MEMORANDUM

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

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

DATE: **May 2, 2003**

SUBJECT: **Emergency Regulations concerning Methods and Standards for Establishing Payment Rates: Inpatient Hospital Services**
       Limit Reimbursement of Inpatient Capital Cost to 80% of Cost;
       Freestanding Psychiatric Hospitall Rates Unchanged for 2004

   I have reviewed the attached emergency regulations that set out criteria limiting inpatient hospital capital cost to 80% of cost and providing that freestanding psychiatric hospital rates will remain unchanged for 2004.

   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 . . . ." This regulation will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2003 Appropriation Act, Item 325 OOO, which states that "[t]he Department of Medical Assistance Services shall amend its State Plan for Medical Assistance to reduce reimbursement for inpatient and outpatient hospital capital costs to 80 percent of allowable cost except Type One hospitals. Type One hospitals shall continue to be reimbursed at levels currently in effect." In addition, Item 325 XXX requires that "[t]he Department of Medical Assistance Services shall amend the State Plan for Medical Assistance to provide that per diem rates of freestanding psychiatric facilities licensed as hospitals shall not be rebased effective July 1, 2003. The Department shall provide that the per diem rates for these facilities in effect in fiscal year 2003 will continue to apply." Regulations to enact both

of these items of the Appropriation Act are required to become effective within 280 days or less from the enactment of the Act.

This situation qualifies as an emergency as provided in § 2.2-4011(A)(ii) because the Appropriation Act requires these regulations to be effective within 280 days of enactment of this provision. Without emergency regulations, the Department would be unable to meet the time frame established by the General Assembly for making these reimbursement changes. 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 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 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 786-3450.

cc: Siran S. Faulders, Esquire

Attachment