

**BEFORE THE  
ADMINISTRATIVE RULES COMMITTEE  
OF THE  
NORTH DAKOTA LEGISLATIVE COUNCIL**

<b>N.D. Admin. Code Chapter</b>	)	<b><u>REPORT OF THE</u></b>
<b>75-02-02.1, Eligibility for Medicaid</b>	)	<b><u>DEPT. OF HUMAN SERVICES</u></b>
	)	<b>March 13, 2018</b>
<b>(Pages 333-374)</b>	)	

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For its report, the North Dakota Department of Human Services (Department) states:

1. The proposed amendments to N.D. Admin. Code chapter 75-02-02.1 are not related to statutory changes made by the Legislative Assembly.
2. These rules are related to federal statute or regulation, specifically the Affordable Care Act, and based on guidance received from Centers for Medicare and Medicaid.
3. The Department uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on December 11, 2017. The record was held open until 5:00 p.m. on December 21, 2017, to allow written comments to be submitted. No comments were received at the public hearing or within the comment period. The "Summary of Comments" is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,328.64.
6. The proposed rules amend chapter 75-02-02.1. The following specific changes were made:

**Section 75-02-02.1-05** is amended to increase the medically needy coverage group from under the age of nineteen to under the age of twenty-one.

**Section 75-02-02.1-14.1** is amended to provide clarification as to how an individual can be found medically frail and amends who may qualify.

**Section 75-02-02.1-17** is amended to expand when good cause can be granted if applicants and recipients are unable to obtain any annuities, pensions, retirement, and disability benefits to which they are entitled.

**Section 75-02-02.1-20** is amended to add employment criteria for individuals to be eligible for transitional Medicaid

benefits if they are ineligible under parent and caretaker relative group and to update rules for consistency purposes with current policy and Affordable Care Act.

**Section 75-02-02.1-28** is amended to remove restriction regarding use of the motor vehicle and to add charitable gift annuity to the list of excluded assets.

**Section 75-02-02.1-28.1** is amended to update a citation reference.

**Section 75-02-02.1-31.1** is amended to allow an individual who is under the age of sixty-five and disabled to establish a special needs trust for the benefit of the individual.

**Section 75-02-02.1-32** is amended to allow the department to determine that a debtor is judgment proof without the applicant or recipient securing a money judgment against the debtor.

**Section 75-02-02.1-33.1** is amended to allow the department to accept partial returns of transferred asset or income to reduce the disqualifying transfer, to add motor vehicle to the list of assets excluded for Medicaid purposes, to add language to allow for other evidence to be presented if absence of a valid written contract for services or assistance furnished by the transferee, to remove the difference between the fair market value of transactions between someone in or not in a confidential relationship, to remove the implied trust presumption based on a transaction involving an individual in a confidential relationship based on Centers for Medicare and Medicaid guidance, to change the frequency that an annuity can be paid out, and to reconcile the language regarding annuities with state law and federal requirements.

**Section 75-02-02.1-33.2** is amended to allow the department to accept partial returns of transferred asset or income to reduce the disqualifying transfer, to add motor vehicle to the list of assets excluded for Medicaid purposes, to replace "lawful" with "reasonable", to remove a requirement for undue hardship due to a Centers for Medicare and Medicaid requirement, to add language to clarify remaining available assets when applying for hardship, to add language to allow for other evidence to be presented if absence of a valid written contract for services or assistance furnished by the transferee, to remove the difference between the fair market value of transactions between someone in or not in a confidential relationship, to remove the implied trust presumption based on a transaction involving an individual in a confidential relationship based on Centers for Medicare and Medicaid guidance, to change the frequency that an annuity can be paid out, and to reconcile the language regarding annuities with state law and federal requirements.

**Section 75-02-02.1-41.2** is amended to add a new subsection regarding budgeting procedures when determining overpayments to support the Affordable Care Act appeals cases.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. There is an expected fiscal impact on the Medicaid program that would result from the implementation of 75-02-02.1-33.1 and 75-02-02.1-

33.2. However, any amount is currently unknown as there is no data to indicate the number of individuals that will apply, when they will apply, or what amount of medical costs they will incur. The remaining proposed rules are not expected to have a significant fiscal impact on state revenues and expenditures.

10. A constitutional takings assessment was prepared and is attached to this report.
11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Jonathan Alm  
Legal Advisory Unit  
North Dakota Department of Human Services  
March 9, 2018



Doug Burgum, Governor  
Christopher Jones, Executive Director

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED AMENDMENTS TO  
N.D. ADMIN. CODE CHAPTER 75-02-02.1  
ELIGIBILITY FOR MEDICAID**

The North Dakota Department of Human Services held a public hearing on December 11, 2017, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code Chapter 75-02-02.1, Eligibility for Medicaid.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 21, 2017.

No one attending the public hearing provided comments. No written comments were received within the comment period.

**SUMMARY OF COMMENTS**

No comments were received.

There will be no change to the proposed rule as no comments were received.

Prepared by:

Jonathan Alm, Director  
Legal Advisory Unit  
N.D. Dept. of Human Services

January 10, 2018

Cc: Michele Gee, Economic Assistance

## MEMO

**TO:** Jonathan Alm, Legal Advisory Unit

**FROM:** Irene Karnopp, Medicaid Eligibility Policy Administrator

**RE:** Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-02.1 Eligibility for Medicaid

**DATE:** October 26, 2017

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed amendments to North Dakota Administrative Code chapters 75-02-02.1. These amendments are anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

### Purpose

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapters 75-02-02.1. Federal law and guidance from Centers for Medicare and Medicaid mandates some of the proposed rules.

### Classes of Persons Who Will be Affected

The classes of person who will most likely be affected by these rules are:

- Medicaid applicants and recipients.

### Probable Impact

The proposed amendments may impact the regulated community as follows:

- Allowing for additional coverage;
- Expanding good cause;
- Amending who may qualify for medically frail and transitional medicaid benefits;
- Removing the use limitation on the motor vehicle;
- Allowing for charitable gift annuity;
- Allowing the department to determine if the debtor is judgment proof instead of requiring a money judgment;
- Allowing the department to accept partial returns of transferred asset or income to reduce the disqualifying transfer;
- Remove the difference between the value of transactions between someone in or not in a confidential relationship;
- Change the frequency requirements for annuity payouts;

- To allow for other evidence to be presented if absence of a valid contract for services or assistance furnished by the transferee; and

#### Probable Cost of Implementation

There is an expected fiscal impact on the medicaid program; however, any amount is currently unknown as there is no data to indicate the number of individuals that will apply, when they'll apply, what assets they will or will not have, or what amount of medical costs they will incur.

#### Consideration of Alternative Methods

There are no alternative methods that would ensure consist understanding and application of the rules governing the administration of the Medicaid program specific to Medicaid eligibility. Also, no alternative methods were considered as some amendments are in response to the Affordable Care Act or are required due to clarifications from Centers for Medicare and Medicaid.



## MEMORANDUM

**TO:** Jonathan Alm, Legal Advisory Unit

**FROM:** Irene Karnopp, Medicaid Eligibility Policy Administrator

**DATE:** October 26, 2017

**SUBJECT:** Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapters 75-02-02.1

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The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed amendments to N.D. Admin. Code chapters 75-02-02.1. Some of the proposed rules are mandated by the Affordable Care Act or are required due to clarification from Centers for Medicare and Medicaid.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

### 1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by these proposed amendments are small political subdivisions consisting of the County Social Service Boards of counties with populations with less than five thousand. Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations with less than five thousand are responsible for locally administered economic assistance and health care coverage programs. The County Social Service Boards must meet, or assist the North Dakota Department of Human Services to meet, compliance and reporting requirements imposed by federal and state law. For these reasons, establishment of less stringent compliance or reporting requirements for these small entities was not considered.

### 2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of County Social Service Boards. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

### 3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required compliance or reporting requirements of County Social Service Boards. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

### 4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

The County Social Service Boards are responsible to meet performance standards as well as operational standards imposed by federal and state law. The proposed amendments do not impose any design standards or impose any additional operational standards or operational standards for County Social Service Boards. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

### 5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

The requirements of the proposed amendments are imposed individuals who apply for health cover coverage under the rules of the Affordable Care Act. For this reason, the proposed rules do not exempt County Social Service Boards of counties with populations with less than five thousand from all or any part of the requirements contained in the proposed rule.

## MEMORANDUM

**TO:** Jonathan Alm, Legal Advisory Unit

**FROM:** Irene Karnopp, Medicaid Eligibility Policy Administrator

**DATE:** October 26, 2017

**SUBJECT:** Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-02.1

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapters 75-02-02.1. Some of the proposed rules are mandated by the Affordable Care Act or are required due to clarification from Centers for Medicare and Medicaid. The proposed rules are not expected to have an adverse economic impact on small entities.

### 1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are county social services.

### 2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No administrative or other costs are required by the small entities for compliance with the proposed rules.

### 3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: There are no probable cost to private persons or consumers for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule:

- Expanding good cause;
- Amending who may qualify for medically frail and transitional medicaid benefits;
- Removing the use limitation on the motor vehicle;
- Allowing for charitable gift annuity;
- Allowing the department to determine if the debtor is judgment proof instead of requiring a money judgment;

- Allowing the department to accept partial returns of transferred asset or income to reduce the disqualifying transfer;
- Remove the difference between the value of transactions between someone in or not in a confidential relationship;
- Change the frequency requirements for annuity payouts; and
- To allow for other evidence to be presented if absence of a valid contract for services or assistance furnished by the transferee.

#### 4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be:

The effect on state revenues is unknown at this time.

#### 5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Small entities should not experience administrative costs or other costs; therefore, alternative methods were not necessary.

## FISCAL IMPACT

There is an expected fiscal impact on the Medicaid program that would result from the implementation of 75-02-02.1-33.1 and 75-02-02.1-33.2, allowing partial return of disqualifying assets before imposition of disqualification period, establishing the fair market value of real or personal property subject to dispute at seventy-five percent of the estimated fair market value, and removing the presumption of disposing of assets or income to someone in a confidential relationship. However, any amount is currently unknown as there is no data to indicate the number of individuals that will apply, when they will apply, or what amount of medical costs they will incur. The remaining proposed rules are not expected to have a significant fiscal impact on state revenues and expenditures.



Doug Burgum, Governor  
Christopher Jones, Executive Director

## TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-02-02.1.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 26<sup>th</sup> day of October, 2017.

by:

A handwritten signature in black ink, appearing to be "C. Jones", is written over a horizontal line. Below the line, the text "N.D. Dept. of Human Services" is printed.

N.D. Dept. of Human Services