



**COMMONWEALTH of VIRGINIA**  
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**MEMORANDUM**

**TO:** **VICTORIA P. SIMMONS**  
Regulatory Coordinator  
Department of Medical Assistance Services

**FROM:** **PAIGE S. FITZGERALD**  
Special Counsel to DMAS

**DATE:** **April 9, 2004**

**SUBJECT:** **Additional Emergency Regulations concerning Prior Authorization of Pharmacy Services and Preferred Drug List**

I have reviewed the attached additional emergency regulations that modify the Preferred Drug List requirements and prior authorization of pharmacy services in accordance with the General Assembly's mandate.

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 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 . . . 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 2003 Appropriation Act (2003 Acts of Assembly chapter 1042), Item 325(ZZ), which states that DMAS "shall amend the State Plan for Medical Assistance Services to modify the delivery system of pharmaceutical products to include a Preferred Drug List program no later than January 1, 2004." Item 325(ZZ) also requires that regulations to enact this item of the Appropriation Act are required to become effective within 280 days or less from the enactment of the Act.

The promulgation of these regulations is authorized pursuant to Virginia Code § 2.2-4011, which provides that "during the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation." This

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emergency action revises an initial emergency regulation, which was approved by a memo dated October, 24, 2003. The legal basis for this emergency regulation is the appropriation act language set forth above, which was the same legal authority for the initial emergency action.

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 initial 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 (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 call me at 786-0095.

cc: Kim F. Piner, Esquire

Attachment