



Executive Order No. 38

State of New York

Andrew M. Cuomo, Governor

Executive Order No. 38

Executive Overview and General Requirements

This document provides a general overview of the Executive Order 38 Determination, Disclosure and Waiver processes. For more detailed information, please download the *EO38 Guide*, available on the EO38 website at: executiveorder38.ny.gov



About this Guide

This guide is designed to provide a high-level overview of the Executive Order 38 (EO38) Determination and Disclosure process. This guide **SHOULD NOT** serve as an instruction manual for producing EO38 reports, worksheets, waivers or other documents.

Individuals/entities that are responsible for reporting data relative to Executive Order 38 should become familiar with the **EO38 Guide**, which is available on the EO38 Website at: executiveorder38.ny.gov under the “GUIDANCE” section. The EO38 Guide defines regulations, concepts and terminology promulgated pursuant to Governor Cuomo’s Executive Order No. 38.

This Guide Highlights the following EO38 Processes:

Determination

Determination is the process by which individuals/entities establish whether or not they are a Covered Provider under EO38. *Covered Providers* are those individuals/entities which are required to file EO38 Disclosure Reports.

Disclosure

The Disclosure Process is the process through which Covered Providers report certain types of Executive Compensation and Administrative Expenses.

Waivers

Covered Providers who exceed (or project to exceed) the regulatory limitations of EO38 may request a Waiver using the EO38 Online Waiver Application.

Plans of Corrective Action

Covered Providers which have not been granted a waiver and that do not meet the Executive Compensation or Administrative Expenses limitations contained within the EO38 regulations will be found non-compliant.

Non-compliant entities will be required to file a **Plan of Corrective Action**, which will be reviewed by State agencies.

For more information about **Plans of Corrective Action** and possible penalties, please visit pages 57-60 of the **EO38 Guide**.



Executive Order 38: Overview

Individuals or entities receiving **State Funds** or **State Authorized Payments** to provide program services may be subject to limitations on administrative expenses and executive compensation under EO38.

EO38 reporting consists of two major processes:

1. **Determination** - Identifies an individual's or entity's covered provider status
2. **Disclosure** - Reports information about administrative expenses and executive compensation

Determination

The first step for an individual or entity is to determine if they are a **Covered Provider**. The term "Covered Provider" refers to an individual or organization subject to regulation under Executive Order 38.

You can determine an individual's or entity's Covered Provider status by completing the online **Covered Provider Determination**, which is available at:

<https://www.eo38.ny.gov/xo/determinationForm>

Disclosure

If an individual or entity is determined to be a **Covered Provider**, they are required to file a **Disclosure Report** no later than 180 days after the close of the **Covered Reporting Period** (For information about determining the Covered Reporting Period, refer to page 13 of the **EO38 Guidance Document**).

Two types of information are gathered in the EO38 Disclosure Report:

1. **Program Services Administrative Expenses** incurred using State Funds or State Approved Payments.

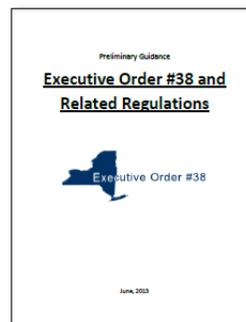
For detailed information about the Determination and Disclosure processes, please consult the **EO38 Guidance Document** found on the EO38 website at: [executiveorder38.ny.gov/content/guidance](https://www.eo38.ny.gov/content/guidance)

The Determination Process: Am I a Covered Provider?

Only **Covered Providers** are regulated by EO38, and only Covered Providers are required to file Disclosure Reports.

You can determine whether or not an individual or entity is a Covered Provider by following the three steps below.

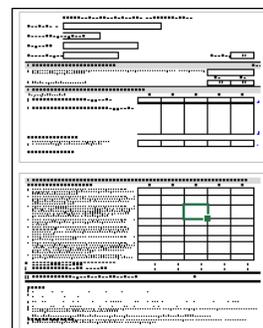
STEP 1. Download and familiarize yourself with the *EO38 Guidance Document*, which provides detailed information related to Executive Order 38 regulations. (you can download this document at: executiveorder38.ny.gov/content/guidance.)



[EO38 Guidance Document](#)

STEP 2. Download and complete the *State Funds/State Authorized Payments Calculation Worksheet* at: executiveorder38.ny.gov/content/guidance.

This worksheet will assist you in completing Step D of the Covered Provider Determination.



[State Funds/State Authorized Payments Calculation Worksheet](#)

STEP 3. Use the worksheet data to complete the online *Covered Provider Determination*. This online assessment will determine whether or not you are required to file a Disclosure Form (Users do not need credentials to complete the online Covered Provider Determination).

The Covered Provider Determination application is available online at: <https://www.eo38.ny.gov/xo/determinationForm>

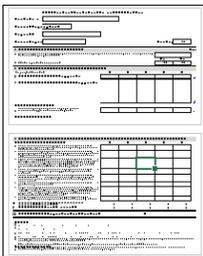
The Disclosure Process: Overview

Once an individual or entity is determined to be a **Covered Provider**, it is required to file a **Disclosure Report** no later than 180 days after the close of the **Covered Reporting Period**. For information about determining your Covered Reporting Period, refer to page 13 of the **EO38 Guidance Document**.

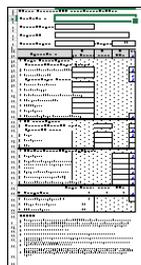
Once submitted, the **EO38 Disclosure Form** will be reviewed and evaluated by the State agencies from which State Funds/State Authorized Payments were received.

If, after a review period of not more than sixty (60) days, a determination is made by the State that the **Covered Provider** violated any of the applicable limitations on **Administrative Expenses** or **Executive Compensation**, or failed to submit the required or requested information, the **Covered Provider** may be considered non-compliant.

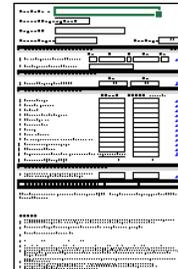
STEP 1. Download and complete each of the three supporting worksheets at: executiveorder38.ny.gov/guidance



[State Funds/State Authorized Payments Calculation Worksheet](#)



[Administrative Expense & Program Services Expense Worksheet](#)



[Executive Compensation Calculation Worksheet](#)

Note that guidance concerning the use of worksheets and methodologies for performing calculations is a recommendation only. Regardless of the method used to calculate **Administrative Expenses**, supporting documentation should be maintained by the Covered Provider and made available to State Agencies upon request.

STEP 2. Open <https://EO38.ny.gov/xo/login> in your Internet Browser.

Login and complete the online **EO38 Disclosure Report** using your **NYS Grants Gateway** account credentials.

If a provider does not have an account in the Grants Gateway, they should register for one at: <https://www.grantsgateway.ny.gov>

We recommend that you have both your worksheets and the **EO38 Guidance Document** available when completing the online **EO38 Disclosure Form**.

Calculating Administrative Expenses

When assessing compliance with EO38, **Covered Providers** must calculate the amount and percentage of Administrative Expenses during a **Covered Reporting Period** in order to determine compliance with EO38 administrative expense limits.

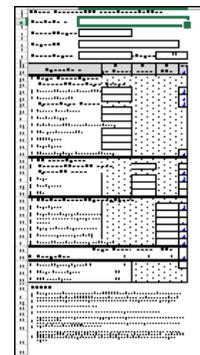
EO38 defines **Administrative Expenses** as those expenses paid with **State Funds** or **State Approved Payments** that are incurred in connection with a Covered Provider's management overhead, but which are not attributable directly to the provision of Program Services.

You can use the **Administrative Expenses and Program Services Expenses Worksheet** to assist you in completing your Disclosure Form.

Administrative Expenses and Program Services Expenses Worksheet

The **Administrative Expenses and Program Services Expenses Worksheet** is designed to capture the amounts of Administrative Expenses and Program Services Expenses, and calculate the percentages of Covered Operating Expenses. These percentages can then be evaluated against the limitations set by the EO38 regulations.

You can download this worksheet at:
executiveorder38.ny.gov/content/guidance



[Administrative Expense & Program Services Expense Worksheet](#)

For detailed information about using the **Administrative Expenses and Program Services Expenses Worksheet**, as well as EO38 administrative expenses limits, please refer to pages 29-35 of the EO38 **Guidance Document**.

Calculating Executive Compensation

Executive Compensation includes all forms of cash and non-cash payments or benefits given directly or indirectly to a **Covered Executive** (For a detailed definition of Executive Compensation, please refer to page 67 of the **EO38 Guidance Document**).

In determining compliance with EO38, Covered Providers must:

1. Identify which individuals qualify as Covered Executives.
2. Calculate the Executive Compensation provided to each Covered Executive.
3. Determine compliance with the Executive Compensation limitations for each Covered Executive.

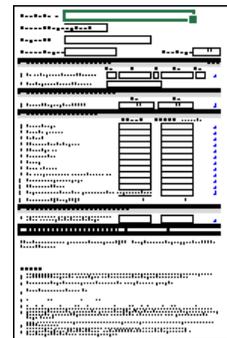
You can use the **Executive Compensation Calculation Worksheet** to assist you in completing your **EO 38 Disclosure Form**.

Executive Compensation Calculation Worksheet

The **Executive Compensation Calculation Worksheet** assists Covered Providers in determining which individuals qualify as **Covered Executives** and provides an evaluation of the **Covered Executive's** compliance with the regulatory compensation limits.

You can download this worksheet at:

executiveorder38.ny.gov/content/guidance



[Executive Compensation Calculation Worksheet](#)

For detailed information about using the **Executive Compensation Calculation Worksheet**, as well as defined administrative expenses limits, please refer to pages 36-44 of the **EO38 Guidance Document**.

Applying for a Waiver

An Individual or entity that qualifies as a **Covered Provider** and exceeds (or expects to exceed) the regulatory limitations under EO38 may submit a waiver application online on the EO38 Website.

In order to submit a Waiver Application, Covered Providers must create an **EO38 Waiver Application User Account**. You can register for an account under the “**WAIVER APPLICATION**” section of the EO38 website at: <http://executiveorder38.ny.gov/content/eo-38-waiver-application>

The **WAIVER APPLICATION** section of the EO38 Website allows you to request a **Waiver Application User Account** and submit Waivers Online.



Waiver Submission

Separate waiver applications must be filed for **Executive Compensation** and **Administrative Expenses**. When filing a waiver for **Executive Compensation**, a separate waiver application must be filed for each executive for whom the Provider seeks a waiver. In addition, separate waivers must be filed for each **Covered Reporting Period** in which the **Covered Provider** fails to meet compliance with EO38 regulations.

Waiver Applications contain two types of questions:

1. Those that require Information calculated using an EO38 Worksheet
2. Questions that require the applicant to explain or provide information pertaining to the calculations made using an EO38 Worksheet and entered in response to a previous question

Once submitted, the Covered Provider will receive a confirmation email, containing the waiver application number, which should be retained by the Covered Provider. The application number will be required in the event that the **Covered Provider** wishes to file an Amended Waiver.

Detailed information about submitting waivers is available on pages 45-57 of the [EO38 Guidance Document](#).

Determination of Non-Compliance

Covered Providers that have not been granted a waiver AND do not meet the **Administrative Expenses** or **Executive Compensation limitations** contained within the EO38 regulations, will be found non-compliant.

A finding of non-compliance first requires a **Covered Provider** to develop and implement a **Corrective Action Plan (CAP)**. If the State determines that the **Covered Provider** has failed to properly implement and complete a **Corrective Action Plan** and remains non-compliant with the limitations of the regulations, the State agencies may then impose penalties on the **Covered Provider**.

Notice of Determination of Non-Compliance

If a **Covered Provider** is determined to be non-compliant with the regulations, a **Notice of Determination of Non-Compliance** - stating the basis for the determination - will be issued to the Covered Provider.

The Covered Provider will be given the opportunity to submit additional or clarifying information within 30 calendar days of the receipt of **Notice of Determination of Non-Compliance**. If the Covered Provider does not submit additional or clarifying information within 30 calendar days, the **Notice of Determination of Non-Compliance** becomes final and the State will issue a **Notice to Cure**.

If the Covered Provider submits additional or clarifying information within the 30-day time period, the information will be reviewed and evaluated by the involved State agencies. There are two possible outcomes of this review:

1. The State agencies determine that the Covered Provider is in compliance with EO38 regulations. In this case, a notice is issued to the Covered Provider indicating that the Covered Provider is in compliance.
2. The State agencies determine that the Covered Provider remains non-compliant. In this case, the **Notice of Determination of Non-Compliance** becomes final and a **Notice to Cure** is issued.

Notice to Cure

Once a determination of non-compliance has been made and finalized, and a **Notice of Determination of Non-Compliance** issued to a Covered Provider, a **Notice to Cure** will be issued to the Covered Provider in writing, articulating the basis for the determination of non-compliance, giving the Covered Provider a defined corrective action period of not less than six months within which to correct the violations identified, and requiring that the Covered Provider submit a Corrective Action Plan within thirty (30) calendar days of receipt of the Notice to Cure.

Corrective Action Plan

A Covered Provider that is not in compliance will receive instructions to submit a Corrective Action Plan in a **Notice to Cure**, after a **Notice of Determination of Non-Compliance** is issued. A **Corrective Action** Plan submitted to the State agencies should include, but may not be limited to, the follow-

1. **A plan that lists the specific actions – including clear, measurable steps – that will be taken by the Covered Provider to correct the identified violations**
2. **A timeline or list of dates on which certain actions/milestones will be completed**
3. **The date on which the Corrective Plan of Action will be fully implemented or completed, and the identified violations cured**

Within thirty (30) calendar days, the State agencies must review and take one of the following actions with regard to the Corrective Action Plan:

1. Approve the Corrective Action Plan
2. Request clarification from the Covered Provider
3. Request alterations to the Corrective Action Plan

If the **Corrective Action Plan** is approved, the State agencies will notify the **Covered Provider** of the approval and inform the Covered Provider of the time period for implementation, which will be six (6) months in duration unless otherwise specified by the State agencies in the notice of approval or in the Corrective Action Plan itself. After the implementation period has concluded, the State agencies may request information from the **Covered Provider** to determine whether the **Corrective Action Plan** was fully and properly implemented.

If the State agencies find that the **Corrective Action** Plan was fully and properly implemented, the matter will be considered closed and no further action on the part of the State agencies or the Covered Provider will be required in regard to the Determination of **Non-Compliance and Notice to Cure**.

Notice of Failure to Cure

If the State agencies find that the Corrective Action Plan was not fully and properly implemented, the State agencies will issue a **Notice of Failure to Cure** to the Covered Provider, articulating the basis for the conclusion that the Corrective Action Plan was not fully and properly implemented, including a statement from the State agencies demonstrating that the totality of the circumstances (including the seriousness of the violations, the nature of the Covered Provider's services, and the Covered Provider's efforts to correct the violations) were taken into consideration, and identifying any additional actions to be taken against the Covered Provider. Such additional actions resulting from a Notice of Failure to Cure may include modifications to the Corrective Action Plan or the CAP's implementation period, or issuance of a **Notice of Sanctions Due to Non-Compliance**.

Notice of Sanctions Due to Non-Compliance

The **Notice of Sanctions Due to Non-Compliance** issued as part of a **Notice of Failure to Cure** will state the violations identified but not corrected, and provide notice of the sanctions that the State agencies intend to impose on the Covered Provider. Such sanctions may include one or more of the following:

1. **Redirection of State Funds/State Approved Payments for Program Services**
2. **Suspension, modification, limitation, or revocation of the Covered Provider’s license(s), certification or permission to provide Program Services**
3. **Suspension, modification, limitation or revocation of contracts or other agreements with the Covered Provider**
4. **Any other lawful actions or penalties deemed appropriate by the State agencies, including letter of reprimand, findings of non-responsibility, referral to investigation or law enforcement officials for potential investigation/legal action.**

Opportunity for Appeal

Within thirty (30) calendar days of a Covered Provider’s receipt of a **Notice of Failure to Cure** and **Notice of Sanctions Due to Non-Compliance**, a Covered Provider may request an Administrative Appeal. Such an appeal request must be submitted in writing, contain a detailed explanation of the legal and factual bases for the Covered Provider’s challenge to the determination, and include any documentation to support the Covered Provider’s position. Such an appeal request will be limited to an administrative review of the record, unless the State agencies seek to impose a sanction for which an administrative hearing is required.

If such a request for appeal is not submitted within thirty (30) calendar days, the **Notice of Failure to Cure** will become final and the sanctions outlined in the **Notice of Sanctions Due to Non-Compliance** will then be imposed on the Covered Provider.

If a request for appeal is submitted within 30 calendar days, the State agencies will perform an administrative review of the record (or, if required by applicable law, provide an administrative hearing) and render a determination on the request for appeal. Once completed, the State agencies will issue a decision on the appeal to the Covered Provider, stating the findings of fact and conclusions of law that support the determination on the appeal. If the Covered Provider is found to be non-compliant pursuant to the decision on the appeal, the sanctions will then be imposed on the **Covered Provider**.

We hope that this Executive Overview has been helpful. We strongly recommend that you review the information provided in the *EO38 Guide*, which is available on the EO38 website at: executive-order38.ny.gov under “GUIDANCE”.

You may also email us your questions by visiting the EO38 Website and clicking on the “CONTACT” menu item.



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