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Fast-Track Regulation
Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) Chapter citation(s)	12 VAC 30-10-610, 12 VAC 30-20-200
VAC Chapter title(s)	Third party liability; Requirements for third party liability; payment of claims
Action title	Third Party Liability Update
Date this document prepared	May 30, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code.*

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The proposed changes are needed in order to respond to a Centers for Medicare & Medicaid Services (CMS) Informational Bulletin requiring states to "ensure that their Medicaid state plans comply with third party liability (TPL) requirements reflected in current law." Virginia's TPL text required updates to align with current law. The Department of Medical Assistance Services (DMAS) submitted a state plan amendment to the CMS that was approved on July 25, 2022, and this regulatory action incorporates the changes in the Virginia Administrative Code (VAC).

CMS then issued State Medicaid Director Letter 23-002, which required Medicaid agencies to issue state rules to bar liable third-party payers from refusing payment for an item or service solely

on the basis that such item or service did not receive prior authorization under the third-party payer's rules. Changes relating to that requirement are also included in this regulatory package.

In addition, the changes respond to a Petition for Rulemaking that was filed on November 3, 2022 relating to lien amounts arising from the Medicaid program and asserted against personal injury claims proceeds.

Changes are also included that respond to House Bill 315, which passed during the 2024 General Assembly session.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

CMS = Centers for Medicare & Medicaid Services
DMAS = Department of Medical Assistance Services
TPL = Third Party Liability
VAC = Virginia Administrative Code

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

I hereby approve the foregoing Regulatory Review Summary entitled "Third Party Liability Update" and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012 of the Administrative Process Act.

May 30, 2023
Date

/signature/
Cheryl J. Roberts, Director
Dept. of Medical Assistance Services

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in the ORM procedures, "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

The Code of Virginia § 32.1 325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance and to promulgate regulations. The Code of Virginia § 32.1-324, grants the Director of the Department of Medical Assistance Services the authority of the Board when it is not in session.

The regulatory changes in 12 VAC 30-10-610 and in 12 VAC 30-20-100 (1) through (5) are expected to be non-controversial because they align with current law. There are no reductions in services associated with the changes.

The changes in 12 VAC 30-20-200 (5) are expected to be non-controversial because they are federal requirements. DMAS has no discretion on whether to include these changes.

The changes in 12 VAC 30-20-200 (6) are expected to be non-controversial because they are being made in response to state legislation (HB 315).

The text in 12 VAC 30-20-200 (7) is expected to be non-controversial because it sets forth a clear process for individuals to follow with regard to Medicaid liens.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The Code of Virginia § 32.1 325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance and to promulgate regulations. The Code of Virginia § 32.1-324, grants the Director of the Department of Medical Assistance Services the authority of the Board when it is not in session.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

TPL represents insurance coverage that individuals may hold in addition to Medicaid. The proposed changes are required in order to be in compliance with federal rules, stipulating that State Medicaid plans comply with TPL requirements reflected in current law. Virginia's TPL text required updates to reflect current law and current DMAS practice.

DMAS is also including text to set forth a clear process for individuals to follow with regard to Medicaid liens.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

In accordance with a CMS directive, states must comply with the following TPL requirements:
(1) States must apply cost avoidance procedures to claims for prenatal services, including labor, delivery, and postpartum care services.
(2) States must make payments without regard to potential third party liability for pediatric preventive services, unless the state has made a determination related to cost-effectiveness and access to care that warrants cost avoidance for up to 90 days.
(3) States have flexibility to make payments without regard to potential third party liability for up to 100 days for claims related to child support enforcement beneficiaries.

Virginia is in compliance with these requirements, and this regulatory update includes those requirements in the Virginia Administrative Code. The sections of the State regulations that are affected by this action are 12VAC30-10-610 and 12VAC30-20-200.

DMAS is also including text to comply with the federal requirements related to prior authorization, to comply with state legislation related to liens, and to establish a clear process for individuals to follow with regard to Medicaid liens.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

These changes create no disadvantages to the public, the Agency, the Commonwealth, or the regulated community. The advantages to the changes are that they align DMAS regulations with federal and state requirements.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no requirements in this regulation that are more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

No state agencies, localities, or other entities are particularly affected by this change.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

Impact on State Agencies

For your agency: projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	There are no costs associated with these regulatory changes.
For other state agencies: projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	There are no costs to other state agencies.
For all agencies: Benefits the regulatory change is designed to produce.	The benefit of this action is to bring the regulations in compliance with regard to pediatric preventive services and prior authorization and to provide clarity to the public on the information necessary for DMAS to process lien requests.

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

Projected costs, savings, fees or revenues resulting from the regulatory change.	There are no costs to localities as a result of these changes.
Benefits the regulatory change is designed to produce.	The benefit of this action is to bring the regulations in compliance with regard to pediatric preventive services and prior authorization and to

	provide clarity to the public on the information necessary for DMAS to process lien requests.

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Regarding the lien inquiries, the impact will be that receipients, law firms, and other entities related to personal injury claims will have to provide greater information to DMAS, but by doing so will ease such entities ability to get accurate information from DMAS. There is no impact as a result of the other changes.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million.	This regulation will impact small businesses such as law firms, but it will be a positive impact because such law firms will have clarify on the information they need to provide DMAS regarding lien inquiries so that such inquires can be addressed efficiently and effectively.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	None.
Benefits the regulatory change is designed to produce.	The benefit of this action is to bring the regulations in compliance with regard to pediatric preventive services and prior authorization and to provide clarity to the public on the information necessary for DMAS to process lien requests.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

No alternatives can achieve the purpose of the regulatory change.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

It is possible that some of the attorneys representing Medicaid members in lien-related activities may be small businesses. The new text will provide clarity about what processes are available to these attorneys, thereby reducing confusion and helping to ensure consistency.

An ORM Economic Impact form for this regulatory package has been posted on the Town Hall.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

Consistent with § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Department of Medical Assistance Services is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: https://townhall.virginia.gov. Comments may also be submitted by mail, email or fax to Jimeequa Williams, DMAS, 600 E. Broad Street, Richmond, VA 23219, 804-225-3508, Jimeequa.Williams@dmas.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
12 VAC 30-10-610			New text in paragraphs E and F was added to indicate that DMAS assures that the state has in effect, laws governing third parties to provide the state with coverage, eligibility, and claims data. Subsequent paragraphs were re-lettered.
12 VAC 30-20-200 (1) – (2)		Funds are collected for pediatric preventive services first, from third party insurers, before payment of claims.	Text changes are made to indicate that payment of pediatric preventive services claims are to be made before the collection of fees from third party insurers. Changes were also made to align timing (number of days) with federal requirements. The term “MMIS” was updated to “MES.” Paragraph 1(c)(4) was eliminated because it deals with internal agency processes.
12 VAC 30-20-200 (5)			Text is added to comply with CMS SMD letter 23-002.
12 VAC 30-20-200 (6)		Text indicated compliance with § 8.01-66.9 of the Code of Virginia.	Text is added to indicate compliance with both § 8.01-66.9 and § 8.01-66.9:2.
12 VAC 30-20-200 (7)			Text is added to indicate the process that is available related to Medicaid liens.