

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

N.D. Admin. Code Section)	<u>REPORT OF THE</u>
75-02-07.1-14, Ratesetting for)	<u>DEPT. OF HUMAN SERVICES</u>
Basic Care)	December 15, 2011
(Pages 90-91))	

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

1. The proposed amendments to N.D. Admin. Code section 75-02-07.1-14 are required as a result of a statutory change made by the Legislative Assembly in 2011 House Bill No. 1423.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department of Human Services 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 August 4, 2011. The record was held open until 5:00 p.m. on August 15, 2011, to allow written comments to be submitted. No comments were received. A summary of the 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 \$2,027.64.
6. The proposed rule amends section 75-02-07.1-14. The following specific change was made:

Section 75-02-07.1-14. Section 75-02-07.1-14 is amended to allow a basic care facility that is combined with a hospital to use the same allocation method as a nursing facility that is combined with a hospital or basic care facility.
7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed amendments are not 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. These rules do have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department. The total Department costs are anticipated to be \$10,132 of which \$4,598 are general funds and \$5,534 are federal funds.
10. A constitutional takings assessment was prepared and is attached to this report.
11. This rule was adopted as emergency (interim final) rules as directed by 2011 House Bill No. 1423. The rule took effect on July 1, 2011.

Prepared by:

Julie Leer
Legal Advisory Unit
North Dakota Department of Human Services
December 15, 2011

CHAPTER 75-02-07.1 RATESETTING FOR BASIC CARE FACILITIES

Section	
75-02-07.1-01	Definitions
75-02-07.1-02	Financial Reporting Requirements
75-02-07.1-03	General Cost Principles
75-02-07.1-04	Participation Requirement
75-02-07.1-05	Resident Census
75-02-07.1-06	Direct Care Costs
75-02-07.1-07	Indirect Care Costs
75-02-07.1-08	Property Costs
75-02-07.1-08.1	Food and Plant Costs
75-02-07.1-09	Cost Allocations
75-02-07.1-10	Nonallowable Costs
75-02-07.1-11	Offsets to Costs
75-02-07.1-12	Home Office Costs
75-02-07.1-13	Related Organizations
75-02-07.1-14	Compensation
75-02-07.1-15	Depreciation
75-02-07.1-16	Interest Expense
75-02-07.1-17	Taxes
75-02-07.1-18	Startup Costs
75-02-07.1-19	Funded Depreciation
75-02-07.1-20	Rate Calculation
75-02-07.1-21	Adjustment Factors for Direct Care, Indirect Care, and Food and Plant Costs
75-02-07.1-22	Rate Limitations
75-02-07.1-23	Rates
75-02-07.1-24	Rate Payments
75-02-07.1-25	Special Rates
75-02-07.1-26	One-Time Adjustments
75-02-07.1-27	No Rate Adjustments of Less Than Twenty-Five Cents Per Day
75-02-07.1-28	Notification of Rates
75-02-07.1-29	Reconsiderations and Appeals
75-02-07.1-30	Resident Personal Funds

SECTION 1. Section 75-02-07.1-14 is amended as follows:

75-02-07.1-14. Compensation.

1. Compensation on an annual basis for top management personnel must be limited, prior to allocation, if any, to the greatest of:
 - a. The highest market-driven compensation of an administrator employed by a freestanding not-for-profit facility during the report year;
 - b. The limit set under this subsection for the previous rate year adjusted by the increase, if any, in the consumer price index, urban

- wage earners and clerical workers, all items, United States city average; or
- c. Thirty-three thousand seven hundred eighty-five dollars.
 - d. If the facility is combined with a nursing facility or hospital, the compensation for top management personnel as determined by chapter 75-02-06, except the allocation of the compensation to the basic care facility may not exceed the greatest of subdivision a, b, or c.
2. Compensation for top management personnel employed for less than a year must be limited to an amount equal to the limitation described in subsection 1, divided by three hundred sixty-five times the number of calendar days the individual was employed.
 3. Compensation includes:
 - a. Salary for managerial, administrative, professional, and other services;
 - b. Amounts paid for the personal benefit of the person, e.g., housing allowance, ☐ at-rate automobile allowance;
 - c. The cost of assets and services the person receives from the provider;
 - d. Deferred compensation, pensions, and annuities;
 - e. Supplies and services provided for the personal use of the person;
 - f. The cost of a domestic or other employee who works in the home of the person; or
 - g. Life and health insurance premiums paid for the person and medical services furnished at facility expense.
 4. Reasonable compensation for a person with at least five percent ownership, persons on the governing board, or any person related within the third degree of kinship to top management personnel must be considered an allowable cost if services are actually performed and required to be performed. The amount to be allowed must be an amount determined by the department to be equal to the amount required to be paid for the same services if provided by a nonrelated employee to a North Dakota facility. Reasonableness also requires that functions performed be necessary in that, had the services not been rendered, the facility would have to employ another person to perform them. Reasonable hourly compensation may not exceed the amount determined under subsection 1, divided by two thousand eighty.
 5. Costs otherwise nonallowable under this chapter may not be included as compensation.
 6. The increase in the consumer price index means the percentage by which that consumer price index for the month of March, as prepared by the United States department of labor, exceeds that index for the month of March of the preceding year.

History: Effective July 1, 1996; amended effective July 1, 1998; July 1, 2011.

General Authority: NDCC 50-06-16, 50-24.5-02(3), 50-24.5-10

Law Implemented: NDCC 50-24.5-02(3), 50-24.5-10

Jack Dalrymple, Governor
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE SECTION 75-02-07.1-14
RATESETTING FOR BASIC CARE FACILITIES**

The North Dakota Department of Human Services (the Department) held a public hearing on Thursday, August 4, 2011, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code Section 75-02-07.1-14, Ratesetting for Basic Care Facilities.

Written comments on these proposed amendments could be offered through 5:00 p.m. on Monday, August 15, 2011.

No one attended or provided comments at the public hearing. 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:



Julie Leer, Director
Legal Advisory Unit
N.D. Dept. of Human Services

August 16, 2011

Cc: LeeAnn Thiel, Medical Services

Jack Dalrymple, Governor
Carol K. Olson, Executive Director

MEMO

TO: Julie Leer, 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 75-02-07.1

DATE: June 10, 2011

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to a proposed amendment to North Dakota Administrative Code Article 75-02-07.1. This amendment is not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The amendment is due to HB 1423 which gave the Department authority to write an emergency rule to allow a basic care facility that is combined with a hospital to use the management compensation allocation that is set out in 75-02-06.

Classes of Persons Who Will be Affected

Basic care facility operators and basic care facility residents will be affected by the proposed rule changes since some of the changes affect components of the ratesetting process for basic care facilities.

Probable Impact

The estimated impact of the change is \$10,132 for 12 months.

Probable Cost of Implementation

The amendment becomes part of existing rules on ratesetting and there are no additional costs associated with implementing the rule change. 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 rule.

Jack Dalrymple, Governor
Carol K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

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

DATE: June 10, 2011

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendment to N.D. Admin. Code chapter 75-02-07.1

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 a proposed amendment to N.D. Admin. Code chapter 75-02-07.1. The proposed rule is 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 rule's impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by the proposed amendment are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program. The proposed amendment affects components of the ratesetting processes for basic care 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. The proposed amendment does not alter the uniform cost reporting requirements necessary to establish the rates for all basic care 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 amendment 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 amendment 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 amendment does 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 amendment are applicable to all basic care 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 amendment.

Jack Dalrymple, Governor
Carol K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

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

DATE: June 10, 2011

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendment to N.D. Admin. Code chapter 75-02-07.1

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 a proposed amendment to N.D. Admin. Code chapter 75-02-07.1. The proposed rule is not mandated by federal law. The proposed rule is 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 rule are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program.

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

2. Costs For Compliance

Administrative and other costs required of basic care facilities for compliance with the proposed amendment is expected to be zero. The proposed amendment affects only the rate calculation used to establish the rates payable by individuals in basic care facilities and do not affect compliance requirements.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule is zero. The proposed amendments affect the rates established for basic care facilities participating in Medicaid and the Basic Care Assistance program. The rate established may only be paid if the rate charged to private pay

residents is equal to or exceeds the rate established. The basic care facility may determine the rate charged to private pay individuals which is not changed by the proposed amendment.

Since the proposed amendment does not apply to private persons and consumers there is no estimated probable benefit.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be none as the proposed amendment 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 rule.

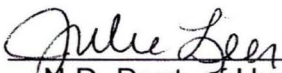
TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code section 75-02-07.1-14.

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 10th day of June, 2011.

by: 
N.D. Dept. of Human Services