



**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**  
Special Counsel to DMAS

**DATE:** May 27, 2005

**SUBJECT:** Emergency Regulations concerning Discontinuing Coverage of Erectile Dysfunction Drugs for Sex Offenders

I have reviewed the referenced emergency regulations regarding modifications to the drugs or drug categories which are not covered, to discontinue coverage of erectile dysfunction drugs for sex offenders.

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 an "emergency situation" includes "a situation involving an imminent threat to public health or safety." These regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to implement the Governor's directive that DMAS immediately terminate this benefit for those Medicaid recipients listed in the Virginia Sex Offender Registry. This situation qualifies as an emergency as provided in § 2.2-4011(A) because without these changes, Medicaid recipients

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who are on the Virginia Sex Offender and Crimes Against Minors Registry will continue to receive erectile dysfunction drugs that are paid for by Medicaid. Because, as discussed above, the Governor has determined that the health or safety of the citizens of the Commonwealth could be adversely affected if this change is not made, the "health and safety" criterion appears to be satisfied.

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. 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 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 call me at 786-1841

cc: Kim F. Piner, Esquire

Attachment