



COMMONWEALTH of VIRGINIA
Office of the Attorney General

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MEMORANDUM

TO: BRIAN MCCORMICK
Regulatory and Manual Section Manager
Department of Medical Assistance Services

FROM: REATHA B. KAY
Assistant Attorney General

DATE: November 10, 2005

SUBJECT: Emergency Regulations concerning Medicare Part D Program (Part D)

I have reviewed the attached emergency regulations concerning the Medicare Prescription Drug Program.

Based on that review, it is this Office's view that the Director, acting on behalf of the Board pursuant to Va. Code § 32.1-324, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act and has not exceeded that authority.

The authority for this emergency action is found in Va. Code § 2.2-4011, which provides that emergency regulations are "[r]egulations that an agency finds are necessitated by an emergency situation." The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2005 Acts of Assembly, Chapters 24 and 56, each which state, in part, "[t]he Board of Medical Assitance Services shall promulgate necessary regulations to implement the provisions of the Medicare Part D prescription drug benefit that becomes effective January 1, 2006. . . . [and] shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment."

Brian McCormick
November 10, 2005
Page 2

Accordingly, with the prior approval of the Governor, these regulations qualify for the “emergency” exemption from Article 2 requirements. Please be advised, however, that under Va. Code § 2.2-4011(A), the Department must state in writing the nature of and necessity for such emergency action, and this appears to have been accomplished in the “Agency Background Document.” In addition, the regulations shall be effective for no more than twelve months from the emergency regulatory action on this subject matter. As the Department intends to continue regulating the subject matter governed by this emergency regulation beyond 12 months, it will be necessary to replace these emergency regulations with regulations duly promulgated under Article 2 of the APA. A Notice of Intended Regulatory Action relating to the proposed replacement regulations must be filed with the Registrar within 60 days of the effective date of the emergency regulations. The proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

If you have any questions, please contact me at 786-1841.

cc: Kim F. Piner, Esquire

Attachment