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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 30-20-540; 12 VAC 30-20-550; 12 VAC 30-20-560
VAC Chapter title(s)	Informal Appeals; Settlement Agreements; Formal Appeals
Action title	Settlement Agreement Discussion Process
Date this document prepared	11/14/2019

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.

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

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

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 "Settlement Agreement Discussion Process*"* 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.

11/14/2019 /signature/

Date 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 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.

This regulatory action is expected to be non-controversial because the changes arose out of 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, and these changes are part of that plan.

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 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

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.

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.

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.

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.

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 of this regulatory change are that they ensure that DMAS regulations and DMAS practices are aligned. This ensures transparency for Medicaid providers, Medicaid members, other agencies, and members of the public. 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.

Other State Agencies Particularly Affected: None.

Localities Particularly Affected: None.

Other Entities Particularly Affected: None.

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	None
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.	To establish a more formalized process by which to address administrative settlement agreements in a timely fashion.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	None
Benefits the regulatory change is designed to produce.	To establish a more formalized process by which to address administrative settlement agreements in a timely fashion.

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.	Providers who initiate settlement agreement processes.
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 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.	Unknown.
All projected costs for affected individuals, businesses, or other entities resulting from the	None

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.	
Benefits the regulatory change is designed to produce.	To establish a more formalized process by which to address administrative settlement agreements in a timely fashion.

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 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.

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.

This regulatory action is not expected to affect small businesses as it does not impose compliance or reporting requirements, nor deadlines for reporting, nor does it establish performance standards to replace design or operational standards. However, these changes seek to establish a more formalized process by which to address administrative settlement agreements in a timely fashion.

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, 600 E. Broad Street, Richmond, VA 23235, 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 30-20-540.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	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-

		that a recommended decision is due.	550, …" This amendment will meet the need identified by the mandated workgroup and avoid unnecessary reporting to the Executive Secretary of the Supreme Court.
N/A	12 VAC 30-20-550		

New chapter-section number	New requirements	Other regulations and law that apply	Intent and likely impact of new 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.

There are no changes between the emergency regulation and the fast track stage regulation.