Pursuant to the authority vested in the Commissioner of Health by Public Health Law, Section 2808 17(c), Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, section 86-2.14 (b) and (f) are amended to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 86-2.14 (b) is amended as follows:

(b) An application by a residential health care facility for review of a certified rate is to be submitted on forms provided by the department and shall set forth the basis for the appeal and the issues of fact. Documentation shall accompany the application, where appropriate, and the department may request such additional documentation as determined necessary. An application based upon error shall be submitted within the time limit set forth in section 86-2.13 of this Subpart. Beginning with appeals for rate year 1983 and, on an annual basis thereafter for all subsequent rate year appeals, the commissioner shall act upon all properly documented applications for a rate year based upon errors within one year of the end of the 120-day period referred to in section 86-2.13(a) of this Subpart. The commissioner shall act upon all other properly documented applications for a rate year appeal submitted pursuant to paragraphs (1) and (3)-(7) of subdivision (a) of this section within one year of the end of the aforementioned 120-day period or the receipt of such applications, whichever date is later. [In the event the department requests additional documentation, the one-year time limit shall be extended for a mutually agreed upon time period for receipt of the documentation established by the commissioner in conjunction with the residential health care facility. The deadline will be set according to the nature and quantity of documentation necessary.] <u>In the event the department requests additional documentation, if the additional documentation requested is not received</u>

within 45 days from the request date, then the rate appeal shall be deemed denied by the commissioner. The one-year time limit shall not apply to rate appeals submitted pursuant to section 86-2.13(b) of this Subpart.

(1) The affirmation or revision of the rate upon such staff review shall be final, unless within 30 days of its receipt a hearing is requested, by registered or certified mail, before a rate review officer on forms supplied by the department. The request shall contain a statement of the factual issues to be resolved. The facility may submit memoranda on legal issues which it deems relevant to the appeal.

(2) Where the rate review officer determines that there is no factual issue, the request for a hearing shall be denied and the facility notified of such determination. No administrative appeals shall be available from this determination. The rate review officer, where they determine that there is factual issue, shall issue a notice of hearing establishing the date, time and place of the hearing and setting forth the factual issues as determined by such officer. The hearing shall be held in conformity with the provisions of Public Health Law, section 12-a and the State Administrative Procedure Act.

(3) The recommendation of the rate review officer shall be submitted to the Commissioner of Health for final approval or disapproval and recertification of the rate where appropriate.

(4) The procedure set forth in this subdivision shall apply to all applications for rate reviews which are pending as of April 1, 1978. Rate appeals filed prior to April 1, 1978 will not be required to be resubmitted subsequent to April 1, 1978.

Section 86-2.14 (f) is amended as follows:

(f) [Reserved] (1) For purposes of subdivision (b) of this section, the commissioner shall establish an appeal review priority for all properly documented rate year appeals from providers experiencing financial distress, defined as having a negative operating margin based on the most recent cost report data available.

(2) Appeals from providers experiencing financial distress shall be prioritized by taking into account factors including, but not limited to: operating loss divided by patient days, magnitude of appeal as a percentage of annual revenue, and the number of rate years potentially impacted by the appeal, and proceeding through the prioritized list until all appeals of qualified providers have been processed. Rate appeals from providers who are not experiencing financial distress will be processed after the completion of rate appeals from providers experiencing financial distress and shall be prioritized by taking into account factors including, but not limited to: operating profit divided by patient days, magnitude of appeal as a percentage of annual revenue, and the number of rate years potentially impacted by the appeal.

(3) Rate Appeals Cap. The department may process all rate appeals up to the annual monetary cap set in paragraph (b) of subdivision (17) of section 2808 of the Public Health Law. If the department reaches the monetary cap without adjudicating all appeals for that year the remaining appeals may be processed in subsequent years.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The statutory authority for this regulation is contained in Public Health Law §2808 subparagraph 17 (c), which states that the commissioner shall promulgate regulations, and may promulgate emergency regulations, establishing priorities and time frames for processing Nursing Home Facility rate appeals.

Legislative Objectives:

To establish fair and appropriate time frames and priorities for processing rate appeals.

Needs and Benefits:

This clarification allows for the Department to act more efficiently in prioritizing and processing Nursing Home Facility rate appeals. By reducing the allowable time to submit additional documentation for appeals the Department will be able to reduce the review and processing time. By establishing an appeal review priority based on financial distress, the Department will have an established methodology for prioritizing appeals. Using the operating margin from the most recent cost report data is an accurate and measurable indicator for financial distress.

Costs:

There is no financial impact or cost of this proposed regulation change.

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

There will be no costs to regulated entities for this change in regulation.

C**osts to State and Local Governments:**

There will be no costs to the State or Local Governments for this change in regulation.

Costs to the Department of Health:

There is no financial impact or cost of this proposed regulation change.

Local Government Mandates:

There are no local government mandates due to this change in regulation.

Paperwork:

There will be a change in the allowable time that facilities can submit additional documentation for filed rate appeals. This regulation change requires that additional information be submitted to the Department within 30 days from the request date.

Duplication:

There is no duplication, overlap, or conflict with any other rules or legal requirements by State and Local governments.

Alternatives:

A court decision directed the Department to outline its process for expediting its rate appeal process.

Federal Standards:

This regulation does not exceed any minimum standard of the federal government for the same or similar subject areas.

Compliance Schedule:

The residential health care facilities are already in compliance with reporting requirements. The regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

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STATEMENT IN LIEU OF

REGULATORY FLEXIBILITY ANALYSIS

No Regulatory Flexibility Analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

STATEMENT IN LIEU OF

RURAL AREA FLEXIBILITY ANALYSIS

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

STATEMENT IN LIEU OF

JOB IMPACT STATEMENT

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

ASSESSMENT OF PUBLIC COMMENT

The New York State Department of Health (NYSDOH or "the Department") published a Notice of Proposed Rulemaking in the State Register on October 25, 2023, regarding amendments to Section 86-2.14 of Title 10 New York Codes, Rules and Regulations (NYCRR) pertaining to Nursing Home Rate Appeal Prioritization guidelines. The Department received two public comments from Associations**.** These comments and the Department's responses are summarized below.

Comment: NYSHFA (New York State Health Facilities Association) indicates their belief that the root cause of the rate appeals backlog is the lack of adequate staff within DOH and a loss of institutional rate-setting memory due to retirements. The commenter is concerned that these staffing concerns, compounded by the Legislative mandated appeals cap that has led to the backlog, places nursing homes in a difficult position. At the same time, revenue that could legitimately be due to them has been delayed at the same time that they have additional expenses resulting from staffing mandates imposed by the Legislature and the Department. NYSHFA requests that realistic interim goals should be established with benchmarks that the Department must meet, including the number of appeals processed and the amount of dollars awarded, with the ultimate goal of achieving the one-year deadline within the next couple years. NYSFHA also raised a concern about the 30-day timeframe to respond to a request for additional documentation from the Department.

Response: The Department of Health, and the State in general, continue to address staffing concerns. Despite this challenge, the Department continues to address the backlog of appeals

which has been noticeably reduced in the past few years. The Department has processed thousands of appeals in the past few years, which is a significant increase from the number of appeals that were historically processed. The Department acknowledges the commenter's concerns and continues to increase the number of appeals processed annually. However, the Department recognizes that a 30-day timeframe for responding to a request for additional documentation may be constrained and has proposed a change to 45 days in the regulation as a result of this comment.

Comment: The association of LeadingAge NY mentions support for prioritizing appeals based on the financial condition of the facility but raises concern that relying exclusively on the operating margin to define financial distress and using per-day operating income may be overly formulaic. They suggest that the magnitude of the appeal, as well as its age, may be important considerations. They indicate that appeals from a distressed provider in a region where costs and Medicaid rates are lower could be overshadowed by appeals from facilities in high-cost areas if per-day loss is the only basis for prioritization. They recommend a proportional loss calculation for consideration in this situation. They also request more clarity in how existing appeals would be sequenced in subsequent years when any annual cap is reached. LeadingAge also raised a concern about the 30-day timeframe to respond to a request for additional documentation from the Department.

Response: The Department understands the commenter's concerns, but notes that a broad expansion of the criteria for appeal prioritization would further complicate the processing of appeals and increase the time for review and processing of appeals, instead of reducing it. However, the Department recognizes the risk of an approach that is too rigid and formulaic and

has proposed a modest change to the regulation as a result of these comments. The comments requested additional time for providers to respond to Department questions after Department review of submitted appeals. This modest change increases the response time from 30 to 45 days. It is the Department's priority to process all current year appeals within the year while remaining under the annual appeal cap limitation. Additionally, the Department will continue to process historical appeals as timing and the cap allow. The Department understands the commenter's concerns and continues to increase the number of appeals processed annually. Additionally, the Department recognizes that a 30-day timeframe for responding to a request for additional documentation may be constrained and has proposed a change to 45 days in the regulation as a result of this comment.