

DOH PUBLISHED A NOTICE OF PROPOSED RULEMAKING MODIFYING EXECUTIVE COMPENSATION LIMITS

On September 4, 2019, DOH published a Notice of Proposed Rulemaking that implements a New York Court of Appeal's ruling striking down the so called "soft cap" limitations and affirming the "hard cap" limitations on executive compensation. In particular, a covered provider is prohibited from compensating a covered executive in an amount greater than \$199,000 per year using solely State Funds, unless a waiver is obtained. [<https://regs.health.ny.gov/sites/default/files/proposed-regulations/Limits%20on%20Executive%20Compensation.pdf>]

In October, 2018 Garfunkel Wild, P.C. issued a Client Alert of the decision of the New York Court of Appeals striking down the "soft cap" and affirming the "hard cap" limitations on executive compensation under NYS regulations that implemented Executive Order # 38 ("EO 38"). [See prior GW Alert – <https://www.garfunkelwild.com/wp-content/2018/ALERTS/court-of-appeals-affirms-lower-courts-decision-striking-down-soft-cap-on-exec-comp.pdf>]. Specifically, the Court upheld the regulations on covered providers, such as hospitals licensed under Article 28 of the Public Health Law, which imposed limits on administrative expenses and executive compensation to the extent funded by "State Funds" – the so-called "hard cap". This applied to funds in the State budget for State funded program services, e.g., Cystic Fibrosis Program, Early Intervention Program or "state-authorized payments", which include funds that are distributed by or disbursed upon a New York State agency's approval, e.g., Medicaid payments. However, the Court invalidated the regulations which placed limitations on the covered provider's use of non-State Funds in funding executive compensation, e.g., private funds, payments from commercial payors, etc. – the so-called "soft cap".

SOME INITIAL OBSERVATIONS

The soft cap prohibited executive compensation in excess of \$199,000 from State Funds and non-State Funds unless (i) the compensation was within the 75th percentile of comparable providers and (ii) the compensation was approved by the provider's governing board, including at least two independent directors. The proposed regulations delete the soft cap prohibition and these comparability data and governing board approval requirements.

The hard cap continues to apply to "covered executives" (generally defined as a compensated director, trustee, managing partner or officer, or key employee), whose salary and benefits, in whole or in part, is considered administrative expenses and exceeds \$199,000 during the reporting period. If there are more than 10 key employees who meet this definition, the covered provider need only report the highest compensated top 10 key employees

Covered providers that are subject to the hard cap are required to obtain a waiver in order to compensate their covered executives in an amount greater than \$199,000. It is our understanding that few, if any covered providers, have used the waiver process. Given the proposed change in the regulations, this waiver process may be more prevalent and an agency's timely processing of waiver applications may be an issue. Presumably, if a covered provider has sufficient non-State Funds to fund executive compensation, a waiver will not be necessary. However, the covered provider must have sufficient controls in place to document that non-State Funds are sufficient to fund executive compensation.



Of course, covered providers are still required to submit an EO 38 Disclosure Form for each covered reporting year.

Lastly, although the proposed regulations eliminate the use of and approval by the governing board of data to show that executive compensation was within the 75th percentile of comparable providers, we recommend the continued use of comparability data and governing board approval by charitable organizations in meeting their obligations under the Internal Revenue Code for executive compensation and by other covered providers to support a waiver application.

We look forward to comments that will be submitted by interested parties in response to the proposed regulations and to the Department's responses to such comments.

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If you have any questions, please contact the [Garfunkel Wild attorney](#) with whom you regularly work.

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