

**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>75-02-06, Ratesetting for</b> | ) | <b><u>DEPT. OF HUMAN SERVICES</u></b> |
| <b>Nursing Home Care</b>         | ) |                                       |
|                                  | ) | <b>March 13, 2018</b>                 |
| <b>(Pages 388-403)</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 75-02-06 are being amended as a result of 2017 House Bill Nos. 1012 and 1315.
2. These rules are not related to changes in a federal statute or regulation.
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 6, 2017. The record was held open until 5:00 p.m. on December 18, 2017, to allow written comments to be submitted. No comments were received at the public hearing. Two written comments were received within the comment period. A "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 \$2,496.84.
6. The proposed rules amend chapter 75-02-06. The following specific changes were made:
  - Section 75-02-06-12** is amended to include the definition for "medicare part B income", to clarify the definition of "therapy income", and update a citation.
  - Section 75-02-06-12.1** is amended to update grammar, numbering, and punctuations and to add third party payer therapy services to non-allowable costs in computing nursing home care rates.
  - Section 75-02-06-16** is amended to update the dates and amounts for rate determination limitations, to increase the final rate adjustment amount, to update and clarify the process for partial

year adjustments, and to replace “interim property rate” with “projected property rate”.

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. Based on the fiscal estimates prepared during the 2017 Legislative Assembly for House Bill Nos. 1012 and 1315 and the increase to the limit rates, the expected fiscal impact on the Medicaid program is \$2,015,942 (total funds) and \$1,007,971 (general funds) for calendar year 2018.
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 75-02-06  
RATESETTING FOR NURSING HOME CARE**

The North Dakota Department of Human Services (the Department) held a public hearing on December 6, 2017, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 18, 2017.

Three individuals attended the hearing and no comments were received. Two written comments were received within the comment period. The commentators were:

1. Shelly Peterson, President, North Dakota Long Term Care 1900 North 11<sup>th</sup> Street, Bismarck ND 58501
2. Wade Peterson, Executive Director, Prospera Communities, 301 Lorrain Drive, Bismarck ND 58503

**SUMMARY OF COMMENTS**

**Comment:**

Thank you for the opportunity to provide input to the proposed amendments to NCCC 75-02-06. These comments represent the consensus of 80 nursing facility providers who are members of the NDLTCA and who are impacted by the changes.

Our comments consist of 2 suggested changes to the amended language proposed as it relates to Medicare Part B income and interim property rates. We also request additional amendments to promote efficiencies related to department and provider resources expended relating to auditing and reviewing immaterial adjustments which have a negligible impact on the rates paid for nursing facility care.

**Section 75-02-06-12. Offsets to cost.**

The proposed rules delete Medicare Part B income from the therapy Income section of Offsets to Costs and add a new subsection to include that all Medicare Part B income must be offset. With this change the provider no longer has the option to make Medicare Part B therapy costs nonallowable as provided for in subsection j. By excluding the exception for Medicare Part B therapy income from subsection J. the language included in subsection 40 (proposed as subsection 39) of section 75-02-06-12.1 now becomes ambiguous and contradictory as the proposed subsection n. states "income from medicare part must be offset" with no provision for treating Medicare Part B therapy income differently as is currently allowed under subsection j. and subsection 40 of section 75-02-06-12.1. The addition of subsection n. should address only Medicare Part B income other than therapy income. In

addition, the reference to subsection 40 must be amended to reflect the proposed renumbering of to 39 of subsection 40 of section 75-02-06-12.1.

We suggest leaving the existing wording in subsection j and further define medicare part B income by including the word therapy to specify that Part B therapy costs can be reported as nonallowable in lieu of the income offset and then exclude Part B therapy income from n. This revision would ensure that Medicare Part B income would appropriately be offset while still allowing for the exception to make costs nonallowable specifically for therapies.

- j. "Therapy income". Except for income from medicare part A, income from therapy services, including medicare part B therapy income, must be offset to therapy costs unless the provider has elected to make therapy costs nonallowable under subsection 39 of section 75-02-06-12.1.
- n. "Medicare part B income". Income from medicare part B, excluding medicare part B therapy income, must be offset to the cost category where the expense is recorded.

**Section 75-02-06-16. Rate determinations.**

The amendment to 75-02-06-16.7.d eliminates the requirement for filing an interim cost report and the need for a retroactive cost settle-up. The word "interim" which is included in the first two sentences of this subsection should also be amended to "projected". This subsection should have wording consistent with the wording used in subsection g which provides for the inclusion of a projected, not an interim, property rate which must be used in adjusting property rates in subsequent cost reporting periods.

- d. For a facility with a significant capacity increase, the rate established for direct care, other direct care indirect care, operating margins, and incentives based on the last report year, must be applied to all licensed beds. ~~An interim~~ A projected property rate must be established based on projected property costs and projected census. The ~~interim~~ projected property rate must be effective. . .

**Section 75-02-06-16. Rate determinations.**

To address the materiality of small and insignificant adjustments being made to rates, we ask that section 75-02-06-16 be further amended to include a change when an adjustment may be applied to an existing rate. Currently, all adjustments in the aggregate totaling at least 10 cents must be applied to an existing rate. This practice results in many small and immaterial individual adjustments being included when finalizing a rate. Amending the current rules to identify that an individual adjustment, error, or omission rather than the aggregate of adjustments, errors and omissions must exceed an established amount would increase both efficiency in the audit process and lessen the provider's burden of providing documentation on small amounts. We suggest changing all plural adjustments, errors and omissions wording to singular references and we further as that the ten cents per day be increased to twenty-five cents per day. Section 9 deals with the cumulative effect of the adjustments in this section and we suggest that this be amended to 25 cents also.

The amendments we are asking for would read, beginning with 75-02-06-16.5.a(1):

- (1) The cost report must be reviewed taking into consideration the prior year's adjustments. The facility must be notified by facsimile transmission or electronic email of any ~~adjustments~~ adjustment, which must have an impact of at least twenty-five cents per day, based on the desk review. Within seven working days after notification, the facility may submit information to explain why the desk adjustment should not be made. The department shall review the information and make appropriate adjustments.
  - (6) The desk rate may be adjusted to reflect ~~errors, adjustments, or omissions~~ an error, adjustment, or omission for the report year that ~~result~~ results in a change of at least ~~ten~~ twenty-five cents per day for the rate weight of one.
- b. Final rate.
- (1) The cost report may be field audited to establish a final rate. If no field audit is performed, the desk audit rate must become the final rate upon notification from the department. The final rate is effective January first of each rate year unless the department specifically identifies an alternative effective date.
  - (2) The final rate must include any ~~adjustments~~ adjustment for nonallowable costs, ~~errors~~ error, or ~~omissions~~ omission that ~~result~~ results in change from the desk audit rate of at least ~~ten~~ twenty-five cents per day for the rate weight of one that ~~are~~ is found during a field audit or ~~are~~ is reported by the facility within twelve months of the rate yearend.
  - (3) The private-pay rate must be adjusted to the final rate no later than the first day of the second month following receipt of notification by the department of the final rate and is not retroactive except as provided for in subdivision c.
  - (4) The final rate may be revised at any time for special rates or one-time adjustments provided for in this section.
  - (5) If ~~adjustments, errors, or omissions~~ are an adjustment, error or omission is found after a final rate has been established, the following procedures must be used:
    - (a) ~~Adjustments, errors, or omissions~~ An adjustment, error or omission found within twelve months of establishment of the final rate, not including subsequent revisions, resulting in a change of at least ~~ten~~ twenty-five cents per day for the rate weight of one must result in a change to the final rate. The change must be applied retroactively as provided for in this section.
    - (b) ~~Adjustments, errors, or omissions~~ An adjustment, error or omission found later than twelve months after the establishment of the final rate, not including subsequent revisions, that would have resulted in a change of at least ~~ten~~ twenty-five cents per day for the rate weight of one had ~~they~~ it been included, must be included as an adjustment in the report year that the adjustment, error, or omission ~~was~~ is found.
    - (c) ~~Adjustments~~ An adjustment resulting from an audit of home office costs, that ~~result~~ results in a change of at least ~~ten~~ twenty-five cents per day for the rate weight of one, must be included as an adjustment in the report year in which the costs were incurred.
    - (d) The two report years immediately preceding the report year to which the ~~adjustments, errors, or omissions~~ apply an adjustment, error, or omission

applies may also be reviewed for a similar adjustments, errors, or omissions adjustment, error, or omission.

9. Under no circumstances, including an appeal or judicial decision to the effect a rate was erroneously established, may a rate adjustment be made to any rate established under this chapter, unless the cumulative impact of all adjustments not already included in the established rate equals or exceeds ten twenty-five cents per day for the rate weight of one.

**Response:**

**Section 75-02-06-12. Offsets to cost.**

The Department will update the proposed amendment to subsection 2(n) of section 75-02-06-12 to the following:

- n. "Medicare part B income". Income from medicare part B must be offset to the cost category where the expense is recorded. Medicare part B therapy income must be offset unless the provider has elected to make therapy costs nonallowable under subsection 39 of section 75-02-06-12.1.

The Department will update the proposed amendment to subsection 2(j) of section 75-02-06-12 to reference subsection 39.

**Section 75-02-06-16. Rate determinations.**

The Department will update the proposed amendment to subsection 7(d) of section 75-02-06-16 to the following:

- d. For a facility with a significant capacity increase, the rate established for direct care, other direct care, indirect care, operating margins, and incentive based on the last report year, must be applied to all licensed beds. ~~An interim~~ A projected property rate must be established based on projected property costs and projected census. The ~~interim~~ projected property rate must be effective from the first day of the month beginning after the date in which the increase in licensed beds is issued by the state department of health or the first day of the month beginning after the date when the request for a projected property rate is made to the department, whichever is later, through the end of the rate year. ~~The facility shall file by March first an interim property cost report following the rate year. The interim cost report is used to determine the final rate for property and to establish the amount for a retroactive cost settle-up. The final rate for property is limited to the lesser of the interim property rate or a rate based upon actual property costs. The property rate for the subsequent rate year must be based on projected property costs and census imputed as ninety-five percent of licensed beds, rather than on property costs actually incurred during the report year; and may not be subject to retroactive cost settle-up. Subsequent property rates must be adjusted using this methodology, except imputed census must be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.~~

The Department will not be making a change to the proposed rules based on the additional comments received for section 75-02-06-16. The accumulation of adjustments rather than making an adjustment for each adjustment, error, or omission assures that immaterial adjustments are not made to either the desk or final rate.

**Comment:**

Thank you for the opportunity to provide input to the proposed amendments to NCCC 75-02-06. We are proposing adding an exception to the nursing facility rules to prevent facilities in the future from having necessary costs limited due to less than 90% occupancy after adding additional beds in a community with need for additional capacity, when a facility can show that their census has been meaningfully increasing prior to the end of a full 12 month cost reporting year.

The 90% Occupancy rule was originally put in place to encourage facilities to consider downsizing or reduce costs where census was declining due to lack of need for the beds at a facility. Unfortunately it has been used to penalize facilities who added capacity to meet the need in a community. Some difference should be given until and during the first full 12 months of a cost report year, to allow a reasonable time to fill those beds.

This proposed change supports past legislative action that significant capacity increases to address an unmet need is different from the concept of paying for empty beds, which was the primary purpose of the occupancy rule that went into effect in 1994.

In 1991 legislation was passed SB 2437 to address significant capacity increases and not penalize facilities. This legislation was jointly supported by DHS and the North Dakota Long Term Care Association.

- f. The actual rate for indirect care costs and property costs must be the lesser of the rate established using:
  - (1) Actual census for the report year; or
  - (2) Ninety percent of licensed bed capacity available for occupancy as of June thirtieth of the report year:
    - (a) Multiplied times three hundred sixty-five; and
    - (b) Reduced by the number of affected beds, for each day any bed is not in service during the report year, due to a remodeling, renovation, or construction project.
- g. The department may waive or reduce the application of subdivision f if the facility demonstrates that occupancy below ninety percent of licensed capacity results from the use of alternative home and community services by individuals who would otherwise be eligible for admission to the facility and:
  - (1) The facility has reduced licensed capacity; or



- (2) The facility's governing board has approved a capacity decrease to occur no later than the end of the rate year which would be affected by subdivision f.
- h. The department may waive the application of paragraph 2 of subdivision f for nongeriatric facilities for individuals with disabilities or geropsychiatric facilities or units if occupancy below ninety percent is due to lack of department-approved referrals or admissions.
- i. The department may waive the application of paragraph 2 of subdivision f to indirect care costs and property costs for a facility that has added bed capacity and or had construction or remodeling occurring within twenty four months of the report year end and can demonstrate that:
- (1) Occupancy has increased significantly in the 12 month period since the addition of beds, construction, or remodeling occurred: and
- (2) The facility has a minimum of a ninety two percent occupancy in each of the last three months of the first full 12 month cost report year.

**Response:**

The Department will not be making a change to the proposed rules based on the comment received. N.D.C.C. § 50-24.4-10 provides discretion to the Department to allow for the waiving of the ninety percent occupancy limitation. The change proposed is not necessary if the Department determines to recognize the one, unique situation that was raised that resulted in the comment submitted. The Department continues to review the financial and occupancy information from the one provider impacted and is able to address the situation without a change to proposed rules.

Prepared by:

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

In Consultation with: LeeAnn Thiel, Medical Services

January 17, 2018

cc: LeeAnn Thiel, Medical Services

## MEMO

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

**FROM:** LeeAnn Thiel, Administrator  
Medicaid Payment and Reimbursement Services, Medical Services

**RE:** Regulatory Analysis of Proposed North Dakota Administrative Code  
chapter 75-02-06

**DATE:** August 31, 2017

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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 Article 75-02-06. These amendments are anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

### Purpose

The amendments to 75-02-06 update the direct, other direct and indirect limits pursuant to 2017 HB 1012. The amendments update the per diem rate change when private pay must be refunded for final rates pursuant to 2017 HB 1315. The amendments identify ongoing program updates and clarifications.

### Classes of Persons Who Will be Affected

Nursing facility operators and nursing facility residents will be affected by the proposed rule changes to 75-02-06 since the changes affect the allowable costs and offset to costs used to establish nursing facility rates.

### Probable Impact

The calendar year 2018 estimated impact of the 75-02-06 increase to the direct, other direct, and indirect limits is expected to be \$2,015,942. The Department's 2017-2019 budget approved by the 2017 Legislative Assembly included appropriation for the increase in these limits.

The calendar year 2018 estimated impact of the 75-02-06 changes for the ongoing program updates and clarifications is expected to be zero.

The probable cost to private persons and consumers who are affected by the proposed rules to 75-02-06 is an estimated additional \$1,728,252 for calendar year 2018. Private pay residents are subject to rate equalization in nursing facilities participating in Medicaid per NDCC 50-24.4-19, therefore, the increase in rates due to the proposed amendments must also apply to private pay individuals.

#### Probable Cost of Implementation

The amendments become part of existing rules on ratesetting and there are no additional costs associated with implementing the rule changes. It is estimated there will be no effect on state revenues.

#### Consideration of Alternative Methods

The Department did not consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.

## MEMORANDUM

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

**FROM:** LeeAnn Thiel, Administrator  
Medicaid Payment and Reimbursement Services, Medical Services

**DATE:** August 31, 2017

**SUBJECT:** Small Entity Regulatory Analysis Regarding Proposed  
Amendments to N.D. Admin. Code chapter 75-02-06

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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 chapter 75-02-06. The proposed rules are not mandated by federal law.

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 the proposed amendments are licensed nursing facilities that have gross revenues of less than \$2.5 million annually. The proposed amendments affect components of the ratesetting processes for nursing facilities that are applied to costs reported by the entities. Because all costs must be considered when establishing limits used in the rate setting process, facilities, including facilities that are considered to be small entities, must file a uniform annual cost report. 42 CFR 447.253(f) requires that the Medicaid agency provide for the filing of uniform cost reports by each participating provider. The proposed amendments do not alter the uniform cost reporting requirements necessary to establish the rates for all nursing facilities in the state that choose to participate in Medicaid and therefore 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 any required schedules or deadlines for the uniform cost reporting requirements and therefore 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 any uniform cost reporting requirements, therefore, consolidation or simplification of 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 proposed amendments do not affect any design or operational standards in existence for these small entities, therefore, establishment of new performance standards were 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 applicable to all nursing facilities that choose to participate in Medicaid and have a rate established for payment of services. Entities choosing not to participate in Medicaid would not be impacted by the proposed amendments.*

## M E M O R A N D U M

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

**FROM:** LeeAnn Thiel, Administrator  
Medicaid Payment and Reimbursement Services, Medical Services

**DATE:** August 31, 2017

**SUBJECT:** Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-06

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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 75-02-06. The proposed rules are not mandated by federal law. The proposed rules are not anticipated 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 nursing facilities participating in the Medicaid program that have gross annual revenue less than \$2.5 million.

There are no other small entities subject to the proposed amendments.

### 2. Costs For Compliance

Administrative and other costs required of nursing facilities for compliance with the proposed amendments are expected to be zero. The proposed amendments affect the rate calculation used to establish the rates payable by individuals in nursing facilities.

### 3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rules to 75-02-06 is an estimated additional \$1,728,252 for calendar year 2018. Private pay residents are subject to rate equalization in nursing facilities participating in Medicaid per NDCC 50-24.4-19, therefore, the increase

in rates due to the proposed amendments must also apply to private pay individuals.

We did not determine any probable benefit to private persons and consumers who are affected by the proposed rules to 75-02-06 because they are subject to rate equalization.

#### 4. Probable Effect on State Revenue

The probable effect of the proposed rules on state revenues is expected to be none as the proposed amendments affect state expenditures.

#### 5. Alternative Methods

The Department did not consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.

## FISCAL IMPACT

Based on the fiscal estimates prepared during the 2017 Legislative Assembly for House Bill Nos. 1012 and 1315 and the increase to the limit rates, the expected fiscal impact on the Medicaid program is \$2,015,942 (total funds) and \$1,007,971 (general funds) for calendar year 2018.





Doug Burgum, Governor  
Christopher Jones, Executive Director


### **TAKINGS ASSESSMENT**

concerning proposed amendment to N.D. Admin. Code chapter 75-02-06.

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 31st day of August, 2017.

by:   
N.D. Dept. of Human Services