



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: May 2, 2003

**SUBJECT: Emergency Regulation concerning Methods and Standards for Establishing Payment Rates:
Long Term Care Services: Nursing Facility Reimbursement Formula**

I have reviewed the attached emergency regulation that limits the inflation adjustments for nursing facilities for fiscal year 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 this emergency action 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 MMM, which states that: "[o]ut of this appropriation, \$8,768,125 from the general fund and \$8,813,838 from nongeneral funds the second year shall be provided to nursing facilities for fiscal year 2004 direct care inflation adjustments," and "[o]ut of this appropriation, \$2,325,094 from the general fund and \$2,337,216 from nongeneral funds the second year shall be provided to nursing facilities for fiscal year 2004 for indirect care inflation adjustments." The Appropriation Act requires that these inflation adjustments be effective on July 1, 2003, and be "calculated in a manner to ensure that the increase in payments does not exceed the funding provided in this amendment."

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, in this case, July 1, 2003. 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 does not intend to continue regulating the subject matter governed by this emergency regulation beyond 12 months, it will not be necessary to replace these emergency regulations with regulations duly promulgated under Article 2 of the APA

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