

Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes  Not Needed

If/when this economic impact analysis (EIA) is published in the *Virginia Register of Regulations*, notification will be sent to each member of the General Assembly (COV § 2.2-4007.04.B).



## Virginia Department of Planning and Budget Economic Impact Analysis

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**12 VAC 30-20 Administration of Medical Assistance Services**  
**Department of Medical Assistance Services**  
**Town Hall Action/Stage: 4610/7827**  
March 28, 2017

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### **Summary of the Proposed Amendments to Regulation**

The proposed regulation will make permanent an emergency regulation adopting the reconsideration process for a final agency decision as laid out in Chapter 694 of the 2016 Acts of Assembly and specifying the scope of evidence that may be considered during that process.

### **Result of Analysis**

The benefits likely exceed the costs for all proposed changes.

### **Estimated Economic Impact**

Chapter 694 of the 2016 Acts of Assembly<sup>1</sup> established a reconsideration process for a final agency decision and authorized promulgation of emergency regulations to specify the scope of evidence that may be considered during that process. The director of the Department of Medical Assistance Services promulgated an emergency regulation on December 6, 2016 adopting the reconsideration process by reference as laid out in the statute.<sup>2</sup> Establishment of the reconsideration process affords an additional chance for a petitioner to make its case before the director, and avoid having to resolve the issue in the circuit court. Thus, the reconsideration process has the benefit of potentially avoiding higher litigation costs for both the petitioner and the agency. However, a petitioner has a right to reconsideration process under the statute with or

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<sup>1</sup> <http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+CHAP0694>

<sup>2</sup> See § 2.2-4023.1 of the Code of Virginia.

without this proposed change in regulatory language. Therefore, the main impact of this proposed change is to clarify that the reconsideration process established in the statute applies to final decisions of the Department of Medical Assistance Services.

In addition, the amended statute allowed and the emergency regulation specified that the scope of evidence while reconsidering a final appeal decision is limited to what is in the case record of the formal appeal. In other words, the director's decision shall be based on the testimony and other evidentiary documents submitted previously during the formal appeal. The proposed regulation specifically excludes from consideration any testimony or documents that were not part of the formal appeal case record. The purpose of this provision is to clarify that the establishment of a reconsideration process is not to allow a petitioner to reopen and reargue a case with new evidence. In general, such a rule is consistent with evidentiary rules applicable to reconsideration of judicial decisions where litigants are allowed only one bite at the apple.

The proposed change pertaining to the scope of review is consistent with a recent Virginia Court of Appeals decision<sup>3</sup> where a provider was initially ordered retraction of overpayments after an audit due to improper documentation supporting the claims paid. During the administrative appeal of the audit, the provider used new evidence to show that although its payments lacked supporting evidence, it was not overpaid. The hearing officer recommended reversal of the order to retract payments, but the director did not reverse the order. The case was appealed to a circuit court. The circuit court affirmed the director's decision which was also appealed. In the end, the Court of Appeals affirmed the director's decision and recognized that the director could not use the new evidence as the basis of her decision.

This proposed change is beneficial because it reduces uncertainty and provides guidance by clarifying that reconsideration does not authorize the reopening of the formal administrative hearing or acceptance of new evidence or testimony. Also, prohibition of consideration of new evidence after a final decision has been rendered would help bring finality to a dispute sooner and avoid potential delays and costs.

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<sup>3</sup> 1st Stop Health Services v. DMAS 63 Va. App. 266, 756 S.E.2d 183 (2014).

**Businesses and Entities Affected**

The proposed regulation will affect individuals or health care providers that file a petition for reconsideration of a final decision. Approximately 60 final agency decisions are issued each year. It is expected that only a subset of the decisions will be petitioned for reconsideration.

**Localities Particularly Affected**

The proposed regulation does not disproportionately affect particular localities.

**Projected Impact on Employment**

No significant impact on employment is expected.

**Effects on the Use and Value of Private Property**

No significant impact on the use and value of private property is expected.

**Real Estate Development Costs**

No impact on real estate development costs is expected.

**Small Businesses:****Definition**

Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

**Costs and Other Effects**

The proposed regulation does not introduce any direct costs or other effects on small businesses.

**Alternative Method that Minimizes Adverse Impact**

No adverse impact on small businesses is expected.

**Adverse Impacts:****Businesses:**

The proposed amendment does not have an adverse impact on non-small businesses.

**Localities:**

The proposed amendment will not adversely affect localities.

**Other Entities:**

The proposed amendment will not adversely affect other entities.

**Legal Mandates**

**General:** The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order Number 17 (2014). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

**Adverse impacts:** Pursuant to Code § 2.2-4007.04(C): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

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