

Pursuant to the authority vested in the Commissioner of Health by section 363-a(2) of the Social Services Law and sections 201(1)(o), 201(1)(p), 206(3) and 206(6) of the Public Health Law, section 1002.3 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

#### 1002.3 Limits on executive compensation

(a) Limits on executive compensation. Except if a covered provider has obtained a waiver pursuant to section 1002.4 of this Part, a covered provider as defined in this regulation shall not use State funds or State-authorized payments for executive compensation given directly or indirectly to a covered executive in an amount greater than \$199,000 per annum, provided, however, that the department shall review this figure annually to determine whether adjustment is necessary based on appropriate factors and subject to the approval of the Director of the Division of the Budget. Commencing on July 1, 2013, the limits on executive compensation pursuant to this Part shall be effective and applicable to each covered provider on the first day of each covered provider's respective covered reporting period.

[(b) Except if a covered provider has obtained a waiver pursuant to section 1002.4 of this Part, where a covered provider's executive compensation given to a covered executive is greater than \$199,000 per annum (including not only State funds and State-authorized payments but also any other sources of funding), and either:

(1) greater than the 75th percentile of that compensation provided to comparable executives in other providers of the same size and within the same program service sector and the same or comparable geographic area as established by a compensation survey identified, provided, or recognized by the department and the Director of the Division of the Budget; or

(2) was not reviewed and approved by the covered provider's board of directors or equivalent governing body (if such a board or body exists) including at least two independent directors or voting members (or, where a duly authorized compensation committee including at least two independent directors or voting members conducted such review on behalf of the full board, such actions were not reviewed and ratified by such board), or such review did not include an assessment of appropriate comparability data; then such covered provider shall be subject to the penalties set forth in section 1002.6 of this Part. To determine whether a covered provider or related organization may be subject to penalties, such provider shall provide, upon request by the department or its designee, contemporaneous documentation in a form and level of detail sufficient to allow such determination to be made.]

[(c)] (b) Program services rendered by covered executives. The limit on executive compensation pursuant to this Section shall not be applied to limit reimbursement with State funds or State-authorized payments for reasonable compensation paid to a covered executive for program services, including but not limited to supervisory services performed to facilitate the covered provider's program services, rendered by the executive outside of his or her managerial or policy-making duties. 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. Such documentation shall be maintained and provided to the department or its designee upon request. Clinical and program personnel in a hospital or other entity providing program services, including chairs of departments, heads of service, chief medical officers, directors of nursing, or similar types of personnel fulfilling administrative functions that are nevertheless directly attributable to and comprise program services shall not be considered covered executives for purposes of limiting the use of State funds or State-authorized payments to compensate them.

[(d)] (c) Covered providers with multiple sources of State funds or State-authorized payments. If a covered provider receives State funds or State-authorized payments from multiple sources, the provider's compliance with the limits on executive compensation in subdivision (a) shall be determined based upon the total amount of such funding received and the reimbursements received from all sources of State funds or State-authorized payments. As set forth in section 1002.5 of this Part, the covered provider shall report all of such State funds and State-authorized payments in the form specified by the department or its designee.

[(e)] (d) Subcontractors and agents of covered providers. The limits on executive compensation in subdivision (a) [and (b)] of this section and the reporting requirements in section 1002.5 of this Part shall apply to subcontractors and agents of covered providers 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 received

State funds or State-authorized payments from the covered provider rather than directly from a governmental agency. A covered provider shall incorporate into its agreement with such a subcontractor or agent the terms of these regulations by reference to require and facilitate compliance. Upon request, covered providers shall promptly report to the funding or authorizing agency the identity of such subcontractors and agents, along with any other information requested by that agency or by the department or its designee. A covered provider shall not be held responsible for a subcontractor's or agent's failure to comply with these regulations.

[(f)] (e) Covered providers receiving State funds or State-authorized payments from county or local government or an entity contracting on its behalf. The department or its designee, rather than the county or local unit of government or an entity contracting on behalf of such government, shall be responsible for obtaining the necessary reporting from and compliance by such covered providers, and shall issue guidance to affected county and local governments to set forth the procedures by which the department or its designee shall do so.

[(g)] (f) Other limits on executive compensation. 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. However, the definition and interpretation of terms in this Part shall not be affected or limited by the definition or interpretation of terms in other regulations or agreements.

[(h)] (g) A covered provider's contract or other agreement with a covered executive agreed to prior to July 1, 2012 shall not be subject to the limits in this section during the term of the contract, except that:

(1) 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, 2015; and

(2) renewals of such contracts or agreements after the completion of their term must comply with these regulations.

## REGULATORY IMPACT STATEMENT

### **Statutory Authority:**

The authority for the promulgation of these regulations is contained in section 363-a(2) of the Social Security Law and in sections 201(1)(o), 201(1)(p), 206(3) and 206(6) of the Public Health Law.

### **Legislative Objectives:**

The objective of section 363-a(2) of the Social Security Law, and sections 201(1)(o), 201(1)(p), 206(3) and 206(6) of the Public Health Law, is to ensure the proper use of funds in furtherance of the Department's oversight of the various programs and procurements for which it pays, or authorizes payment.

### **Needs and Benefits:**

This proposed regulation is necessary to comply with the Court of Appeal's decision in LeadingAge, et al. v. Shah, et al., 32 N.Y.3d 249 (2018), which invalidated a portion of the existing regulations concerning limits on executive compensation.

### **COSTS:**

#### **Costs to Private Regulated Parties:**

This amendment will provide covered providers clarity in calculating the limits on executive compensation and should not result in any additional costs.

**Costs to Local Government:**

This proposal will not impact local governments unless they are covered providers, in which case costs will be the same as costs for private entities.

**Costs to the Department of Health:**

The proposed regulatory changes will not result in any additional operational costs to the Department of Health.

**Costs to Other State Agencies:**

The proposed regulatory changes will not result in any additional costs to other state agencies.

**Local Government Mandates:**

This provision does not impose any additional mandates on local governments.

**Paperwork:**

This provision does not impose any additional paperwork.

**Duplication:**

This regulation does not duplicate any other State or federal regulation.

**Alternatives:**

There are no alternatives to the proposed amendment.

**Federal Standards:**

This proposal does not conflict or duplicate federal provisions.

**Compliance Schedule:**

This proposed amendment will become effective upon publication of a Notice of Adoption in the *New York State Register*.

**Contact Person:** Katherine E. Ceroalo  
New York State Department of Health  
Bureau of Program Counsel, Regulatory Affairs Unit  
Room 2438, ESP Tower Building  
Albany, NY 12237  
(518) 473-7488  
(518) 473-2019 – FAX  
REGSQNA@health.ny.gov



**STATEMENT IN LIEU REGULATORY FLEXIBILITY ANALYSIS  
FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS**

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

## **STATEMENT IN LIEU OF RURAL AREA FLEXIBILITY ANALYSIS**

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administration Procedure Act (SAPA). It is apparent from the nature of the proposed regulation that it will not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

## **STATEMENT IN LIEU OF JOB IMPACT STATEMENT**

No job impact statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

## ASSESSMENT OF PUBLIC COMMENT

The New York State Department of Health (Department) received comments from Agencies for Children's Therapy Services (ACTS) and The Continuing Care Leadership Coalition (CCLC).

The comments and the Department's responses are summarized below.

**Comment:** A comment was received stating that the \$199,000 executive compensation threshold is antiquated and should be updated to reflect new duties executives have been required to take on as well as inflation. The commenter suggested that the executive compensation cap be at a minimum constituent with the Bureau of Labor Statistics data on inflation.

**Response:** The regulations establish a \$199,000 maximum for the use of State funds or State-authorized payments for executive compensation given directly or indirectly to a covered executive. However, this amount does not limit the amount of compensation paid to such executives from other sources of income outside of State funds or State-authorized payments. In addition, the regulations provide for an annual review to be conducted by the Department to determine whether adjustment is necessary based on appropriate factors and subject to the approval of the Director of the Division of Budget. As such, no changes were made to the proposed regulation as a result of this comment.

**Comment:** A comment was received asking that the Department recognize that not-for-profit entities engage in a similar process as set forth in the proposed regulation to comply with Internal Revenue Service requirements related to executive compensation. The commenter suggested that the Department consider further aligning State reporting and Federal reporting for such entities, to reduce the paperwork burden for not-for-profit entities.

**Response:** The proposed regulation is necessary to comply with the Court of Appeal’s decision in LeadingAge, et al. v. Shah, et al., 32 N.Y.3d 249 (2018), which invalidated section 1002.3(b) of the existing regulation. The proposed rulemaking only seeks to remove this provision of the regulation and no additional amendments are being made at this time. The Department will take this comment under consideration for any future rulemaking. No changes were made to the proposed regulation as a result of this comment.

**Comment:** A comment was received suggesting that the Department update the materials on the State’s EO #38 website, as the existing materials appeared to be dated and confusing to understand.

**Response:** The Department will take this comment under consideration; however, no changes are necessary to the regulation as a result of this comment.

**Comment:** A comment was received in support of the regulatory amendments.

**Response:** No changes to the proposed regulation are necessary as a result of this comment.