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MEMORANDUM

TO: All Members

FROM: Dan Heim, Executive Vice President

DATE: June 18, 2015

SUBJECT: **Filing Requirements Under Executive Order #38: Limits on Executive Compensation and Administrative Expenses**

ROUTE TO: Administrator, Program Directors, Finance, Human Resources

ABSTRACT: Time-sensitive clarifications on filing requirements under Executive Order #38.

Introduction

As the filing due dates approach for providers that are affected by Executive Order #38 (EO#38) and its limitations on executive compensation and administrative expenses, this memo provides LeadingAge New York members with important clarifications on EO#38 requirements including: (1) status of our litigation; (2) mechanics of filing; (3) applicable filing deadlines; (4) applicability to public providers; and (5) treatment of Medicaid capital reimbursement.

On January 18, 2012, Governor Cuomo issued EO#38 which directed the various state agencies that provide State funds or State-authorized payments (SF/SAP) for services to promulgate regulations imposing restrictions on executive compensation and administrative expenses of entities that receive such funds and payments. The Department of Health (DOH) and other State agencies adopted the [final regulations](#) in May 2013, with an effective date of July 1, 2013.

A covered provider will be required to make its first EO#38 disclosure filing and any required waiver filings for the initial covered reporting period (CRP) that begins on or after July 1, 2013. For most LeadingAge NY members, the initial CRP will be the 2014 calendar year and any disclosures/waivers will need to be filed in 2015.

EO#38 and the agency regulations limit the total amount of compensation that can be paid to certain covered executives by establishing a \$199,000 cap and a process for imposing penalties for executive compensation that exceeds the cap unless the amount of compensation is less than the 75th percentile of comparable executives, and has been approved by the governing board following a review of appropriate comparability data. The regulations also limit the entity's administrative expenses to no more than 25 percent of covered operating expenses for the CRP

beginning between July 1, 2013 and June 30, 2014; 20 percent for the CRP beginning between July 1, 2014 and June 30, 2015; and 15 percent for CRPs beginning on or after July 1, 2015.

If a covered provider exceeds (or projects that it will exceed) the administrative expenses and/or executive compensation limitations within a CRP, it may apply for a waiver. Waiver applications must be submitted no later than concurrent with the timely submission of the covered provider's EO#38 disclosure form.

[The Executive Order #38 website](#) is intended to provide information to entities receiving state funds and state-authorized payments, as well as a mechanism for submitting applications for waivers to the executive compensation and administrative expense limits. Included are a frequently asked questions section and a 113-page [Guidance Document](#).

Status of LeadingAge NY Litigation

LeadingAge NY is still awaiting a decision on its lawsuit challenging the EO#38 regulations. **In the meantime, the regulations and associated filing requirements remain fully in effect throughout the State, with the exception of Nassau County where an earlier Supreme Court decision stayed their implementation.**

State Supreme Court, Albany County has not yet issued a decision in *LeadingAge New York et al v. Shah*, a case we brought with other groups challenging EO#38 and the associated regulatory requirements. In the lawsuit, we argued that: (1) the EO#38 regulations conflict with existing State laws, including both the Business Corporations Law and the Not-for-Profit Corporations Law; (2) the State regulatory agencies engaged in policy-setting that would otherwise be reserved for the State Legislature; and (3) the EO#38 regulations are arbitrary and capricious.

Given the importance of the issue and the divergent opinions among the courts so far, it is likely that the Appellate Division or even the Court of Appeals – the State's highest court – will have the final word on the validity of EO#38 and the regulations.

The Mechanics of Filing

To initiate filing of EO#38 disclosures and any needed waivers, navigate in your browser to <https://EO38.ny.gov/xo/login>. You will then be asked to login using your NYS Grants Gateway account credentials. If you do not have an account in the NYS Grants Gateway, you may register for one at: <https://www.grantsgateway.ny.gov>.

******* DOH HAS REVIEWED THE CLARIFICATIONS PROVIDED IN THE BALANCE OF THIS MEMO FOR ACCURACY. *******

Filing Deadline for Disclosures and Waivers

LeadingAge NY members have recently sought clarification on when EO#38 disclosure forms must be submitted (which also dictates the deadline for any required waiver requests). Generally, the submission deadline for the disclosure form is "...one hundred eighty calendar days following the covered reporting period, unless otherwise authorized." [See the regulations at 10 NYCRR §1002.5(a).] However, the definition of "reporting period" contains a clear authorization to submit disclosure forms contemporaneously with the due date of an applicable cost report. Specifically, the regulation at 10 NYCRR §1002.1(k) states as follows:

“(k) Reporting period shall mean, at the provider’s option, the calendar year or, where applicable, the fiscal year used by a provider. However, where a provider is required to file an annual Cost Report with the State, reporting period shall mean the reporting period applicable to said Cost Report, and **the date required for timely submission of said Cost Report shall control and be the date required for the submission of the EO#38 Disclosure Form** in the event such form is required to be filed pursuant to section 1002.5 of this Part.” [emphasis added]

Appendix C of the [Guidance Document](#) lists the applicable cost reports recognized for EO#38 purposes. The reports most applicable to LeadingAge NY members, and the associated filing deadlines, appear below:

Cost Report	Due Date for 2014 Report
Residential Health Care Facility Report (RHCF-4)	Aug. 14, 2015
Residential Health Care Facility Report (RHCF-2)	Aug. 14, 2015
Certified Home Health Agency Cost Report	Aug. 15, 2015
Long Term Home Health Agency Cost Report	Aug. 15, 2015
Personal Care Cost Report	Sept. 15, 2015
Program specific Annual Medicaid Managed Care Operating Reports (MMCOR) (MMCOR, HIV-SNP, Medicaid Advantage, MLTC, PACE MLTC, and Partial Cap MLTC)	April 20, 2015

The intent of the regulations is to provide covered providers with a minimum of 180 days from the close of their reporting period to finalize their financial reporting and submit their EO#38 disclosure form, if one is required. However, a provider may be required by DOH or another agency to file a cost report; in such cases, the financial reporting may not be completed until the due date of the cost report. Accordingly, the following clarifications are provided:

- Each provider with its own Medicaid provider number is considered a covered provider if it meets the EO#38 regulatory criteria. A parent entity or other organization that operates multiple providers – each with its own Medicaid provider number – may be required to file multiple EO#38 disclosures, depending on whether each provider is considered covered under the regulations.
- A covered provider that operates a nursing home or a home care/personal care agency and is otherwise required to submit an EO#38 disclosure form must submit its disclosure by the applicable cost report due date identified above.
- A covered provider that files a cost report that is not listed above or in Appendix C of the [Guidance Document](#) is required to file its EO#38 disclosure within 180 days of the end of the CRP. For example, an Assisted Living Program that otherwise meets the criteria for a covered provider must file its disclosure for the 2014 calendar year by June 29, 2015.
- A covered provider whose cost report deadline pre-dates the general 180-day deadline for EO#38 filings may make its EO#38 filings using the 180-day deadline. For example, a managed care plan that otherwise meets the criteria for a covered provider must file its disclosure for the 2014 calendar year by June 29, 2015.
- A covered provider that files a cost report with more than one of the State agencies that published the regulations may select the cost report (and associated filing deadline) to be used to determine its reporting period and EO#38 disclosure due date.

Providers Operated by Government Entities

Another question LeadingAge NY has received from its members is whether government-operated providers are subject to EO#38 requirements. The regulation at 10 NYCRR §1002.1(d)(6) confirms that providers operated by government entities are exempt from EO#38 regulatory requirements and need not file EO#38 disclosures or waiver requests:

“(6) The following providers **shall not be considered covered providers**:

(1) State, county, and local governmental units in New York State, and tribal governments for the nine New York State recognized nations, and any subdivisions or subsidiaries of the foregoing entities;” **[emphasis added]**

This exemption is also discussed in the [Guidance Document](#) on pages 13-14.

Exclusion of Medicaid Capital Reimbursement

An additional question has come up as to whether Medicaid capital reimbursement should be excluded from the calculation of total SF/SAP for purposes of determining whether a provider is considered a covered provider under the regulations. In this regard, the regulations at 10 NYCRR §1002.1(l)(3) (State-authorized payments) and 1002.1(m)(3) (State funds) provide as follows:

“(l) For purposes of this regulation, State-authorized payments shall not include any payments solely for the following purposes:

(3) capital expenses, including but not limited to non-personal service expenditures for the purchase, development, installation, and maintenance of real estate or other real property, or equipment;

(m) For purposes of this Part, State funds shall not include any payments solely for the following purposes:

(3) capital expenses, including but not limited to non-personal service expenditures for the purchase, development, installation, and maintenance of real estate or other real property, or equipment;”

Accordingly, the capital component of a Medicaid payment rate (e.g., for a nursing home, an assisted living program, etc.) may be excluded from the total Medicaid funds received by the provider that would otherwise be considered SF/SAP, for purposes of determining whether it is a covered provider and for any required reporting.

Conclusion

LeadingAge NY will keep its members posted on the status of our litigation and other EO#38 developments. Please contact me at dheim@leadingageny.org or (518) 867-8383, ext. 128 if you have any questions on this memo.