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## Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	DEPT. OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation(s)</b>	12 VAC 30-70-411; 12 VAC 30-70-429; 12 VAC 30-80-20; 12 VAC 30-160-10
<b>Regulation title(s)</b>	Supplemental Payments for Certain Teaching Hospitals Supplemental Payments for Qualifying Private Acute Care Hospitals; Services that are reimbursed on a cost basis; Hospital Assessment
<b>Action title</b>	FFS Supplemental Payments and Hospital Assessment
<b>Date this document prepared</b>	July 27, 2017

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to eighteen months), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation. 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 of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 regulatory action accomplishes three goals: 1) it authorizes DMAS to levy assessments upon private acute care hospitals operating in Virginia to fund new Medicaid coverage for adults as well as new Medicaid hospital supplemental payments; 2) it establishes new supplemental inpatient and outpatient payments for qualifying private acute care hospitals in Virginia; and 3) it

sunsets supplemental payments made to certain private teaching hospitals to avoid overlapping supplemental payments.

## Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.*

DMAS = Department of Medical Assistance Services

## Emergency Authority

*The APA (Code of Virginia § 2.2-4011) 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. Please explain why this is an emergency situation as described above, and provide specific citations to the Code of Virginia or the Appropriation Act, if applicable.*

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 § 2.2-4006(A)(4).

The items in this regulation are authorized by the 2018 Acts of Assembly (see the Legal Basis section below) and are required to be in place within 280 days.

The Governor is hereby requested to approve this agency's adoption of these emergency regulations and to authorize the initiation of the promulgation process provided for in § 2.2-4007.

## Legal basis

*Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) the promulgating entity, i.e., agency, board, or person.*

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.

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.

All of the items included in this regulatory action are required to occur within 280 days, and an emergency regulation is necessary.

The 2018 Acts of Assembly, Chapter 2, Items 3-5.15 and 5.16 instruct DMAS to levy a provider coverage assessment and a provider payment rate assessment beginning on or after October 1, 2018 when all necessary state plan amendments have been approved by CMS. The assessment must begin on October 1, 2018 in order to allow Medicaid expansion to be implemented on January 1, 2019.

In addition, the 2018 Acts of Assembly, Item 303.XX 6 c states that supplemental payments for certain teaching hospitals shall sunset after the effective date of a statewide supplemental payment for private acute care hospitals authorized in Item 3-5.16.

**Purpose**

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

Each of the three items included in this regulatory package is required to fund new Medicaid coverage for adults as well as new Medicaid hospital supplemental payments. The provider coverage assessment will fund the non-federal share of Medicaid coverage for newly-eligible adults while the provider payment rate assessment will fund the non-federal share of an increase in inpatient and outpatient supplemental payments to qualifying private acute care hospitals. The private acute care hospitals required to pay the assessment will benefit from the new coverage and the supplemental hospital payments. These regulations establish these new supplemental payments and sunset ones that were previously authorized.

**Need**

*Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.*

Each of the three items included in this regulatory package is required to fund new Medicaid coverage for adults as well as new Medicaid hospital supplemental payments. The new Medicaid coverage for adults is essential to protect, the health, safety, and welfare of citizens; it will provide health care coverage to approximately 400,000 Virginians who currently do not have medical insurance (i.e., do not qualify for health insurance subsidies under the Affordable Care Act). The assessments also fund the non-federal share of expansion instead of

appropriating general funds. In addition, Medicaid expansion allows Virginia to draw down federal dollars for the expansion population, which generates savings for the state.

## Substance

*Please describe any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons the agency has determined that the proposed regulatory action is essential to protect the healthy, safety, or welfare of Virginians.*

This regulatory action: 1) authorizes DMAS to levy a provider coverage assessment and a payment rate assessment upon private acute care hospitals operating in Virginia; 2) establishes new supplemental inpatient and outpatient payments for qualifying private acute care hospitals in Virginia; and 3) sunsets existing supplemental payments made to certain teaching hospitals to avoid overlapping supplemental payments.

### 1) Provider Coverage Assessment and Payment Rate Assessment

The provider coverage assessment will generate funds that will be used to cover the non-federal share of the full cost of Medicaid coverage for newly eligible individuals, including the administrative costs of collecting the assessment and implementing and operating the coverage for newly eligible adults.

The provider payment rate assessment will generate funds that will be used to fund: 1) an increase in inpatient and outpatient rates paid to private acute care hospitals in Virginia up to the private hospital “upper payment limit” and “managed care organization hospital payment gap” and 2) the administrative costs of collecting the assessment and of implementing and operating the associated rate actions.

Separate funds are being established for each assessment.

### 2) New Supplemental Inpatient and Outpatient Payments for Qualifying Private Acute Care Hospitals in Virginia

The 2018 Acts of Assembly directs DMAS to provide supplemental inpatient and outpatient hospital payments to qualifying hospitals up to the private hospital upper payment limit for payment to private hospitals. Qualifying hospitals are all private acute care hospitals excluding public hospitals, freestanding psychiatric and rehabilitation hospitals, children’s hospitals, long stay hospitals, long-term acute care hospitals and critical access hospitals. The total supplemental payment shall be based on the difference between the private hospital inpatient or outpatient upper payment limit (in 42 CFR § 447.272, and 42 CFR 447.321, respectively) as approved by CMS and all other Medicaid payments subject to such limit. DMAS is amending the State Plan to make supplemental payments to all qualifying hospitals and is amending its contracts with managed care organizations to include a directed payment for qualifying hospitals consistent with the State Plan Amendment.

### 3) Sunsetting Other Supplemental Payments for Private Acute Care Hospitals.

In order to avoid overlapping supplemental payments, supplemental payments made to a limited group of private hospitals are being terminated on the date the new payments (in #2, above) are effective.

The following supplemental payments will sunset in this regulatory action: Supplemental Inpatient Payments for Certain Teaching Hospitals (Sentara Norfolk General and Carilion Medical Center). Supplemental payments for Private Hospital Partners of Type One Hospitals are being sunset in a separate Fast Track regulatory action.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
30-70-411			Sunset inpatient payments for certain teaching hospitals (Sentara Norfolk General and Carilion Medical Center)
	12 VAC 30-70-429	N/A	Establishes supplemental payments for qualifying private acute care hospitals for inpatient services.
30-80-20		Describes payments for outpatient hospital services	Establishes supplemental payments for private acute care hospitals for outpatient services.
	12 VAC 30-160-10	N/A	Establishes the hospital assessments that will be used to fund the non-federal share of the cost of Medicaid coverage for newly-eligible individuals and for the hospital supplemental payments.

### Alternatives

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.*

There are no alternatives that will meet the General Assembly mandate.

### Public participation

*Please indicate whether the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments. Please also indicate whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel has been used in the development of the emergency regulation and whether it will also be used in the development of the permanent regulation.*

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to Emily McClellan, DMAS, 600 E. Broad Street, Richmond, VA 23219, 804-371-4300, or [emily.mcclellan@dmass.virginia.gov](mailto:emily.mcclellan@dmass.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this 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, and do not increase or decrease disposable family income.