Fast-Track Regulation
Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-70-50, 12 VAC 30-70-221, 12 VAC 30-70-301
Regulation title(s)	Hospital Reimbursement System, General, and Payment to Disproportionate Share Hospitals
Action title	Hospital DSH Changes
Date this document prepared	July 21, 2015

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This action replaces the current Disproportionate Share Hospital (DSH) payment methodologies for hospitals providing care to Medicaid members. The current methodology is unsustainable given the current state budget and federal DSH allotments for Medicaid states, including the allotment reductions mandated by the Affordable Care Act (ACA) (section 1923(f) of the *Social Security Act*. This action also more equitably distributes the available funding and provides for annual revisions to reflect changes in the disproportionate share costs incurred by hospitals.

Statement of final agency action

Please 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 Hospital DSH Changes with the attached amended regulations (12 VAC 30-70-50; 12 VAC 30-70-221; 12 VAC 30-70-301) and adopt the action stated therein. I certify that this fast track regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012.1, of the Administrative Process Act.

__7/21/2015_____ /s/ Cynthia B. Jones/ln_____

Date Cynthia B. Jones, Director

Dept. of Medical Assistance Services

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Based on authority under Item 301.WWW of the *2014 Appropriation Act*, and Item 301.WWW of the *2015 Appropriation Act*, this regulatory amendment replaces the existing DSH payment methodologies for all inpatient hospital services. These changes referencing the state's DSH allotment are consistent with the federal law changes contained in the *Social Security Act* § 1923(f).

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this action is to replace the current Disproportionate Share Hospital (DSH) payment methodologies for hospitals providing care to Medicaid members with a sustainable

payment methodology. The current methodology is unsustainable given the current state budget and federal DSH allotments for Medicaid states, including the allotment reductions mandated by the Affordable Care Act (ACA).

In addition, this action more equitably distributes the available funding and provides for annual revisions to reflect changes in the disproportionate share costs incurred by hospitals.

This action does not directly affect the health, safety, and welfare of citizens of the Commonwealth.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

This regulatory action is being promulgated as a fast track action as the changes are non-controversial. (The changes were based on recommendations of the Hospital Payment Policy Advisory Council.) The Center for Medicare and Medicaid Services (CMS) has reviewed and approved these changes.

Substance

Please 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.

The section of the State Plan for Medical Assistance that is affected by this action is Methods and Standards for Establishing Payment Rates- Inpatient Hospital Services (12VAC30-70-50 - Hospital Reimbursement System; 12VAC30-70-221 - General; 12 VAC 30-70-301 – Payment to Disproportionate Share Hospitals).

The DSH methodology in effect prior to July 1, 2014, calculates DSH payments based on operating reimbursement multiplied by Medicaid utilization in excess of specific utilization thresholds. Over time, this methodology has produced unsustainable growth in DSH reimbursement, resulting in budget changes to freeze DSH payment levels or otherwise adjust DSH payments to available funding on an ad hoc basis.

The new methodology multiplies eligible DSH days in a base year by the DSH per diem for all hospitals except Type One hospitals. DSH will be calculated annually based on updated data.

Eligible DSH days for each hospital except Type One hospitals are any Medicaid inpatient acute, psychiatric and rehabilitation days in a base year in excess of 14% Medicaid utilization. Additional eligible DSH days for each hospital are Medicaid days in excess of 28% Medicaid utilization. Additional eligible DSH days provide additional DSH reimbursement for hospitals with very high Medicaid utilization. DSH days for out-of-state enrolled hospitals is prorated by

the percentage of Medicaid utilization that is for Virginia Medicaid members. In addition, eligible DSH days for out-of-state hospitals with less than 12$ Virginia Medicaid utilization are reduced by 50%.

Medicare also uses Medicaid days to calculate Medicare DSH, but Virginia's definition of Medicaid days differed from Medicare and Virginia developed separate reporting requirements for Medicaid days. These regulations align Virginia's definition of Medicaid days with the Medicare definition and use the Medicare cost report as the source for Medicaid days.

The DSH per diem is calculated separately for Type two Hospitals (excluding Children's Hospital of the King's Daughters (CHKD)), CHKD and state inpatient psychiatric hospitals.

The regulations define a DSH allocation for Type Two hospitals excluding CHKD equal to the amount of DSH paid to these hospitals in state fiscal year 2014 increased annually by the percent change in the federal DSH allotment, including any reductions as a result of the Affordable Care Act. The DSH per diem for these hospitals is equal to this allocation divided by eligibly DSH days for these hospitals.

For CHKD, the DSH per diem equals three times the DSH per diem for Type Two hospitals excluding CHKD.

The regulations define a DSH allocation for state inpatient psychiatric hospitals equal to the amount of DSH paid to these hospitals in state fiscal year 2014 increased annually by the percent change in the federal DSH allotment, including any reductions as a result of the Affordable Care act. The DSH per diem for these hospitals is equal to this allocation divided by eligible DSH days for these hospitals.

The DSH payment methodology for Type One hospitals equals their uncompensated care costs. This differs from the methodology authorized in the budget because the Centers for Medicare and Medicaid Services would not approve the parallel State Plan amendment. As a practical matter, however, DSH for Type One hospitals would be limited under either methodology by the annual DSH allotment for the Commonwealth.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.

DMAS submitted to CMS, and CMS rejected a proposal to allot Type One hospitals a DSH payment 17 times more than for Type Two hospitals. The changes in this regulatory action have been reviewed and approved by CMS.

The advantage of this regulatory action is that it will allow hospital DSH payments to remain in place. The old system was unsustainable, and payments could not have continued under the old system.

There are no disadvantages to the public, the agency, or the Commonwealth from this action. Some individual hospital facility payments may increase or decrease under the new methodology, but that is not possible to predict in advance.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include 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 statement to that effect.

There are no requirements more restrictive than federal contained in these recommendations.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There will be no localities that are more affected than others as these requirements will apply statewide.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

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.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including: **a) fund source / fund detail; and** **b) a delineation of one-time versus on-going expenditures**	This amendment is estimated to be budget neutral in aggregate. Individual facility payments may increase or decrease under the new methodology; however, the new payment methodology is not expected to increase annual DSH payments for hospitals in aggregate**.**
Projected cost of the new regulations or changes to existing regulations on localities.	There are no projected costs for localities.
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	Type One and Type Two Hospitals will be affected by these changes.
Agency's best estimate of the number of such entities that will be affected. Please 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.	There are two Type One hospitals (UVA and VCU). There are currently 34 Type Two hospitals. This number may change slightly from year to year as the hospitals that meet the eligibility criteria change. None of the potentially eligible hospitals are small businesses.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: **a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and** **b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.**	There are no projected costs for individuals, businesses, or other entities. There are no reporting, recordkeeping, or other administrative costs. There are no costs related to the development of real estate.
Beneficial impact the regulation is designed to produce.	The regulation updates the current, unsustainable DSH reimbursement methodologies with changes that will allow the payments to remain sustainable. The changes also more equitably distribute the available funding and allow it to be revised annually.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

These changes were drafted to meet CMS requirements, and they have been approved by CMS. No other alternatives are available.

Public participation notice

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.

Family Impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; nor encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.

Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre**-emergency regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
12 VAC 30-70-50		In 30-70-50(A), the Health Care Financing Administration is referenced.	In 30-70-50(A) the HCFA reference is updated to reflect the Centers for Medicare and Medicaid Services.

		In 30-70-50(B)(6), the moving average is determined by Data Resources, Incorporated. In 30-70-50(B)(7) the escalation factor that became effective July 1, 2009, was listed in non-chronological order. In 30-70-50(G), DSH criteria are established only for certain hospitals.	In 30-70-50(B)(6) this reference is updated to reflect values compiled and published by Global Insight or its successor. In 30-70-50(B)(7) the escalation factor that became effective July 1, 2009, was moved to be in chronological order. Changes in 30-70-50(G) sunset this methodology to replace it with the new methodology contained in sec. 301.
12 VAC 30-70-221		In 30-70-221(C) the Medicaid Utilization Percentage is defined.	The definition of Medicaid Utilization Percentage in 30-70-221 is sunset in favor of a new definition effective July 1, 2014, in 12 VAC 30-70-301(B) .
12 VAC 30-70-301		In 30-70-301, there was no definition section. In 30-70-301, the old DSH rules were described.	Section 30-70-301(A) is now a definition section, including the definition of uncompensated care costs. Changes were made to 30-70-301 B, C, D, and E to implement the new DSH methodology. Paragraph F was amended to clarify that the old DSH rules for hospitals qualifying under the 14% inpatient Medicaid utilization percentage applied prior to July 1, 2014. The old section 30-70-301(D) was stricken and updated content was included in a new paragraphs K and L.