing of the provider's unsuccessful efforts to secure executives with the same levels of experience, expertise and skills for the positions of covered executives at compensation levels within the threshold.
- Proof of the provider's efforts to monitor and control executive compensation costs.

Administrative expenses waiver criteria include:

- Demonstration of why administrative expenses exceeding the threshold are necessary and unavoidable, including a description of any one-time extraordinary expenses.
- Evidence that a failure to reimburse specific administrative expenses would negatively impact the availability or quality of program services in the covered provider's geographic area.

- Description of the nature, size and complexity of the covered provider's operations and the program services provided, or of the unique or special services of the provider, that warrant administrative spending beyond the threshold.
- Proof of the provider's efforts to monitor and control administrative expenses and to limit requests for reimbursement for such costs.
- Documentation of the provider's efforts to find other funding sources to support its administrative expenses, and the nature and extent of such efforts and funding sources.

Information is available separately regarding detailed guidance and training for the EO 38 web portal and related topics.

Questions concerning this Bulletin should be directed to your budget examiner.

[Agriculture & Markets](#)

[Division of Criminal Justice Services](#)

[Department of Corrections and Community Supervision](#)

[Department of Health](#)

[Department of State](#)

[Division of Homes and Community Renewal](#)

[Office for the Aging](#)

[Office of Alcoholism and Substance Abuse Services](#)

[Office of Children and Family Services](#)

[Office of Mental Health](#)

Office for People with Developmental Disabilities

Office of Temporary and Disability Assistance

[Office of Victim Services](#)