Pursuant to the authority vested in the Commissioner of Health by Section 2808, of the Public Health Law, Subpart 86-2 of Title 10 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:

New subparagraphs (i) and (ii) are added to paragraph (6) of subdivision (m) of section 86-2.40 and paragraphs (7), (8), (9), and (10) of subdivision (m) of section 86-2.40 are amended to read as follows:

(6) Subsequent case mix adjustments to the direct component of the price for rate periods effective after January 1, 2012 shall be made in July and January of each calendar year and shall use Medicaid-only case mix data applicable to the previous case mix period.

(i) For the case mix periods beginning on and after July 1, 2021, the case mix adjustment to the direct component of the price shall be made in January and July of each calendar year and shall use all Medicaid-only case mix data submitted to CMS applicable to the previous six-month period (e.g., April – September for the January case mix adjustment; October – March for the July case mix adjustment).

(7) Case mix adjustments to the direct component of the price for facilities for which facility specific case mix data is unavailable or insufficient shall be equal to the [base year] previous case mix of the peer group applicable to such facility.

(8) The adjustments and related patient classifications for each facility shall be subject to audit review by the Office of the Medicaid Inspector General[.], and/or other agents as authorized by the Department.

(9) [The operator of a proprietary facility, an officer of a voluntary facility, or the public official responsible for the operation of a public facility shall submit to the Department a written certification, in a form as determined by the Department, attesting that all of the "minimum data set" ("MDS") data reported by the facility for each census roster submitted to the Department is complete and accurate.]

For case mix periods beginning on and after July 1, 2021, the operator of a proprietary facility, an officer of a voluntary facility, or the public official responsible for the operation of a public facility shall submit to the Department a written certification, in a form as determined by the Department, attesting that all of the "minimum data set" ("MDS") data reported by the facility and submitted to CMS is complete and accurate.

[(10) In the event the MDS data reported by a facility results in a percentage change in the facility's case mix index of more than five percent, then the impact of the payment of the Medicaid rate adjustment attributable to such a change in the reported case mix may be limited to reflect no more than a five percent change in such reported data, pending a prepayment audit of such reported MDS data, provided, however, that nothing in this paragraph shall prevent or restrict post-payment audits of such data as otherwise provided for in this subdivision.]

REGULATORY IMPACT STATEMENT

Statutory Authority:

Section 2808 of the Public Health Law authorizes the Department to issue regulations relating to rates of reimbursement for nursing homes. The statutory authority for this regulation is contained in subdivision 2-b of section 2808 of the Public Health Law, which authorizes the Department to issue regulations concerning the operating component of rates of Medicaid reimbursement for nursing homes.

Legislative Objectives:

The objective of Public Health Law § 2808 is to enable the Department to set appropriate rates of reimbursement for nursing homes. To this end, the proposed regulations will amend section 86-2.40 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York and codify the Department's revised methodology for establishing nursing home Medicaid rate of payment for patient acuity.

Needs and Benefits:

Current regulations do not specify the amount of data that the Department should use when determining the case mix for nursing homes. The Department has been concerned that past methodologies have not yielded accurate case mix calculations and, for this reason, informed nursing homes that it would begin using larger data sets within the case mix period to determine case mixes, for purposes of calculating rates for periods beginning July 1, 2021. These regulations calculate the case mix adjustment by viewing acuity data for all relevant dates, rather than a single date, which can lead to inaccurate and distorted results.

Additionally, facilities will no longer be required to upload census data separately from the Minimum Date Set ("MDS") data. The streamlining of the MDS process will reduce administrative burdens on the provider and increase accuracy in Medicaid rates of payment.

Finally, current regulations give the Department discretion to cap changes in a facility's case mix index at 5%. The Department does not intend to exercise this discretion and, therefore, is repealing this provision.

Costs:

For those nursing homes where the Department ability to consider all acuity data in its possession results in a case mix that is more accurate, reimbursement rates will be increased or decreased accordingly. For those nursing homes that are already appropriately submitting data that represents the nursing home's actual case mix, there will be no costs associated with these regulations.

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

There will be no additional costs to private regulated parties. The only data requested from providers are standard periodic reports which are already being completed by providers.

Costs to State and Local Governments:

There are no additional costs to the State or local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

There will be no additional mandates as a result of this proposed regulation.

Paperwork:

There will be no additional paperwork as a result of this proposed regulation.

Duplication:

The proposed regulation does not duplicate any existing laws or regulations.

Alternatives:

The option of not issuing these regulations was considered. However, that alternative was rejected, as the Department should use broader samples of data to obtain the most accurate representation of the case mix in nursing homes.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

There is no compliance element to the proposed regulations. The regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

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REGULATORY FLEXIBILITY ANALYSIS

FOR

SMALL BUSINESSES AND LOCAL GOVERNMENTS

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be nursing homes (NH) with 100 or fewer full-time equivalents. Based on recent data collected from nursing homes cost reports statewide, approximately 63 nursing homes were identified as employing fewer than 100 employees. These regulations codify the range of data that the Department uses for determining case mix, which was previously determined as a matter of policy. Additionally, facilities will no longer be required to upload census data separately from the Minimum Date Set ("MDS") data. The streamlining of the MDS process will reduce administrative burdens on the provider and increase accuracy in Medicaid rates of payment. Finally, current regulations give the Department discretion to cap changes in a facility's case mix index at 5%. The Department does not intend to exercise this discretion and, therefore, is repealing this provision.

This rule will have no direct effect on local governments.

Compliance Requirements:

This proposed rule will streamline reporting requirements and reduce administrative burdens for all nursing homes.

The rule will have no direct effect on local governments.

Professional Services:

No additional professional services will be required.

Compliance Costs:

There will be no additional costs to private regulated parties as a result of this rule. The only data requested from providers are standard periodic reports which are already being completed by providers.

Economic and Technological Feasibility:

There are no new economic and technological requirements imposed as a result of this proposed regulation. Use of existing technology will allow small businesses to comply with no additional cost while the streamlined data requirement will reduce costs.

Minimizing Adverse Impact:

This regulation seeks to clarify the data collection process for case mix adjustments in nursing homes rate. All data submitted by nursing homes will be used without requiring a census collection. It will also smooth the rates for facilities allowing for more accurate forecasting. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

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 Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas. In fact, the proposed rule will streamline reporting requirements and reduce administrative burdens for all nursing homes, including those in rural areas.

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 a substantial adverse impact on jobs and employment opportunities.

ASSESSMENT OF PUBLIC COMMENT

1. **Comment**: All three comments raise concerns that the case mix index calculations would be applied retroactively and change the methodology used to determine the case mix adjustment for periods prior to June 30, 2019. LeadingAge New York ("Leading Age") also indicated concerns that the data being used would be from a period prior to the effective date.

   Response: The Department has made a technical change to the regulation to clarify that the case mix calculations will be applied prospectively and will only affect rate periods beginning on July 1, 2021.

2. **Comment**: New York Provider Alliance ("NYPA") and New York State Health Facilities Association ("NYSHFA") commented that the policy within this regulation was adopted without direct consultation or recommendations of a Department-commissioned Workgroup to advise on case mix calculations, which they suggested would be counter to the statutory requirements.

   Response: The Residential Health Care Facilities Case Mix Adjustment Workgroup's ("Workgroup") scope as established in Section 9, Part G of Chapter 57 of the Laws of 2019 was:

> ... The workgroup shall review recent case mix data and related analyses conducted by the department with respect to the department's implementation of the July 1, 2019 change in methodology, the department's minimum data set collection process, and case mix adjustments authorized under subparagraph (ii) of paragraph (b) of subdivision 2-b of section 2808 of the public health law. Such review shall seek to promote a higher degree of accuracy in the minimum data set data, and target abuses. The workgroup may offer recommendations on how to improve future practice regarding accuracy in the minimum data set collection process and how to reduce or eliminate abusive practices. In developing such recommendations, the workgroup shall ensure that the collection process and case mix adjustment recognizes the appropriate acuity for residential health care residents. The workgroup may provide recommendations regarding the proposed patient driven payment model and the administrative complexity in revising the minimum data set collection and rate promulgation processes. The commissioner shall not modify the method used to determine the case mix adjustment for periods prior to June 30, 2019. Notwithstanding any changes in federal law or regulation relating to nursing home acuity reimbursement, the workgroup shall report its recommendations no later than June 30, 2019.

Pursuant to its statutory authority, the Workgroup provided recommendations concerning the implementation of the change in case mix adjustments to Medicaid rates of payment

of residential health care facilities that were expected to take effect July 1, 2019. The Department reviewed each of the Workgroup's recommendations and none of the suggested policies presented to or considered by the Department would provide a more accurate measure of patient acuity as compared to utilizing all patient assessments over the most recent six-month period available for rate setting. With respect to recommendation to use the RUG-IV patient classification system instead of the RUG-III system, the Department notes that the RUG-III system is required by Section 2809 (2-b)(b)(ii) of the Public Health Law. Accordingly, the Department has determined that no changes to the regulation are needed.

3. **Comment**: One comment from LeadingAge asserted that the proposed methodology is at odds with the statutory language requiring that the State provide the Workgroup with case mix data and analysis. Similarly, NYSHFA asserted that the State had based the change on unsubstantiated allegations of fraud around case mix data submission.

   Response: The Department disagrees with the premise on which these comments were based. The Department shared relevant and available data and analyses with the Workgroup at meetings held in May 2019 and June 2019. The data that was shared can be found at this site: https://www.health.ny.gov/facilities/long_term_care/reimbursement/nhaw/ . Nursing home-specific case mix data and related analysis are governed by a Data Use Agreement with the Centers for Medicare & Medicaid Services ("CMS"), and despite seeking approval from CMS to share this specific data, the Department did not receive a response

from CMS as to whether such data can be shared by the Department with nursing homes or their associations. Instead, the Department offered that any one or more of the nursing homes could provide their own data to the Workgroup for discussion and analysis. No nursing home in the Workgroup was willing to share its data. In the absence of CMS approval to share nursing home data, and of any data offered by nursing homes to inform the Workgroup process, additional data beyond what was provided in May 2019 and June 2019 could not be shared. In any event, as the Department's computations used data submitted by the nursing homes to CMS, each home has access to its own data.

The Department also demonstrated--through the data that was shared—that, in aggregate, the Statewide average acuity scores ranged from a low of 1.02, in April 2018, to a high of 1.30, in July 2018. Additionally, the percentage of patients receiving higher acuity rehabilitation services, as reported by nursing homes, more than tripled, from 17 percent in April 2018, to 60 percent in July 2018. These swings demonstrate that the case mix values are higher during the dates used for rate setting purposes than those dates that are not used, so the move to include all days would more accurately capture the true acuity of those being served by including all measurements of their need. Accordingly, the Department has determined that no changes to the regulation are needed.

4. **Comment**: LeadingAge commented that the State failed to properly notify the public that this regulation was under consideration, and that the Regulatory Agenda published in the January 29, 2020 State Register did not include this item.

Response: The regulation was proposed consistent with all notice requirements. Although publication in the Regulatory Agenda is not a prerequisite for publishing a regulation, the Department endeavors to include all regulations in the Regulatory Agenda. See State Administrative Procedure Act section 202-d(2)(a). The Regulatory Agenda is also intended for future intended publications. Accordingly, simultaneous publication in the Agenda would have been redundant. Finally, the Department's plans were clearly communicated to facilities through Budget actions and communications with the Workgroup.

5. **Comment**: One comment from LeadingAge asserted that the removal of the five percent constraint would add to the rate volatility and is contrary to State law.

Response: Section 86-2.40 of the regulations provides that, in the event that case mix data reported by the facility results in a percentage change of more than five percent of the facility's case mix index, the State "may" limit the impact to five percent. Although this has been prior practice, the withhold of funds until the completion of an audit has resulted in upwards of three years delay in providers and/or the State receiving funds owed to them. Eliminating this practice will reduce ongoing liabilities faced by both the State and providers and is consistent with statute, as it does not eliminate, nor reduce the ability of the Office of the Medicaid Inspector General ("OMIG") to audit case mix data. Accordingly, the Department has determined that no changes to the regulation are needed.

6. **Comment**: LeadingAge and NYPA both indicated concerns relating to lost revenue, which could also impact quality.

Response: Facilities are expected to meet their obligation to protect residents and maintain quality of care. The Department has carefully considered the appropriate methodology for determining reimbursement rates to facilities for providing such care. Accuracy of acuity data is the most critical component in the reimbursement of acuity. Without accurate acuity measurements, it is probable that reimbursement levels are also not appropriate. In the current methodology, acuity adjustments are calculated using only a single assessment submitted by the nursing home to CMS during the data collection period rather than all assessments submitted to CMS as required by federal rules. Statewide data presented during Budget negotiations, and to the Workgroup members at the first meeting of the Workgroup, demonstrated that the use of a single assessment to compute the acuity adjustment has not provided an accurate measure of acuity for rate adjustment purposes, because the assessments submitted by nursing homes in some cases vary widely, both in aggregate, on a facility-specific basis and at the resident-specific level. The inclusion of all assessments submitted by nursing homes will achieve a higher degree of accuracy in case mix reimbursement, and the reimbursement will be appropriate for the acuity levels. Accordingly, the Department has determined that no changes to the regulation are needed.

7. **Comment**: LeadingAge and NYPA expressed concerns related to additional data submissions and lack of validation of the data by providers.

   Response: Current CMS requirements include a submission of case mix data for each individual being served every 92 days. This submission is a federal requirement. Using the full complement of submitted data, as opposed to data from a single point in time, can *only* provide a more thorough picture of an individual's acuity for reimbursement purposes. As this data is submitted by the provider already, it does not represent an additional burden to submit nor to validate, as it is validated by the provider prior to their submission to CMS. Accordingly, the Department has determined that no changes to the regulation are needed.

8. **Comment**: NYSHFA commented that the adoption of using all acuity measures had not been approved by CMS.

   Response: CMS typically reviews and approves State Plan Amendments by the end of the quarter in which it becomes effective. The Department believes that CMS will approve the associated State Plan Amendment by the end of the third quarter. Accordingly, the Department has determined no changes to the regulation are needed.