



COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: RENE E WHITE
Regulatory Coordinator
Department of Medical Assistance Services

FROM: USHA KODURU
Assistant Attorney General

DATE: May 26, 2005

SUBJECT: Emergency Regulations to Modify Supplemental Payment Methods for Medicaid Public Providers

I have reviewed the attached emergency regulations that will modify state regulations and the State Plan for Medical Assistance Services relating to supplemental payments to non-state public hospitals, clinics and nursing homes, and state hospitals and clinics to comply with recent CMS restrictions.

Based on that review, it is this Office's view that the Department of Medical Assistance Services, pursuant to Item 326 (O) of the 2005 Appropriations Act, 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 these emergency actions is found in Va. Code § 2.2-4011, which provides that an "emergency situation" includes a situation "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..." The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2005 Appropriation Act (2005 Acts of the Assembly), Item 326(O). Item 326(O) states that DMAS

“shall modify existing regulations and the State Plan for Medical Assistance Services as they relate to supplemental payments to non-state public nursing homes, hospitals and clinics and state hospitals and clinics as necessary to comply with changes negotiated with the Centers for Medicare and Medicaid Services to sunset current Inter-Governmental Transfers and to develop alternative strategies. The department shall have the authority to enact emergency regulations under §2.2-4011 of the Administrative Process Act, to effect this provision.”

This situation qualifies as an emergency as provided in § 2.2-4011(A)(ii) according to the language of the 2005 Appropriations Act, Item 326(O). As such, these regulations may be adopted without public comment with the prior approval of the Governor.

Accordingly, with the prior approval of the Governor, these regulations will 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. 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 (and it appears that this has been done). 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 or need any additional information, please feel free to contact me at 786-1840.

cc: Kim F. Piner, Esquire

Attachment