



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

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June 10, 2010

**MEMORANDUM**

**TO:** **BRIAN MCCORMICK**  
Regulatory Supervisor  
Department of Medical Assistance Services

**FROM:** **JENNIFER L. GOBBLE**  
Special Counsel to DMAS

**DATE:** **June 10, 2010**

**SUBJECT:** **Emergency Regulations - Durable Medical Equipment and Supplies**

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I have reviewed the attached emergency regulations that would implement changes to the payment methodology for Durable Medical Equipment (DME) and Supplies.

Based on that review, it is this Office's view that the Director of the Department of Medical Assistance Services ("DMAS"), acting on behalf of the Board of Medical Assistance Services pursuant to Virginia Code § 32.1-324, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Virginia Administrative Process Act ("APA") and has not exceeded that authority.

The authority for this emergency action is found in Virginia Code § 2.2-4011(B), which provides that emergency regulations may be adopted in "situations in which Virginia statutory law, the [Virginia] appropriation act, or federal law or federal regulation 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 2010 *Acts of Assembly* Chapter 874, Item 297 UUU and WWW.

Please be advised that under Virginia Code §2.2-4011(B), the Department must state in writing "the nature of the emergency and of the necessity for such action and may adopt the regulations. Pursuant to § 2.2-4012, such regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations." The Department's statement of the nature of the emergency and necessity for such action appears to have been accomplished in the "Agency Background Document." In addition, the emergency regulations shall be effective for no more than 12 months. If the Department intends to continue regulating the subject matter

governed by these emergency regulations 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 Register within 60 days of the effective date of the emergency regulations. The proposed regulations must be filed with the Register within 180 days after the effective date of the emergency regulations. Va. Code § 2.2-4011(C).

If you have any questions or need any additional information, please feel free to contact me at 786-4905.

cc: Kim F. Piner  
Senior Assistant Attorney General