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Regulatory
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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) citation	12 VAC 30-20-500, 520, 540, and 560
Regulation title	Eligibility and Appeals
Action title	Appeal Regulation Updates
Date this document prepared	

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.

- 1) Please explain why this is an emergency situation as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an agency may adopt regulations in an “emergency situation”: (A) upon consultation with the Attorney General after the agency has submitted a request stating in writing the nature of the emergency, and at the sole discretion of the Governor; (B) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of Subdivision A.4 of §

2.2-4006; or (C) in a situation in which an agency has an existing emergency regulation, additional emergency regulations may be issued as needed to address the subject matter of the initial emergency regulation provided the amending action does not extend the effective date of the original action. This suggested emergency regulation meets the standard at *COV* 2.2-4011 (B) as discussed below.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Appeals Regulations Update 12VAC 30-20-500, 520, 540 and 560) and also authorize the initiation of the permanent regulations via the promulgation process provided for in §2.2-4007.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority. [Please cite the authority you are using to promulgate an emergency regulation.]???

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, §§ 32.1-324 and 325, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Chapter 3 of the 2012 *Acts of Assembly*, Item 307 III states:

The Department of Medical Assistance Services, related to appeals administered by and for the department, shall have authority to amend regulations to:

- (i) Utilize the methods of transmittal of documentation to include email, fax, courier and electronic transmission.*
- (ii) Clarify that the day of delivery ends at normal business hours of 5:00 pm.*
- (iii) Eliminate an automatic dismissal against DMAS for alleged deficiencies in the case summary that do not relate to DMAS's obligation to substantively address all issues specified in the provider's written notice of informal appeal. A process shall be added, by which the provider shall file with the informal appeals agent within 12 calendar days of the provider's receipt of the DMAS case summary, a written notice that specifies any such alleged deficiencies that the provider knows or reasonably should know exist. DMAS shall have 12 calendar days after receipt of the provider's timely written notification to address or cure any of said alleged deficiencies. The current requirement that the case summary address each adjustment, patient, service date, or other disputed matter identified in the provider's written notice of informal appeal in the detail set forth*

in the current regulation shall remain in force and effect, and failure to file a written case summary with the Appeals Division in the detail specified within 30 days of the filing of the provider's written notice of informal appeal shall result in dismissal in favor of the provider on those issues not addressed by DMAS.

- (iv) Clarify that appeals remanded to the informal appeal level via Final Agency Decision or court order shall reset the timetable under DMAS' appeals regulations to start running from the date of the remand.*
- (v) Clarify the department's authority to administratively dismiss untimely filed appeal requests.*
- (vi) Clarify the time requirement for commencement of the formal administrative hearing.*
- (vii) The Department of Medical Assistance Services shall have authority to promulgate regulations to implement these changes within 280 days or less from the enactment date of this act.*

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this regulatory action is to comply with the legislative mandate and address recent case law and administrative decisions that have created the need to clarify existing appeals processes and codify emerging processes made urgent by court and administrative case decisions and the increasing volume of appeals generated by provider audits and other utilization review mandates. Specifically, recent case decisions such as VA Department of Medical Assistance Services v. Patient Transportation System, 58 Va.App.328, 709 S. E. 2d 188 (2011), and its predecessor appeal in circuit court have necessitated clarifying the means by which documentation can be transmitted and the manner in which alleged deficiencies in case summaries can be addressed. The volume of appeals has left outdated appeal timetables established a decade ago and require immediate clarification and updating to reflect the realities that the hearing officers and all parties to the appeal process face in attempting to meet outdated timelines that were originally established when the volume of appeals was less than 1/3 the current volume.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

This regulation is necessary to comply with the requirements set out in Chapter 3 of the 2012 *Acts of Assembly*, Item 307, III, and are not expected to have direct impact on the health, safety, or welfare of the citizens of the Commonwealth.

The Code of Virginia 32.1-325.1 requires the agency to provide the right of appeal to Medicaid service providers and to do so within established timeframes that are more specifically contained in the regulations subject to this regulatory action. The mandate must be fulfilled and in order to do so, the timelines and requirements must adapt to and reflect the growing volume and complexity of appeals over time. Protecting the agency's right to collect overpayments of public funds, while assuring the provider's right to a timely appeal, requires clarifying existing processes and codifying processes that court and administrative proceedings have placed in practice to deal with the increasing volume of appeals. It is in the interest of all parties to establish clarity and to amend the appeal regulation to reflect current needs and practices.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

The section(s) of the State Plan for Medical Assistance that are affected by this action are 12 VAC 30-20-500, 520, 540, and 560 (Administration of Medical Assistance Services).

This change specifically addresses the DMAS timelines and specification for filing required documentation, including the sufficiency of the contents of Case Summaries; and to clarify the Agency’s authority to administratively invalidate untimely filed appeals.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
12 VAC 30-20-500		Current requirements do not define how documentation is to be transmitted.	Add the definition of “Transmit”. This definition provides that documentation can be sent by means of the U.S. Postal Service, courier or other hand delivery, facsimile, electronic mail or electronic submission.
12 VAC 30-20-500		Current requirements do not define the term "Administrative Dismissal".	Add the definition of "Administrative Dismissal" which means a dismissal that requires only the issuance of a decision with appeal rights but that does not require the submission of a case summary or any further proceedings. Term Clarification: "transmit" inserted and "mail" deleted to conform to amended language and definitions throughout regulations.

<p>12 VAC 30-20- 520</p>		<p>Sets parameters for daily activity but does not currently define normal business hours or the practice to be followed when the agency is open only a partial day.</p> <p>Current requirements do not indicate the specific time that the day of delivery ends.</p>	<p>In Subsection C insert the term "transmit" in place of the term "mail" and adjust references accordingly to conform to amended language and definitions throughout the regulations.</p> <p>Subsection E clarifies that its provision (extending Appeal deadlines when DMAS is closed) also applies to days that DMAS is 'partially closed.'" There are times when DMAS is unexpectedly closed mid-day by reason of weather, holiday leave or other reasons. Providers and DMAS outside contractors are often unaware of early closing and should not be penalized if they cannot deliver documents that are on deadline. This amendment clarifies that the extension due to DMAS closure also pertains to partial day closures.</p> <p>Subsection I clarifies that day of delivery ends at normal agency business hours of 5:00 pm.</p>
<p>12 VAC 30-20- 540</p>		<p>Sets forth the requirements for processing an informal appeal.</p> <p>Current requirements do not address the issue of time periods when appeals are</p>	<p>Subsection A. is being amended to clarify that the notice of appeal must specify the issues to be addressed and to clarify that notices of appeal not filed within the time limits set forth in the regulations shall be administratively invalidated as untimely filed. Failure to clarify the Agency's authority to administratively dismiss untimely filed appeals has the unintended and unexpected result of causing the Agency to expend resources in processing appeals that were filed beyond the regulatory deadline for filing. The invalidation will carry further appeal rights, should the provider wish to challenge the invalidation and present evidence at a hearing to establish that its appeal was timely filed.</p> <p>Case Summary obligations are clarified and automatic entry of default against DMAS with no opportunity to cure defects is eliminated for alleged non-substantive deficiencies. A process is set forth whereby providers can raise objection to alleged non-substantive deficiencies and the agency can have a fair opportunity to address the objection or cure the defects.</p> <p>Added to Subsection G that whenever an informal appeal is required pursuant to a remand by court order, Final Agency</p>

		<p>remanded back to the Appeals Division.</p>	<p>Decision, agreement of the parties or otherwise, all time periods set forth in this 12 VAC 30-20-540 shall begin to run effective with the date upon which the remand was ordered, unless otherwise specified within the order. To clarify and thus eliminate confusion as to how the timetables in these regulations shall be adjusted for both parties when cases are remanded for further processing.</p>
<p>12 VAC 30-20- 560</p>		<p>Sets forth the requirements for processing a formal appeal.</p> <p>Current requirement deadline is 30 days for the parties' submission of "exceptions" to the Hearing Officer's recommended decision.</p>	<p>In Subsection A. add "that identifies the issues being appealed" to conform to amended language and clarification.</p> <p>In Subsection B insert "transmit" and delete "exchange" to conform to amended language and definitions throughout the regulations.</p> <p>Subsections C and E are being amended to clarify the timeline for commencement of formal appeals. It codifies current practice of commencement and extension of 45 day timeline by mutual consent of the hearing officer and all parties. It authorizes the Hearing Officer to adjust/truncate the parties' briefing schedules and requires Hearing Officer's decision to be issued within the timetable required by law.</p> <p>Subsection G amends the deadline for the parties' submission of "exceptions" to the Hearing Officer's Recommended Decision from the current 30 days to 14 days. This shortens the timeline for the filing of exceptions, to give the Agency needed additional time to review and address exceptions and to discuss the Final Agency Decision draft with the Agency Counsel.</p>

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

Agency action on appeals is governed by the Agency's regulations and the purpose and needs described herein. Other alternatives do not exist and this regulatory action is the most cost-effective manner to address the identified purpose and need.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

Please also indicate, pursuant to your Public Participation Guidelines, whether a panel has been used in the development of the emergency regulation and whether it will also be used in the development of the proposed regulation.

The agency/board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to **Samuel Metallo, Appeals Division, DMAS, 600 E. Broad Street, Suite 1300, Richmond, VA 23219, 804 786-1501, fax 804 371-8491, Samuel.Metallo@dmas.virginia.gov**. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public meeting will not be held pursuant to an authorization to proceed without holding a public meeting.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment nor directly increase or decrease disposable family income.