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

<b>Agency name</b>	DEPT. OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation</b>	12VAC30-120-1600 through 12VAC30-120-1699
<b>Regulation title</b>	Alzheimer's Assisted Living (AAL) Waiver
<b>Action title</b>	Establish an assisted living waiver for individuals with Alzheimer's and related dementias
<b>Document preparation date</b>	

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 review ([www.townhall.state.va.us/dpbpages/apaintro.htm#execreview](http://www.townhall.state.va.us/dpbpages/apaintro.htm#execreview)) and the Virginia Registrar of Regulations ([legis.state.va.us/codecomm/register/regindex.htm](http://legis.state.va.us/codecomm/register/regindex.htm)), pursuant to the Virginia Administrative Process Act ([www.townhall.state.va.us/dpbpages/dpb\\_apa.htm](http://www.townhall.state.va.us/dpbpages/dpb_apa.htm)), Executive Orders 21 (2002) and 58 (1999) ([www.governor.state.va.us/Press\\_Policy/Executive\\_Orders/EOHome.html](http://www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html)), and the *Virginia Register Form, Style, and Procedure Manual* ([http://legis.state.va.us/codecomm/register/download/styl8\\_95.rtf](http://legis.state.va.us/codecomm/register/download/styl8_95.rtf)).

### Preamble

*The APA (Section 2.2-4011) states that an "emergency situation" is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.*

- 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 "emergency situation" is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date. This suggested emergency regulation meets the standard at COV 2.2-4011(ii) as discussed below.

The Department of Medical Assistance Services was directed in Chapter 951 of the *2005 Acts of the Assembly*, Item 326 SS to develop a home and community-based care waiver for individuals with Alzheimer’s and related dementias who choose to live in an assisted living facility:

“SS. 1. The Department of Medical Assistance Services shall develop, in conjunction with affected constituents, a waiver pursuant to §1915(c) of the Social Security Act (42 U.S.C. 1396n) from the Centers for Medicaid and Medicare Services to establish a home and community-based care waiver for persons with Alzheimer’s and related dementias (“Alzheimer’s/Dementia Assisted Living Waiver”). The Alzheimer’s/Dementia Assisted Living Waiver shall be for those individuals who meet the functional criteria for admission to a nursing facility, who have a diagnosis of Alzheimer’s or a related dementia, and who are eligible to receive an Auxiliary Grant. The waiver enrollment for the first year of such program shall be limited to an enrollment of 200 individuals who choose to move to an assisted living facility.... The agency shall promulgate emergency regulations to become effective within 280 days or less from the enactment of this act.”

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Waiver Services: Home and Community Based Services Alzheimer’s Assisted Living Waiver and also authorize the initiation of the permanent rule promulgation process provided for in § 2.2-4007 of the *Code of Virginia*.

**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 action is to establish a new waiver program to provide additional services to residents of assisted living facilities who receive an auxiliary grant, who meet nursing facility criteria, who are age 55 and older and who have a diagnosis of Alzheimer’s or a related dementia. Related dementia is defined as an individual with a diagnosis of Dementia of the Alzheimer’s Type as defined by the Diagnostic and Statistical Manual of Mental Disorders. Individuals eligible to be placed on the AAL Waiver are currently either (a) remaining at home where a spouse or adult child is typically serving as primary care giver; (b) residing in an assisted living facility possibly without the benefit of specialized services, which are not provided for in the auxiliary grant payment; or (c) residing in a more restrictive setting such as a nursing facility. Through the proposed Alzheimer’s Assisted Living (AAL) Waiver, recipients would be able to receive an appropriate level of care within special care units of assisted living facilities.

**Legal basis**

*Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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, 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.

## Substance

*Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons why the regulation is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.*

The 2005 General Assembly through Item 326.SS of the Appropriations Act mandated that the Director of the Department of Medical Assistance Services (DMAS) develop a 1915(c) Medicaid-funded Home and Community-Based Waiver for individuals with Alzheimer's or a related dementia. DMAS formed an advisory group of stakeholders to collaborate on the development of the waiver proposal. The advisory group consisted of representatives of the Virginia Department of Social Services, the Virginia Department for the Aging, State Long Term Care Ombudsman, the Alzheimer's Association, the Virginia Association of Non-Profit Homes for the Aging, the Virginia Health Care Association, Virginia Association of Area Agencies on Aging, Virginia Association for Home Care, Virginia Association of Homes for Adults, Virginia Association of Personal Care Providers, Sunrise Senior Living, Sentara Life Care Corporation, two caregivers of individuals with Alzheimer's, and DMAS. DMAS submitted a report to the Governor and the Chairman of the Joint Commission on Health Care in October 2004.

New regulations containing the policy and procedures for the AAL Waiver were developed from input that stakeholders gave in the development of the report. The regulations are contained in seven new sections under 12VAC30-120, Department of Medical Assistance Services, Waivered Services. The seven sections are: 12VAC30-120-1600 which contains definitions of AAL Waiver terms; 12VAC30-120-1610 which outlines individual eligibility requirements; 12VAC30-120-1620 which defines covered services under the AAL Waiver, 12VAC30-120-1630 which outlines general requirements for home and community-based participating providers; 12VAC30-120-1640 which defines participation standards for AAL waiver services participating providers; 12VAC30-120-1650 which outlines DMAS payment for services; and, 12VAC30-120-1660 which outlines DMAS utilization review of the AAL Waiver.

The AAL Waiver covers only those individuals who: have a diagnosis of Alzheimer's or a Related Dementia; are 55 years of age or older; choose to live in an assisted living facility; and receive an Auxiliary Grant. By providing specialized services to eligible individuals living in an assisted living facility, the AAL Waiver is being developed as an alternative to nursing facility placement. Individuals eligible to be placed on this Waiver are currently either: Remaining at home where a spouse or adult child is typically serving as primary care giver; residing in an assisted living facility possibly without the benefit of specialized services, which are not provided for in the auxiliary grant payment; or residing in a more restrictive setting such as a nursing facility. Through the AAL Waiver, recipients would be able to receive an appropriate level of care within special care units of assisted living facilities.

While individuals admitted to the AAL Waiver will receive services in assisted living facilities (ALF), it is important to note that individuals must also meet nursing facility admission criteria in order to receive AAL Waiver services and be diagnosed with Alzheimer's or Dementia of the Alzheimer's Type. Therefore, while current ALF regulations meet the requirements for people at the regular assisted living level of care they are not deemed to be sufficient to meet the health and welfare requirements for a Medicaid Waiver. The additional regulations are necessary to establish sufficient

safeguards for this vulnerable population. Wherever possible, DMAS has worked to make these regulations consistent with the ALF regulations maintained by the Department of Social Services.

The regulations are necessary to have operational authority for the waiver, which is projected to start September 1, 2005. The effective date is contingent upon CMS approval of Virginia's application for the waiver.

### 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.*

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These regulations were developed by DMAS based on the final report prepared by the advisory group for the AAL Waiver. The choices made regarding all aspects of this program were based upon consideration of the health and safety for the targeted population being served and input by the advisory group. Due to the specific mandate of the General Assembly, and the specific comments of the advocacy group, there were no alternatives to this proposed regulatory action.

### Family impact

*Please assess the impact of the emergency regulatory action on the institution of the family and family stability.*

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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. The AAL Waiver will have a positive impact on families. By providing AAL Waiver services, the waiver will provide a less restrictive alternative to nursing facility placement for those families caring for a family member with Alzheimer's.