

New York State Not-For-Profit Entities Task Force Asks for Compensation Details

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On August 3, 2011, Governor Cuomo created the **New York State Not-For-Profit Entities Task Force (“Task Force”)**, to conduct a comprehensive review and audit of current compensation levels of organizations that receive taxpayer funding from the state. The Task Force is chaired by the **Superintendent of the Department of Financial Services**, Benjamin Lawskey, and includes representatives from relevant state agencies.

On August 25, 2011, the Task Force sent a letter to the **boards of directors of not-forprofit organizations** seeking detailed information about compensation for their executives, administrators and board members. Organizations receiving the letter include entities serving people with disabilities, mental health providers, hospitals and clinics and social service providers and were selected based upon the organization’s receipt of state funds.

Much of the information requested in the letter is factual and seeks aggregate information related to compensation paid by the organization. Some of this information may already be accessible to the public through IRS Form 990 submissions. In particular, **the IRS Form 990 requires an organization to list the five highest compensated employees that are paid more than \$150,000**. Significantly, however, the letter also seeks detailed information on:

- Compensation paid to every individual who is an executive, administrator, board member or received compensation of \$100,000 or more;
- Identification of the number of employees who receive any compensation, bonus and or incentives greater than \$200,000; and
- Identification of the top twenty-five highest paid executives, administrators, and/or board members.

Importantly, the letter does not define “compensation” and asks for quantitative valuations of “other compensation” including incentives, benefits of any kind, or perks such as apartments, cars, or tickets to events. In addition, boards are also asked to provide more subjective information such as:

- What justified the compensation to executives?
- What is the organization's view regarding recoupment and/or claw-back of executive and/or board compensation?
- Does the organization believe that recoupment and/or claw-back of executive and/or board compensation is necessary?

These questions appear to seek the opinion of a board of directors on compensation practices that may not even be part of the organization's own compensation program.

Importantly, responses to the questions can raise potential legal issues and risks. For example, the responses almost certainly are subject to disclosure under the **Freedom on Information Law (FOIL)**, except to the extent that the information falls under a specific FOIL exemption. Notably, the letter asks for compensation structures, use of consultants, and how compensation is tied to performance. Even if certain information is public, many organizations may be of the view that the additional information sought by the letter is proprietary.

The information requested of board members may raise **complex issues of fiduciary duty** as boards weigh the legal and political obligation to cooperate with the Task Force against the possible negative consequences that disclosure of sensitive business information could have. Such fiduciary duty concerns may also arise concerning board conduct in establishing executive compensation levels or other governance policies and procedures as well as the integrity of the governing body itself.

Accordingly, responses submitted to the letter require careful planning. Given the nature of the information requested and that it is unclear how the Task Force will use the information, it is important to consult with counsel experienced in not-for-profit board governance and executive compensation matters prior to submitting a response.

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