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Proposed Regulation
Agency Background Document

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30-90
Regulation title	Methods and Standards for Establishing Payment Rates-Long Term Care Services: Transition to New Capital Payment Method
Action title	Ownership Criteria for Fair Rental Value
Document preparation date	

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (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), and the *Virginia Register Form, Style and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

Presently, the Nursing Home Payment System does not specify a particular period of ownership and non-chain affiliation as criteria for qualifying for the exemption from the transition methodology. The purpose of the exemption is to enable small nursing home providers (one or two health care facilities) to more easily sell their facilities and leave the nursing home business by allowing the purchaser of these facilities to benefit from the full Fair Rental Value methodology.

The proposed revision to the regulation at 12 VAC 30-90-29 would require a three year period of ownership and operation by a non-chain or small-chain provider prior to the sale of that nursing facility in order for that facility, after the sale, to qualify for the exemption from the transition methodology of capital cost reimbursement and instead go immediately to the full Fair Rental Value methodology (FRV) of capital cost reimbursement.

Basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the 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 (BMAS) the authority to administer and amend the Plan for Medical Assistance. The Code also provides, in the Administrative Process Act (APA) §§ 2.2-4007 and 2.2-4013, for this agency's promulgation of proposed regulations subject to the Governor's review.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This proposed regulatory action is not expected to have any affect on the health, safety, or welfare of either the citizens of the Commonwealth or of Medicaid recipients. This amendment proposes to clarify the necessary criteria to include a specified period of ownership and non-chain affiliation of a nursing facility in order for that facility to qualify for immediate conversion to the full Fair Rental Value methodology of capital cost reimbursement after the facility's sale. This revision will help prevent the use of questionable transactions by chain or chain affiliated facilities to attempt to convert to the full Fair Rental Value methodology. Qualifying quickly for conversion to the full FRV is potentially lucrative to nursing home owners and could encourage the churning sales of facilities.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

The section of the State Plan for Medical Assistance affected by this suggested change is Methods and Standards for Establishing Payment Rates-Long Term Care Services (Attachment 4.19-D, Supplement 1 (12 VAC 30-90-29)).

The existing regulations, effective July 1, 2002, provide for a gradual 10-year transition to the Fair Rental Value (FRV) methodology of determining capital cost reimbursement from the reimbursement of actual depreciation and interest costs incurred. As a general rule, the FRV methodology will increase reimbursement for older facilities that have reduced interest and depreciation expenses. These regulations also provide for an exemption from the transition period that allows certain facilities to convert to the full FRV immediately after the sale of a facility. The facilities that qualify for the exemption are those that are owned and operated by an individual or individuals, and/or by a chain consisting of no more than two health care facilities. This provision applies to small providers who are selling their facilities, and, in particular, was originally provided to help small providers get out of the nursing home business as their personal circumstances changed. The difference between the capital cost per day under full FRV as compared to the current transition methodology can range from no change up to $10.00 per Medicaid day. For a typical 120-bed facility with 30,000 Medicaid days, this could amount to as much as $300,000 additional reimbursement for one year. The ability to immediately convert to the full FRV methodology could increase the marketability of an older facility, because the purchaser can expect to realize an immediate increase in capital reimbursement under the full FRV methodology.

To qualify for the existing exemption, any sale must be bona fide.

Recent inquiries have been received regarding whether the immediate conversion to the full FRV methodology exemption could apply to sales by chain providers structured primarily to take advantage of the exemption. For example, if the ultimate sale is essentially between two chain providers, but structured to include an intermediate sale to a non-chain entity that would own and operate the facility briefly, and then resell the facility to the other chain provider, requesting, in the process, immediate conversion to the FRV methodology upon the second sale, the exemption would not apply. As stated previously, where the sale is not a "bona fide" sale, the exemption would not be available, and therefore, the transaction described above would not qualify for the exemption.

Nevertheless, DMAS believes that the suggested revisions, a minimum holding period as a non-chain or small-chain provider, may be necessary to limit potential abuses of the exemption. This holding period requirement, however, would not obviate the requirement that any sale transaction be a bona fide sale. DMAS is proposing to require a minimum holding period, as a non-chain affiliated facility, of three years by an individual or individuals or small-chain (no more than two facilities) owners and sellers of a nursing facility in order for the sale to result in the reimbursement of capital costs, after the sale, under the full Fair Rental Value methodology. As previously stated, the purpose of this change is to clarify that this exemption is available only to those few small (*i.e.* no more than a two health care facility chain) providers who have a need to sell in order to get out of the nursing home business. Further, this change will provide DMAS an objective standard by which it can more readily identify short-term, questionable ownership transactions (churning sales) that are intended to inappropriately claim the exemption.

Issues

Please identify the issues associated with the proposed regulatory action, including:
1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
2) the primary advantages and disadvantages to the agency or the Commonwealth; and
3) other pertinent matters of interest to the regulated community, government officials, and the public.
If there are no disadvantages to the public or the Commonwealth, please indicate.

There would be no advantage or disadvantage to the general public. This regulatory revision would preclude transactions seeking to take advantage of a special exemption included in the Nursing Home Payment System intended to aid small owners and operators of nursing facilities to sell their facilities when these individuals wish to leave the nursing home business.

This revision to the regulations is expected to benefit DMAS and the Commonwealth by preventing unintended Medicaid expenditures to nursing facilities. The revised regulation is expected to preclude chain providers (other than small-chain providers) from converting, via questionable sale transactions, to a higher reimbursement rate for nursing facility capital costs.

Financial impact

Please identify the anticipated financial impact of the proposed regulation and at a minimum provide the following information:

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	No additional cost is anticipated.
Projected cost of the regulation on localities	No additional cost is anticipated.
Description of the individuals, businesses or other entities likely to be affected by the regulation	Those individuals or entities who would try to take advantage of the existing regulation via questionable transactions.
Agency's best estimate of the number of such entities that will be affected	Potentially all nursing homes presently affiliated with a chain organization could be affected. There are approximately 220 chain affiliated nursing homes
Projected cost of the regulation for affected individuals, businesses, or other entities	There will be no cost to individuals, businesses or other entities caused by this revision.

This provision prevents inappropriate financial gains by nursing home owners through the use of an exemption provision intended to aid individual or small-chain owners and operators of nursing facilities when these individuals want to get out of the nursing home business.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The alternatives are (1) to not modify the regulation or (2) to eliminate altogether the exemption provided for the small owner/operator. To not modify the regulation would potentially result in hundreds of thousands of dollars of additional reimbursement being paid to nursing homes during the next 9 years of transition to the FRV methodology. The second alternative would be to go back on an agreement reached by DMAS with the nursing home industry to include this provision at the time of the initial enactment of the FRV regulations. Neither alternative is acceptable.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

DMAS' Notice of Intended Regulatory Action was published in the August 11, 2003, *Virginia Register* (VR 19:24, p 3457) for its comment period from August 11th through September 10, 2003. No comments were received.

Impact on family

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

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, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
30-90-29.D	N/A	There is no holding period defined	Would define a 3-year period of ownership as a non-chain affiliated facility to qualify for the exemption.