

## Governor's Task Force on Not-for-Profit Entities Issues Letter Seeking Detailed Compensation Information

The Chairman of the Governor's Task Force on Not-for-Profit Entities has sent a letter to Board members of fifty not-for-profit corporations in New York State, largely regarding executive and Board compensation. According to the letter, the Task Force is "conducting a top-to-bottom review, not only to audit current compensation levels, but also to make recommendations for future rules to ensure taxpayer dollars are used to serve and support the people of this state, not pay excessive salaries and compensation." This is the same language used by Governor Cuomo in announcing the Task Force earlier this month.

Like the press release announcing the issuance of the Task Force letter, the letter is especially accusatory and divisive in tone. The letter states that it is being sent to the "Board of Directors . . . as the not-for-profit's top management likely has a significant interest in the size of their compensation." The letter includes thirty-nine questions, with subparts, asks that responses to twenty-four questions be provided on Excel spreadsheets, and demands response by September 15th. The information requested covers the last four and one-half years.

Among the more pointed questions are these:

- "34. Do you believe that recoupment and/or claw-back of executive and/or board compensation is necessary?
- 36. [I]s the board or management considering any recoupment and/or claw-back for past salary and/or benefits?
- 38. What justified the compensation to executives?
- 39. What justifies you being a not-for-profit?"

The Chairman of the Task Force is Benjamin M. Lawsky, Superintendent of the newly created State Department of Financial Services. That department was created from the former State Departments of Insurance and Banking, and the Division of Consumer Protection. Notably, the Department of Financial Services has no specific authority over not-for-profit entities, nor any apparent familiarity or expertise regarding them. Despite that, it appears that Task Force will be staffed by Department of Financial Services' employees. The other members of the Task Force are State Inspector General Ellen Biben, Secretary of State Cesar A. Peralas, Medicaid Inspector General Jim Cox, Health Commissioner Nirav Shah, OPWDD Commissioner Courtney Burke, and OMH Commissioner Mike Hogan.

We believe that the fifty not-for-profits to receive this letter are all OPWDD providers. We are told that the same or similar letter will eventually go to licensees of the Departments of Health, the Offices of Mental Health, Persons with Developmental Disabilities, and Substance Abuse Services, and to the State's not-for-profit educational institutions and social service agencies.

Receipt of this letter will likely cause great concern among members of not-for-profit Boards of Directors. Whether and how to respond to the letter should be discussed with counsel. The letter does not have the force of law, but, nevertheless, it must be taken seriously. Much of the information requested is already submitted to government agencies either on Form 990s, in Consolidated Fiscal Reports, or in annually completed cost reports. For example, the letter asks for “[a]nnual total number of employees with base salaries of over \$100,000.” Form 990, Part VII, Line 2 requires the same information. The letter also asks for the name, job title, start date, annual base compensation, annual bonus, annual total of other forms of compensation (i.e., incentive compensation, benefits, cars, travel, hotel expenses, etc.), annual deferred compensation, and average hours per work week of each executive, administrator, and board member, as well as any other individual that received over \$100,000 in total compensation. Form 990, Part VII, Section A, Line 1(a) and Section B, Line 1, requires substantially similar information.

In general, federal law requires that a not-for-profit organization’s compensation arrangements be reasonable. The Internal Revenue Code provides a two-part test for determining the reasonableness of a compensation arrangement. First, the payment of compensation must be reasonable and necessary to carrying out the organization’s purposes. IRC § 4941(d)(2)(E). Second, the payment of compensation cannot be excessive. Id. Treasury Regulations provide that compensation is reasonable if it is “such an amount as would ordinarily be paid for like services by like enterprises under like circumstances.” Treas. Regs. § 1.162-7(b)(3). There is a rebuttable presumption of reasonableness if the following conditions are satisfied:

- (1) the compensation arrangement is approved in advance by disinterested members of an authorized body of the organization;
- (2) the authorized body obtained and relied upon appropriate data as to comparability prior to making its compensation determination; and
- (3) the authorized body adequately documented the basis for its determination concurrently with making its determination.

IRC § 4958; Treas. Regs. § 53.4958-6(a)(1)-(3). Although organizations are generally advised to follow the presumption of reasonableness procedures, compensation arrangements can be reasonable without meeting the presumption of reasonableness. If an organization has utilized the presumption of reasonableness procedures, the supporting documentation for its compensation arrangements are a guide for answering many of the Task Force’s questions.

Whether your entity has received the letter already, or whether it receives it later, the letter clearly is intended to cause a discussion within boards about the appropriate levels of compensation, and your not-for-profit’s mission. If your Board has already received the letter, executive leadership should be in active discussions with the Board and counsel about it. If your organization has not yet received the letter, board members should be prepared for its receipt.

A copy of the letter may be viewed by clicking [here](#).

If you have any questions, please contact:

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