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Fast-Track Regulation Agency Background Document

Agency name	Dept. of Medical Assistance Services
Virginia Administrative Code (VAC) Chapter citation(s)	12 VAC 30-90-28; 12 VAC 30-90-30; 12 VAC 30-90-31; 12 VAC 30-90-36; 12 VAC 30-90-37; 12 VAC 30-90-44
VAC Chapter title(s)	Mid-year Fair Rental Value (FRV) rate determination; Plant cost; New nursing facilities and bed additions; Nursing facility capital payment methodology; Calculation of FRV per diem rate for capital; calculation of FRV rental amount; change of ownership; Nursing facility price-based payment methodology
Action title	Fair Rental Value for New and Renovated Nursing Facilities
Date this document prepared	February 24, 2020

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The 2019 Appropriations Act, Item 303.VVV, required DMAS to revise the state plan to clarify payment rules for new nursing homes or renovations that qualify for mid-year rate adjustments. DMAS submitted a state plan amendment to the Centers for Medicare and Medicaid Services (CMS) that was approved on November 26, 2019, and this regulatory action incorporates those same changes in the Virginia Administrative Code.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

DMAS = Department of Medical Assistance Services
FRV = Fair Rental Value
NF = Nursing Facility

Statement of Final Agency Action

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 entitled "Fair Rental Value for New and Renovated Nursing Facilities" 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.

February 24, 2020
Date

/signature/
Karen Kimsey, Director
Dept. of Medical Assistance Services

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

The full text of the General Assembly mandate is included in the Legal Basis section below.

This action is expected to be non-controversial because it provides clarity and additional information regarding Medicaid capital reimbursement to nursing facility providers who are undertaking renovations or new construction. DMAS shared the draft regulation with the Virginia Health Care Association, which had no objections.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the

promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The Code of Virginia § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance and to promulgate regulations. The Code of Virginia § 32.1-324, grants the Director of the Department of Medical Assistance Services the authority of the Board when it is not in session.

The 2019 Appropriations Act, Item 303.VVV states:

Effective July 1, 2019, the department shall amend the State Plan for Medical Assistance to clarify payment rules for new nursing homes or renovations that qualify for mid-year rate adjustments, to include the following:

1. For any facility whose Fair Rental Value report has less than 12 months of experience, the department shall develop an occupancy schedule that represents average statewide occupancy by month of operation for use in calculating the per diem rate in lieu of a minimum occupancy requirement or actual occupancy.
2. Any new beds or renovations placed in service between the reporting year and the rate year shall be treated as a mid-year rate adjustment. No new rate will be made after April 30. Rate updates that fall between May 1 and June 30 shall be effective July 1 of the same year.
3. The department shall annualize real estate taxes, property taxes and property insurance costs that do not represent a full year's cost.
4. Costs shall be based on currently available documentation at the time but are subject to audit. The department may use any reasonable method to estimate costs for which there is inadequate documentation. Any adjustments based on subsequent documentation or audit for a current rate year shall be applied beginning with the next rate year.
5. The department shall have 15 days from the date of the provider's submission to determine if the filing is complete for purposes of setting a rate for a new or renovated facility. The facility shall have 15 days from the date the filing is deemed incomplete to submit the required information. The deadline for setting the rate shall be extended for 30 days after the filing is deemed complete.
6. Providers may propose a phased renovation subject to approval by the department. The phased renovation may include reductions to available beds. Any modifications to the proposed renovation are also subject to approval by the department.
7. The department shall have the authority to implement these reimbursement changes effective July 1, 2019 and prior to the completion of any regulatory process undertaken in order to effect such change.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

These regulatory changes are essential to protect the health, safety, or welfare of citizens in that they give providers information about Medicaid reimbursement when constructing or renovating nursing facilities that require improvements for residents' safety and/or health.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

The 2019 Appropriations Act, Item 303.VVV requires DMAS to revise the state plan to clarify payment rules for new nursing homes or renovations that qualify for mid-year rate adjustments, effective July 1, 2019. The changes in this regulatory package meet the requirements of the GA mandate.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

The primary advantages to nursing homes as a result of these changes are that changes to providers' capital reimbursement will be more transparent, that is, providers can estimate changes to their capital rates prior to completing new construction or renovations to existing facilities. There are no disadvantages to the public, the agency, or the Commonwealth.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no requirements in this regulation that are more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact

which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

No state agencies, localities, or other entities are particularly affected by this change.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

For your agency: projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	There are no costs associated with these changes.
For other state agencies: projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	None
For all agencies: Benefits the regulatory change is designed to produce.	These changes will clarify payment rules for new nursing homes or renovations that qualify for mid-year rate adjustments.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	None
Benefits the regulatory change is designed to produce.	These changes will clarify payment rules for new nursing homes or renovations that qualify for mid-year rate adjustments.

Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	New nursing homes will be affected. Nursing homes that engage in renovations that qualify for mid-year rate adjustments will be affected.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small	DMAS estimates that one or two nursing facilities will be affected by these regulations each year. None of these nursing facilities are considered small businesses.

<p>business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.</p>	<p>There are no costs associated with reporting, recordkeeping, real estate development, fees, or purchases of equipment or services.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>These changes will clarify payment rules for new nursing homes or renovations that qualify for mid-year rate adjustments.</p>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

No alternative methods will accomplish the objectives of the General Assembly mandate.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

No alternative regulatory methods will accomplish the objectives of the General Assembly mandate.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

As required by § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

DMAS is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Emily McClellan, DMAS, 600 E. Broad Street, Richmond, VA 23219, 804-371-4300, emily.mcclellan@dmas.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
	12 VAC 30-90-28		Establishes rules for new nursing facilities and facilities undergoing a major renovation to follow in order to apply for a mid-year FRV rate determination or change if putting into service a major renovation or new beds.
12 VAC 30-90-30			Adds information about the required occupancy percentage for facilities with less than 12 months of occupancy experience.
12 VAC 30-90-31			Provides a cross reference for cost documentation requirements for new and renovated nursing homes.
12 VAC 30-90-36			The term "occupancy schedule" is defined and a related table is added. The term "RS means location factors" was clarified at the request of CMS. The term "required occupancy percentage" is updated in accordance with the new rules.

			Paragraph C3 (mid-year rate change) is updated to provide a cross reference to the new rules in 12 VAC 30-90-28.
12 VAC 30-90- 37			Provides a cross reference to the rules in 12VAC30-90-28 related to the calculation of the FRV per diem rate.
12 VAC 30-90- 44			Paragraph C2, C2a, C2b, C3, and C4 are updated to reflect the new rules.