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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-20-540; 12 VAC 30-20-550; 12 VAC 30-20-560
Regulation title(s)	Informal Appeals; Settlement Agreements; Formal Appeals
Action title	Settlement Agreement Discussion Process
Date this document prepared	October 16, 2018

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 regulatory action establishes a more formalized process by which to address administrative settlement agreements in a timely fashion. The proposed new regulation, 12 VAC 30-20-550, describes the process for settlement agreement discussions between a Medicaid provider and the Department of Medical Assistance Services (DMAS) and how it affects the time periods currently set forth in the existing informal and formal appeal regulations at 12 VAC 30-20-500 et. seq. The proposed amendments to 12 VAC 30-20-540 and 12 VAC 30-20-560 are necessary for these

sections to be consistent with the proposed new regulation, 12 VAC 30-20-550. The amendments affect the timelines for issuing either the informal decision in an informal administrative appeal or recommended decision of the hearing officer in a formal administrative appeal when the proposed new regulation 12 VAC 30-20-550 pertaining to the settlement agreement process is used.

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.

DMAS – Department of Medical Assistance Services

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.

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 § 2.2-4006(A)(4). The 2018 Acts of Assembly, Chapter 2, Item 303, V.2 and JJ.1.vii, and the 2019 Acts of Assembly, Chapter 854, Item 303, V.2 and JJ.1.vii directed the agency to provide for a settlement agreement process for informal and formal administrative proceedings within 280 days of the Act’s effective date..

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Informal Appeals (12 VAC 30-20-540), Settlement Agreements (12 VAC 30-20-550) and Formal Appeals (12 VAC 30-20-560) and also authorize the initiation of the promulgation process provided for in § 2.2-4007.01.

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.

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.

The 2018 Acts of Assembly, Chapter 2, Item 303, V.2 and JJ.1.vii and the 2019 Acts of Assembly, Chapter 854, Item 303, V.2 and JJ.1.vii directed the agency to provide for a settlement agreement process for informal and formal administrative proceedings.

Item 303, V.2 states that "Notwithstanding the provisions of § 32.1-325.1, Code of Virginia, the director shall issue an informal fact-finding conference decision concerning provider reimbursement in accordance with the State Plan for Medical Assistance, the provisions of § 2.2-4019, Code of Virginia, and applicable federal law. The informal fact-finding conference decision shall be issued within 180 days of the receipt of the appeal request, except as provided herein. If the agency does not render an informal fact-finding conference decision within 180 days of the receipt of the appeal request or, in the case of a joint agreement to stay the appeal decision as detailed below, within the time remaining after the stay expires and the appeal timeframes resume, the decision is deemed to be in favor of the provider. An appeal of the director's informal fact-finding conference decision concerning provider reimbursement shall be heard in accordance with § 2.2-4020 of the Administrative Process Act (§ 2.2-4020 et seq.) and the State Plan for Medical Assistance provided for in § 32.1-325, Code of Virginia. The Department of Medical Assistance Services and the provider may jointly agree to stay the deadline for the informal appeal decision or for the formal appeal recommended decision of the Hearing Officer for a period of up to sixty (60) days to facilitate settlement discussions. If the parties reach a resolution as reflected by a written settlement agreement within the sixty-day period, then the stay shall be extended for such additional time as may be necessary for review and approval of the settlement agreement in accordance § 2.2-514 of the Code of Virginia. Once a final agency case decision has been made, the director shall undertake full recovery of such overpayment whether or not the provider disputes, in whole or in part, the informal fact-finding conference decision or the final agency case decision. Interest charges on the unpaid balance of any overpayment shall accrue pursuant to § 32.1-313, Code of Virginia, from the date the Director's agency case decision becomes final."

Item 303, JJ.1.vii states that "Clarify that settlement proposals may be tendered during the appeal process and that approval is subject to the requirements of § 2.2-514 of the Code of Virginia. The amended regulations shall develop a framework for the submission of the settlement proposal and state that the Department of Medical Assistance Services and the provider may jointly agree to stay the deadline for the informal appeal decision or for the formal appeal recommended decision of the Hearing Officer for a period of up to sixty (60) days to facilitate settlement discussions. If the parties reach a resolution as reflected by a written settlement agreement within the sixty-day period, then the stay shall be extended for such additional time as may be necessary for review and approval of the settlement agreement in accordance with law."

The Department of Medical Assistance Services shall have authority to promulgate regulations to implement these changes within 280 days or less from the enactment date of this Act.

In addition, 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. These criteria have been met regarding the proposed new regulation 12 VAC 30-20-550 and amendments to the existing sections, 540 and 560.

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.

Mandated by Item 306 WW of the 2017 Appropriations Act, DMAS convened a workgroup consisting of representatives of the provider community, legal community, and Office of the Attorney General. DMAS held three open public meetings to explore and discuss DMAS' audit methodology and findings, as well as the appeals process. The workgroup agreed to adopt a Plan of Action that included developing a process to permit settlement discussions at the informal appeal level with the purpose of settling cases that do not merit the time and cost of a formal administrative hearing. The recommendations of the workgroup were reported to the General Assembly, which directed the Agency to provide for a settlement agreement process for informal and formal administrative proceedings.

These proposed new and amended regulations are needed to meet this outcome of the workgroup and the items in the 2018 and 2019 Acts of Assembly.

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.

These regulations are needed to provide clarification to providers regarding a new legal settlement process, at the informal appeal level, created in an effort to achieve more time-sensitive and cost-efficient outcomes. The proposed new and amended regulations would serve to protect the health, safety, or welfare of citizens, because they would provide an additional avenue of relief for Medicaid-enrolled providers and serve to encourage providers to participate or continue their participation in the Medicaid program, thus providing greater access to citizens receiving medical assistance services.

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 health, safety, or welfare of Virginians.

No policy currently exists permitting settlement discussions at the informal appeal level. Because no current written policy exists informing providers that they can discuss settlement, most providers wanting to enter into settlement discussions with DMAS have resorted to filing a request for a Formal Administrative Hearing. Doing so costs the Medicaid service providers and the Commonwealth time, money, and other resources that could be better used to serve and provide medical assistance to needy Virginians.

Because no statutory or regulatory authority currently exists permitting settlement discussions at the informal appeal level, these proposed new and amended regulations are the only means of meeting the need identified by the mandated workgroup and the General Assembly.

For changes to existing regulations, refer to this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
12 VAC 30-20-540.E	N/A	The informal appeal decision must be issued within 180 days of receipt of the notice of informal appeal, or the appeal defaults in favor of the provider.	Adds the following language: "...unless the provider and DMAS have mutually agreed in writing to stay the timeframe for issuing the informal decision pursuant to 12 VAC 30-20-550." This amendment will meet the need identified by the mandated workgroup and General Assembly. It will avoid the possibility of an informal decision that defaults in favor of the provider regardless of the merits of the issues under appeal.
12 VAC 30-20-560.E	N/A	The hearing officer must submit a recommended decision to the DMAS director and the provider within 120 days of the filing of the formal appeal notice, or DMAS must file a report with the Executive Secretary of the Supreme Court and the hearing officer that a recommended decision is due.	Adds the following language: "...unless the provider and DMAS have mutually agreed in writing to stay the timeframe for issuing the recommended decision pursuant to 12 VAC 30-20-550. If the hearing officer does not submit a recommended decision within 120 days of the filing of the notice of formal appeal or the period specified under 12 VAC 30-20-550, ..." This amendment will meet the need identified by the mandated workgroup and avoid unnecessary reporting to the Executive Secretary of the Supreme Court.

For the new regulation being promulgated, refer to this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
12 VAC 30-20-550	Establishes a process permitting DMAS and a provider to enter into settlement discussions at the informal and formal appeal levels. Permits the deadlines previously set forth for issuing the informal decision or submitting the recommended decision to be stayed to give the parties a set amount of time to enter into a settlement agreement.	Opens this process to providers who have filed an appeal under 12 VAC 30-20-540 or 12 VAC 30-20-560. Complies with the requirements of Virginia Code § 2.2-509 regarding the ability of a DMAS Appeal Representative authorized by the Office of the Attorney General to represent DMAS in settlement agreement discussions. Also complies with Virginia Code § 2.2-514 regarding the authority of the Attorney General to settle disputes.	This proposed new regulation will meet the need identified by the mandated workgroup to settle cases at the informal appeal level that do not merit the time and cost of a formal administrative hearing, as well as fulfill the General Assembly mandate.

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 viable alternatives exist to meet the General Assembly mandate to establish and follow the recommendations of the workgroup. The process for informal and formal appeals is set out in existing regulations. Adding a process to permit a stay of proceedings to allow settlement discussion requires that a new section 550 be created and current regulations at 540 and 560 be amended to be consistent with the new process.

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.

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, email, or fax to **Jimeequa Williams, 600 East Broad Street Richmond Virginia 23219, 804-225-3508, jimeequa.williams@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.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; nor 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. It does not strengthen or erode the marital commitment and does not increase or decrease disposable family income.