



**COMMONWEALTH of VIRGINIA**

*Office of the Attorney General*

*Richmond 23219*

Mark R. Herring  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120

**TO:**           **EMILY MCCLELLAN**  
Regulatory Supervisor  
Virginia Department of Medical Assistance Services

**FROM:**       **USHA KODURU** *uk*  
Assistant Attorney General

**DATE:**       **October 13, 2016**

**SUBJECT:**   **Emergency Regulation to Provide for Reconsideration of Final Agency  
Decisions 12 VAC 30-20-570 (4610/7638)**

I am in receipt of the attached regulation to establish a process for the DMAS Director to reconsider Final Agency Decisions. You have asked the Office of the Attorney General to review and determine if DMAS has the legal authority to promulgate the regulation and if the regulation comports with state and federal law.

Based on that review, it is my view that the Director, acting on behalf of the Board of Medical Assistance Services pursuant to Virginia Code §§ 32.1-324 and 325, has the authority to promulgate this regulation, 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. Chapter 694 of the 2016 Acts of Assembly authorizes DMAS to promulgate emergency regulations. Accordingly, this regulation qualifies for the "emergency" exemption from Article 2 requirements. A Notice of Intended Regulatory Action relating to the proposed replacement regulation must be filed with the Registrar within sixty days of the effective date of the emergency regulation, and appears to already have been so filed at the same time as the

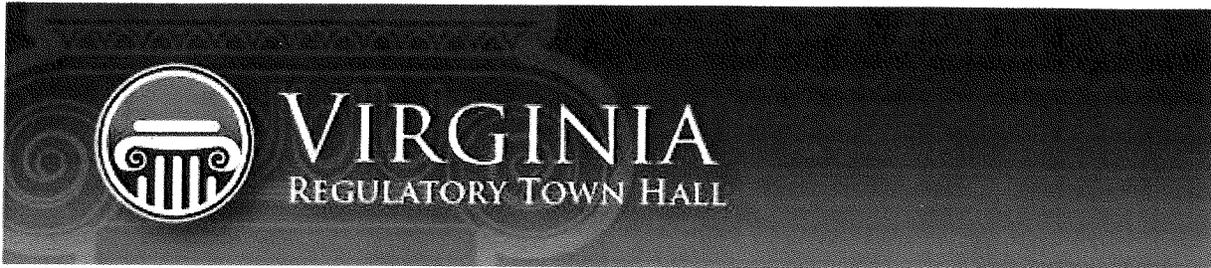
Emily McClellan  
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emergency regulation. The proposed replacement regulation must be filed with the Registrar within 180 days after the effective date of the emergency regulation. This regulation will amend the State Plan; therefore, approval by the Centers for Medicare and Medicaid Services also will be required.

If you have any questions or need additional information about this regulation, please contact me at 786-4074.

cc: Kim F. Piner, Esquire

Attachment



townhall.virginia.gov

## 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(s)</b>	12VAC30-20-570
<b>Regulation title(s)</b>	Reconsideration of Final Agency Decision
<b>Action title</b>	Reconsideration of Final Agency Decision
<b>Date this document prepared</b>	August 1, 2016

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to eighteen months), 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 branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### 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.*

This is a new emergency regulation made necessary and authorized by action of the 2016 Virginia General Assembly in enacting *Code of Virginia* §2.2-4023.1. That new section provides for establishment of a reconsideration process by which appellants can petition the agency director to reconsider the agency's Final Agency Decision made pursuant to the *Code of Virginia* §2.2-4020. The statute specifically authorizes the agency to promulgate emergency regulations to specify the scope of the reconsideration review. This emergency regulation specifies the scope of review.

## Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

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Final Agency Decision: The agency's final case decision made pursuant to the *Code of Virginia* §2.2-4020.

## Emergency Authority

The APA (*Code of Virginia* § 2.2-4011) states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006. Please explain why this is an emergency situation as described above, and provide specific citations to the *Code of Virginia* or the *Appropriation Act*, if applicable.

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Section 2.2-4011 of the *Code of Virginia* states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of *Code of Virginia* §2.2-4006(A)(4). The 2016 *Acts of the Assembly*, Chapter 694 specifically authorizes the agency to promulgate emergency regulations stating,

2. That any agency which intends to promulgate regulations that specify the scope of evidence that may be considered by such agency in support of any petition for reconsideration may promulgate emergency regulations to become effective within 280 days or less from enactment of this act.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Reconsideration of Final Agency Decision 12 VAC 30-20-570 and also authorize the initiation of the promulgation process provided for in *Code of Virginia* § 2.2-4007.

## 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) the promulgating entity, i.e., agency, board, or person.

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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.

In addition, the 2016 Virginia *Acts of Assembly* Chapter 694 created a new section of the Virginia Administrative Process Act which provides for a process by which appellants may petition an agency to reconsider its final case decision, and specifically authorizes the agency to promulgate emergency regulations that specify the scope of that reconsideration review.

Section 2.2-4011 of the Code of Virginia states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.

**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 2016 Virginia Acts of Assembly Chapter 694 has created a new section of the Virginia Administrative Process Act, *Code of Virginia* §2.2-4023.1, which provides for a process by which appellants may petition an agency to reconsider its final case decision made pursuant to Va. Code §2.2-4020. The Chapter further specifically authorizes the agency to promulgate emergency regulations that specify the scope of that reconsideration review. This emergency regulation, creating 12 VAC 30-20-570, is needed to accomplish the goal of establishing and defining the scope of review for reconsiderations conducted in accordance with *Code of Virginia* §2.2-4023.1

**Need**

*Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.*

This regulatory action is essential to protect the health, safety, and welfare of citizens by ensuring the integrity of the DMAS appeals process (by ensuring that it is in accordance with the Code of Virginia) so that individuals and providers may challenge health care determinations made by the state Medicaid agency.

**Substance**

*Please describe 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 the*

agency has determined that the proposed regulatory action is essential to protect the healthy, safety, or welfare of Virginians.

Prior to the newly enacted *Code of Virginia* §2.2-4023.1 by the Virginia Acts of Assembly – 2016 Session, Chapter 694, there was no process by which an appellant could petition the agency director to reconsider a final agency case decision made pursuant to *Code of Virginia* §2.2-4020.

Virginia Acts of Assembly – 2016 Session, Chapter 694, in enacting *Code of Virginia* §2.2-4023.1, provides a procedural timeline for the reconsideration process, but authorizes the agency to enact emergency regulations to define the scope of the reconsideration review.

This emergency specifies the scope of the reconsideration review, as authorized by the 2016 General Assembly in enacting *Code of Virginia* §2.2-4023.1. The emergency regulation establishes that the scope of review shall be upon the record of the case decision made pursuant to *Code of Virginia* §2.2-4020. The reconsideration shall not authorize the reopening of the formal administrative hearing or acceptance of evidence or testimony not part of the record of the case, in accordance with *1st Stop Health Services v. DMAS* 63 Va. App. 266, 756 S.E.2d 183 (2014).

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
12 VAC 30-20-570	Specifies that the scope of the review shall be upon the record of the agency case decision made pursuant to <i>Code of Virginia</i> §2.2-4020.	This section follows 12 VAC 20-30-560 which specifies the agency’s process and timeline for formal administrative appeals pursuant to <i>Code of Virginia</i> §2.2-4020.	<p>The intent in paragraph A is to adopt the process and timeline for agency reconsideration of final case decisions made pursuant to <i>Code of Virginia</i> §2.2-4020, as mandated in the recently enacted <i>Code of Virginia</i> §2.2-4023.1.</p> <p>The intent of paragraph B is to specify the scope of the reconsideration review, as authorized by <i>Code of Virginia</i> §2.2-4023.1</p> <p>The impact is likely to allow for a timely review and decision by the director after careful consideration of the appellant’s petition and the record of the case.</p>

### 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. Also describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

No alternatives will satisfy the legislative mandate. The Reconsideration process is mandated by recently enacted *Code of Virginia* §2.2-4023.1, which specifies the process and timeline, but authorizes the agency to enact emergency regulations to specify the scope of the reconsideration review. This emergency regulation adopts the reconsideration process and timeline set forth in *Code of Virginia* §2.2-4023.1 and specifies the scope of the review.

### Public participation

*Please indicate whether the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments. Please also indicate whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel has been used in the development of the emergency regulation and whether it will also be used in the development of the permanent regulation.*

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The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, phone, or email to Emily McClellan, Regulatory Supervisor, DMAS, 600 E. Broad Street, Richmond, VA 23219, 804-371-4300, [Emily.McClellan@dmas.virginia.gov](mailto:Emily.McClellan@dmas.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

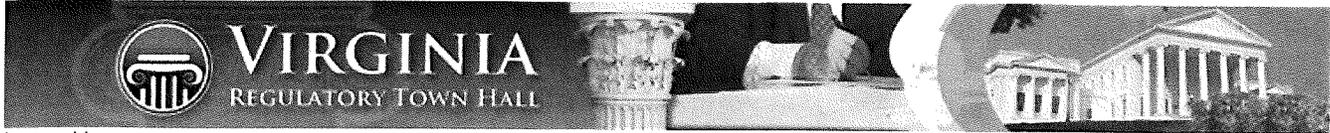
### Family Impact

*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.*

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This action does not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children. This action does not 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. This action does not strengthen or erode the marital commitment. This action does not affect disposable family income.

Virginia.gov Agencies | Governor



Logged in as

Usha Koduru

## Emergency Text

**Action:** Reconsideration of Final Agency Decision

**Stage:** Emergency/NOIRA

10/13/16 1:19 PM [latest] ▼

### **12VAC30-20-570. Reconsideration of Final Agency Decision.**

A. Reconsiderations of DMAS final appeal decision issued on a formal appeal conducted pursuant to Virginia Code § 2.2-4020 shall be conducted in accordance with Virginia Code § 2.2-4023.1.

B. The DMAS Directors review shall be made upon the case record of the formal appeal. Testimony or documentary submissions that were not part of the formal appeal case record prior to issuance of the final agency decision shall not be considered.