



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: November 4, 2003

SUBJECT: Emergency Regulations concerning Drug Utilization Review

I have reviewed the attached emergency regulations regarding changes to the regulations governing the drug utilization review ("DUR") program.

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 involving an imminent threat to public health or safety." These regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to implement changes in the DUR program that will enhance the health of Medicaid recipients. This situation qualifies as an emergency as provided in § 2.2-4011(A) because without these changes, DMAS will be unable to modify its DUR program to reject the use of pharmacy services that could endanger the life and health of Medicaid recipients. Because, as discussed

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above, the health of Medicaid recipients could be adversely affected if this change is not made, an argument can be made that the “health and safety” criterion is satisfied. DMAS is mandated to have a DUR program pursuant to section 1927(g) of the Social Security Act (42 U.S.C. § 1396r-8(g)).

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, and this appears to be accomplished in the “Agency Background Document.” In addition, the regulations shall be effective for no more than twelve months. As the Department intends to continue regulating the subject matter governed by this emergency regulation 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 Registrar within 60 days of the effective date of the emergency regulations, (and it appears that this has been done) and the proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

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