



Final Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30 -10 and 20
Regulation title	State Plan Under Title XIX of the Social Security Act Medical Assistance Program; General Provisions; Administration of Medical Assistance Services
Action title	Estate Recovery Update
Date this document prepared	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The proposed regulation changes are to update and clarify the current regulations regarding Medicaid Estate Recovery carried out by the Department of Medical Assistance Services (DMAS). This regulatory action will more closely reflect current Agency practice based upon language provided by the federal Medicaid agency, the Centers for Medicare and Medicaid Services (CMS), in its guidance document publication entitled the State Medicaid Manual. This change repeals 12 VAC 30-20-140 (Estate Recoveries) in order to re-promulgate this section in a restructured and revised format as 12 VAC 30-20-141. This regulatory action will add new definitions, for “cost effective” and “homestead of modest value”. The definitions for “estate” and “applicable medical payments,” will be deleted from 12 VAC 30-10-560 and moved into the new regulation section 12 VAC 30-20-141. This revision will also include the exemption from Medicaid estate recovery for American Indian/Alaska Native (AI/AN) income, resources and property as defined in the federal State Medicaid Manual. Consistent with the State Medicaid

Manual, assets or resources that were disregarded due to a qualified Long-Term Care Partnership Insurance policy are being exempted from estate recovery actions.

Changes that are suggested in response to public comments in the final stage are as follows: (i) add the statement that the Commonwealth does not pursue this policy after two items of federal preprinted language that are not implemented in Virginia; (ii) modify the definition of 'homestead of modest value' to incorporate the term 'median' in addition to 'average price'; (iii) clarify new policies by adding references concerning their application to services received by recipients age 55 or older; (iv) clarify new policies by using specific terms more consistently; (v) correct regulatory text to show that anyone can apply for a hardship waiver but DMAS will decide, pursuant to its regulations, if such an application has merit, and; (vi) add clarifying provisions in response to received public comments but in slightly different places than the suggested comment.

Statement of final agency action

Please 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 with the attached amended State Plan pages entitled Estate Recovery Update (12VAC30-10-560, 12vAC30-20-140 (Repealed), 12VAC30-20-141) 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.

Date

Patrick W. Finnerty, Director

Dept. of Medical Assistance Services

Legal basis

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 numbers, 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.

The Medicaid estate recovery program was mandated by the federal Omnibus Budget Reconciliation Act of 1993, as codified at 42 U.S.C. § 1396p(b)(1)(B) of the *Social Security Act* [42 U.S.C. 1396p], which requires the Commonwealth to seek adjustment or recovery from certain beneficiaries' estates. Section 32.1-326.1 of the *Code of Virginia* directs DMAS to comply with the federal requirements and operate a Medicaid estate recovery program.

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 it 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.

Several aspects of the regulations regarding Medicaid estate recovery are in need of updating and clarification. This action clarifies ambiguous language and augments the language of the estate recovery regulations to add greater detail to enhance understanding about the Medicaid estate recovery process. This proposed action is expected to have a significant and positive impact on the health, safety, and welfare of the citizens of the Commonwealth by aiding the fiscal integrity of the Medicaid program, and recovering Medicaid benefits paid under the estate recoveries provisions in §1917(b) of the *Social Security Act*. This regulatory action further provides clarification on mandatory and optional recovery when a Medicaid beneficiary receives services that are specified as collectable services under the Commonwealth's State Plan for estate recovery.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The sections of the State Plan for Medical Assistance that are affected by this action are State Plan Under Title XIX of the Social Security Act; Medical Assistance Program; General Provisions; Administration of Medical Assistance Services (12 VAC 30-10-560, 12 VAC 30-20-140 (being repealed), and 12 VAC 30-20-141).

DMAS intends to update the language of the estate recovery regulations to more closely reflect current Agency practice based upon language provided by the federal Medicaid agency, CMS. Specifically the Agency intends to delete the definitions for "estate" and "applicable medical assistance payments" located in 12 VAC 30-10-560 and move these two definitions into the new regulations section, 12 VAC 30-20-141.

The Agency also intends to repeal 12 VAC 30-20-140 (Estate Recoveries) in order to re-promulgate this section in a re-structured and revised format in 12 VAC 30-20-141. The Agency intends to revise several of the definitions included in the section and to add two new definitions, for “Cost effective” and “Homestead of modest value”. The revision also includes the exemption from Medicaid Estate recovery for American Indian/Alaska Native (AI/AN) income, resources and property as defined in the State Medicaid Manual, and assets or resources that were disregarded due to an authorized State Long-Term Care Insurance Partnership policy.

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.

The advantages of these changes to the public are that they clarify what is required by CMS relating to Medicaid estate recovery. The proposed update does not change how DMAS is currently handling Medicaid estate recovery, but better articulates the provisions and understanding of the federal regulations. DMAS has not identified any disadvantages to the public or the Commonwealth regarding these proposed changes.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
30-20-141(A)	Defined ‘homestead of modest value’ using the term ‘average price’.	The term ‘median’ has been added to ‘average price’ so it is clear to the public what DMAS means by the term ‘average’. DMAS is also adding reference to potential future other sources of such information and, if and when another source becomes available, will advise the affected public via publication of a guidance document what new source of data is being used in place of the U.S. Census data.	Public comment stated that on the U.S. Census website there were no prices labeled ‘average’. The commenter suggested that some other source of housing price value be used in place of the U.S. Census data.
30-20-141(C)	Introductory paragraph establishes adjustment or recovery policy and exceptions to it.	Reference is added that individual must be age 55 or older in order for adjustments/recoveries to occur.	Age qualification added for clarity in this paragraph as it already exists in other places in this regulation.

30-20-141(C)(2)	Subdivision (iii) refers to limited benefit Medicare/Medicaid recipients.	Word 'non' is added in front of specific group identifying names.	During drafting and internal reviews, the word was inadvertently omitted from the text.
30-20-141(C)(3)	Subsection expresses opposing policies.	The word 'however' is added to the beginning of the second sentence to better highlight the opposite policies.	Public comment made that the addition of this word clarified the contrast between the two sentences in this subsection.
30-20-141(C)(4)	Subsection uses different terms (premium payment and capitation payment) to refer to the payments made by DMAS to managed care programs for the care rendered to recipients.	The term 'premium' has been changed to 'capitation'.	To improve the clarity of this subsection.
30-20-141(C)(8)	Section concerns annuities and when DMAS seeks recoveries from estates of recipients who have invested in such financial instruments.	The second sentence is being removed as it does not pertain to DMAS' administration of the policy of pursuing recoveries against estates that may contain annuities.	Public comment said this sentence is confusing so it is being removed.
30-20-141(D)	Section concerns undue hardship waivers.	Drafting error in the second sentence created the implication that DMAS intended to determine whether individuals could have the right to apply for such waivers. This drafting error has been corrected.	Public comment stated that anyone had the right to apply and that it was DMAS' position to evaluate the application for merit.
30-20-141(D)(1) and (2)	Subsections concern the situations that will qualify for special consideration in estate recovery.	Drafting error.	Public comment pointed out the lack of a needed verb and lack of parallel construction.
30-20-141(F)	Section concerns the waiving of recovery when DMAS determines it would not be cost effective.	Sentence added after catch line establishing DMAS' authority to have and apply a dollar threshold below which recovery will not be pursued.	Public comment on this point suggested this but in a slightly different location.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

DMAS' proposed regulations were published in the September 15, 2008, *Virginia Register of Regulations* (VR 25:1) for their public comment period from September 15, 2008, through November 14, 2008. Comments were received only from the Virginia Poverty Law Center. A summary of the comments received and the agency's response follows.

Commenter	Comment	Agency response
Virginia Poverty Law Center	12VAC30-10-560(A)(1) Since VA does not pursue estate recoveries against permanently institutionalized individuals, this provision should be removed.	This is language issued to all states on federal preprint State Plan pages. VA cannot remove this language per this suggestion. VA does pursue recoveries from permanently institutionalized individuals if they are ages 55 or older.
Virginia Poverty Law Center	12VAC30-10-560(C) The same sentence that has been added to subdivisions 1 and 3 should be added to 2.	DMAS agrees that the addition of the language to subdivision 2 would be helpful and has therefore made this change.
Virginia Poverty Law Center	12VAC30-20-141(A) Commenter was unable to find 'average price' referred to in the regulations on the U.S. Census website.	Currently, this is the only source that DMAS can reasonably rely on for this information. However, since an alternative source may become available in the future and it may provide more up to date information than the U.S. Census site, DMAS wishes to have the flexibility to switch to such an alternative source. DMAS will publish a guidance document when and if it determines that such a change of source information is appropriate. DMAS is also changing its final suggested regulations to incorporate a reference to the 'median' price which is another term for 'average'.
Virginia Poverty Law Center	12VAC30-141(C)(1) Commenter suggested that the age limitation be clarified by adding text at the end: "Recovery is limited to medical assistance for services received at age 55 or thereafter." The content of subdivision 1 should be merged with paragraph (C).	DMAS agrees that the addition of the age clarification would improve the regulation but has added this at a different place than the one suggested by the commenter. DMAS declines this comment.
Virginia Poverty Law Center	12VAC30-20-141(C)(2) This section is awkward because it combines dual eligibles who receive full Medicaid benefits with those who only receive limited Medicaid benefits. Since the persons receiving limited Medicaid benefits are not subject to mandatory recovery, this commenter suggested the removal of these individuals from this list as being subject to estate recovery.	DMAS declines to make this change as Virginia does exercise its optional right to consider recoveries against all potential groups of eligibles.
Virginia Poverty Law Center	12VAC30-20-141(C)(3) This section would be easier to understand by inserting 'however' and by using the language at 12VAC30-10-560 to describe the estate recovery exemption for	DMAS agrees with the addition of the word 'however' at the beginning of the second sentence and has made this change accordingly. DMAS declines the second comment.

	people using the LTC Partnership program.	
Virginia Poverty Law Center	12VAC30-20-141(C)(4) Reference to both 'premium payments' and 'total capitation rate' seems redundant. This section should be clarified that it only applies to premiums paid when the individual is age 55 or older.	As a result of this comment, DMAS notes that the use of the term 'premium' should have been 'capitation' and has changed the regulation accordingly.
Virginia Poverty Law Center	12VAC30-20-141(C)(6) This entire section is not needed since the exemptions are all listed in the previous subdivision (5). This commenter recognized that the State Medicaid Manual (<i>CMS guidance document published to the states</i>) contained this language but this commenter stated that it is excessive.	DMAS disagrees with this view and has declined to remove subdivision (6). Subdivision (5) states that certain AN/AI property is protected. Subdivision (6) states that AN/AI property that is not specifically protected shall be subject to recovery. The Commonwealth must have both provisions in its regulations as they provide for different circumstances.
Virginia Poverty Law Center	12VAC30-20-141(C)(8) The intent and effective dates are not clear.	DMAS agrees with the public comment and has removed the second sentence.
Virginia Poverty Law Center	12VAC30-20-141(D) This commenter stated that the last sentence was confusing because the Commonwealth does not decide if people <u>have the right to apply</u> for hardship waivers. The Commonwealth decides if the individual's application has merit.	DMAS agrees with the intent of this comment that it cannot decide if persons can be permitted to apply for a hardship waiver. Therefore, DMAS has changed the text to provide that anyone who may be affected by Medicaid estate recovery may apply for an undue hardship waiver.
Virginia Poverty Law Center	12VAC30-20-141(D)(1) This commenter suggested the addition of the word 'exist' at the end of subdivision (iii).	DMAS agrees that the addition of this word improves the regulation language but has added it in a different place in (iii).
Virginia Poverty Law Center	12VAC30-20-141(D)(2) This commenter suggests that an affirmative statement is needed and that a cross reference would be helpful.	DMAS agrees that modifying the structure of this subdivision would improve its clarity and improve the regulatory parallel construction and has made a change accordingly. DMAS declines to add the suggested cross reference as such non-critical internal citations typically create long term maintenance problems in future regulatory actions.
Virginia Poverty Law Center	12VAC30-20-141(F)(2) Commenter suggested modifications to the last sentence with the addition of 'DMAS shall establish a cost effectiveness threshold below which estate recovery will not be pursued.'	DMAS agrees with the addition of this text but in a different location than the one suggested. Instead DMAS has added this provision after the initial catch line for item F.

All changes made in this regulatory action

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

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12VAC30-20-140	12VAC30-20-141	Medicaid estate recovery process	The change will clarify CMS requirements for DMAS to pursue estate recovery.
12VAC30-20-140	12VAC30-20-141	Add definitions for “Cost effective” and Homestead of modest value.”	The definitions will be added to the proposed new section to clarify CMS requirements.
12VAC30-10-560 (D)	12VAC30-20-141(D)	Estate Recovery, 1. Definitions: for “Applicable medical assistance payments and “Estate”.	The definitions will be moved to the new section so that all related estate recovery definitions and requirements will be located in one section.

Regulatory flexibility analysis

Please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

This regulatory change impacts Medicaid recipients’ estates, which do not meet the statutory definition of small business. Therefore, the adverse impact on small businesses does not apply in the development of this regulatory action.

Family impact

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