BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL

N.D. Admin. Code Chapter 75-02-05 Provider Integrity	)	**REPORT OF THE DEPT. OF HUMAN SERVICES**
(Pages 131-132)	)	**December 6, 2021**

. . . . . .

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

1. These rules are not related to a change in state statute.
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 human service zone 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 and the Attorney General’s review.

4. A public hearing on the proposed rules was held in Bismarck on September 7, 2021. The record was held open until 5:00 PM on, September 17, 2021, to allow written comments to be submitted. No one attended 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 $2,423.10.
6. The proposed rules amend chapter 75-02-05. The following specific changes were made:

   Section 75-02-05-04 is amended to update the claims submission, processing, and adjustment time period and to permit the Department to grant a variance.
7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule 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. The anticipated fiscal impact resulting from implementation of the proposed amendments is nominal.
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
December 1, 2021

NORTH Dakota | Human Services
Be Legendary.™

SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-02-05
PROVIDER INTEGRITY

The North Dakota Department of Human Services (the Department) held a public hearing on Tuesday, September 7, 2021, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapter 75-02-05, Provider Integrity.

Written comments on these proposed amendments could be offered through 5:00 p.m. on Friday, September 17, 2021.

No one attended or provided comments at the public hearing. Two written comments were received within the comment period. The commentors were:

1. Tim Blasl, President, North Dakota Hospital Association in conjunction with Courtney Koebele, Executive Director, North Dakota Medical Association, PO Box 7340, Bismarck, ND 58507-7340

2. Marina Spahr, Medicaid Fraud Control Unit, Office of Attorney General, 600 E Boulevard Avenue, Dept. 125, Bismarck, ND 58505-0040

SUMMARY OF COMMENTS

Comment: The Medicaid Fraud Control Unit agrees with the suggested changes and requests that definitions of the terms "*original claim*" and "*final claim*" be added to avoid confusion.

Response: The Department appreciates Medicaid Fraud Control Unit's, Office of Attorney General, agreement with the proposed changes. The Department will monitor the need to add the suggested definitions in future rule changes if confusion occurs. However, the use of "original claim" and "final claim" should be understood in their ordinary sense and construed according to the context accordance with sections 1-02-02 and 1-02-03 of the North Dakota Century Code.

Comment: Subsection 6 of Section: 75-02-05-04. The change proposed to subsection six provides that no payment will be made by Medicaid or CHIP for original claims received later than 180 days from the date of service. And final claim adjustments must be submitted within 365 days from the date of service, rather than 12 months from the most recent processed claim.

Under the existing rule, providers are able to keep claims active by keeping an active remit posted to the claim. This change would shorten that period to only 365 days from the date of service. Allowing 12 months from the last remit is not standard among payers, but it is something that has been very helpful to providers. We respectfully ask the Department to abandon this change and continue to allow providers 12 months from the last remit date rather than only 365 days from the date of service.

Subsection six also is amended to provide that the Department may grant a variance to extend the deadline for a provider to submit a final claim adjustment. A refusal to grant a variance is not subject to a request for review or an appeal.

We are concerned with the new timely filing deadlines, especially when things that are not within the control of the provider prevent the timely filing of a claim. For example, at times there are system issue denials that need to be fixed by the Department. Will the timely filing deadline be extended to when these system issues are fixed?

The same concern applies to patients who were incarcerated at the time of service. A provider only receives notice of Medicaid coverage when it bills the jail. If that billing and response process takes longer than the claim filing deadline, will it be an allowed exception? It is currently set up that way. We respectfully ask that the current process be allowed to continue.

We are also concerned that claims may be rejected as not timely filed if the patient has applied for Medicaid but an eligibility determination is made after the claim filing period. We respectfully request that the Department specify that claims that occurred during the pendency of a Medicaid application are not subject to the timely filing deadlines. In the alternative, the Department could provide a list of examples in which an override timely filing limits will be granted, such as attaching a provider revalidation letter or patient retro activation letter. For example, the South Dakota Medicaid program provides a letter if coverage is backdated, which a provider may attach to older claims that would be past the filing limit for reimbursement.

We also have a concern with how these new timely filing deadlines will apply in overpayment recovery situations. For example, Medicaid Expansion will engage in a takeback due to a coverage change to traditional Medicaid when a patient goes between these two programs. But there is often a delay in informing providers of the change in coverage. Will a provider have only six months from the date of service to file to traditional Medicaid? We respectfully request that, if Medicaid Expansion informs a provider that it will require repayment because the patient was covered by traditional Medicaid instead, the timely filing claims deadline start from the date of such notice, rather than the date of service.

Response: The commentors are correct, that providers under the current rule have been able to keep claims active forever by continuing to file the same claim and that the

Department's current practice is not standard among other health care plans. The proposed amendment will help align the Department's claim processing with other health care plans. In addition, this proposed change will improve the management of the claims adjudication and payment process and to create an accurate account of Department expenditures within the fiscal year for budgeting purposes. It is the Department's position that providers have the means and ability to submit proper claims within 365 days of providing a service to receive payment.

The proposed rule allows the Department to grant a variance to extend the deadline for a provider to submit a final claim adjustment. The ability to issue a variance addresses the commentors' concern about "when things are not within the control of the provider prevent the timely filing of a claim" as the rule permits the Department to grant a variance to allow the provider to submit claims beyond 365 days from the date of service if there are system issues that require correction from the Department or changes in eligibility, including retrospective member eligibility. The ability to issue a variance addresses the commentors' concern about overpayment recovery situations as the rule permits the Department to grant a variance to allow the provider to submit claims beyond 365 days from the date of service. It is the Department's position that the proposed rule addresses the commentors concern.

Medicaid does not cover an individual while they are incarcerated at the time of service. If there was Medicaid coverage prior to incarceration the Department would resolve the overlap in coverage, however the bills would go to and be paid by the jail or prison where the individual is residing.

Comment: Subsection seven. The proposed amendment to this subsection provides that the Department will process claims within 180 days from the date on the Medicare explanation of benefits if the provider followed Medicare's timely filing policy. The existing language of the rule provides that the department will process claims six months past the Medicare explanation of benefits date if the provider followed Medicare's timely filing policy.

It is unclear what change, if any, is being made with the proposed amendment. If it does change claims processing deadlines in some way, could that change please be clarified? If there is no substantive change, then can an explanation please be provided as to why the amendment is being made.

Response: The proposed rule does not substantially change claims processing deadline as the time frame was updated to 180 days to have consistency throughout the policy using days instead of months due to months having varying number of days.

Prepared by:

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

In Consultation with: LeeAnn Thiel, Medical Services

cc: Caprice Knapp, Medical Services
LeeAnn Thiel, Medical Services

September 17, 2021

Christopher Jones, Executive Director
North Dakota Department of Human Services
600 East Boulevard Avenue Dept 325
Bismarck, ND 58505

RE: Proposed amendments to N.D. Administrative Code chapter 75-02-05

Dear Mr. Jones,

On behalf of our member hospitals and physicians, the North Dakota Hospital Association (NDHA) and the North Dakota Medical Association (NDMA) respectfully submit the following comments on the amendments proposed by the North Dakota Department of Human Services (Department) to North Dakota Administrative Code chapter 75-02-05, Provider Integrity.

Section: 75-02-05-04

Subsection six. The change proposed to subsection six provides that no payment will be made by Medicaid or CHIP for original claims received later than 180 days from the date of service. And final claim adjustments must be submitted within 365 days from the date of service, rather than 12 months from the most recent processed claim.

Comment:
Under the existing rule, providers are able to keep claims active by keeping an active remit posted to the claim. This change would shorten that period to only 365 days from the date of service. Allowing 12 months from the last remit is not standard among payers, but it is something that has been very helpful to providers. We respectfully ask the Department to abandon this change and continue to allow providers 12 months from the last remit date rather than only 365 days from the date of service.

Subsection six also is amended to provide that the Department may grant a variance to extend the deadline for a provider to submit a final claim adjustment. A refusal to grant a variance is not subject to a request for review or an appeal.

Comment:
We are concerned with the new timely filing deadlines, especially when things that are not within the control of the provider prevent the timely filing of a claim. For example, at times there are system issue denials that need to be fixed by the Department. Will the timely filing deadline be extended to when these system issues are fixed?

The same concern applies to patients who were incarcerated at the time of service. A provider only receives notice of Medicaid coverage when it bills the jail. If that billing and response process takes longer than the claim filing deadline, will it be an allowed exception? It is currently set up that way. We respectfully ask that the current process be allowed to continue.

We are also concerned that claims may be rejected as not timely filed if the patient has applied for Medicaid but an eligibility determination is made after the claim filing period. We respectfully request that the Department specify that claims that occurred during the pendency of a Medicaid application are not subject to the timely filing deadlines. In the alternative, the Department could provide a list of examples in which an override timely filing limits will be granted, such as attaching a provider revalidation letter or patient retro activation letter. For example, the South Dakota Medicaid program provides a letter if coverage is backdated, which a provider may attach to older claims that would be past the filing limit for reimbursement.

We also have a concern with how these new timely filing deadlines will apply in overpayment recovery situations. For example, Medicaid Expansion will engage in a takeback due to a coverage change to traditional Medicaid when a patient goes between these two programs. But there is often a delay in informing providers of the change in coverage. Will a provider have only six months from the date of service to file to traditional Medicaid? We respectfully request that, if Medicaid Expansion informs a provider that it will require repayment because the patient was covered by traditional Medicaid instead, the timely filing claims deadline start from the date of such notice, rather than the date of service.

Subsection seven. The proposed amendment to this subsection provides that the Department will process claims within 180 days from the date on the Medicare explanation of benefits if the provider followed Medicare's timely filing policy. The existing language of the rule provides that the department will process claims six months past the Medicare explanation of benefits date if the provider followed Medicare's timely filing policy.

Comment:
It is unclear what change, if any, is being made with the proposed amendment. If it does change claims processing deadlines in some way, could that change please be clarified? If there is no substantive change, then can an explanation please be provided as to why the amendment is being made?

If you have questions or need additional information, please feel free to contact us or Melissa Hauer, NDHA General Counsel/VP, at (701) 224-9732 or mhauer@ndha.org. Thank you for considering these comments.

Sincerely,

Tim Blasl, President
North Dakota Hospital Association

Courtney Koebele, Executive Director
North Dakota Medical Association

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210
www.attorneygeneral.nd.gov

Wayne Stenehjem
ATTORNEY GENERAL

Medicaid Fraud Control Unit

MEMORANDUM REGARDING AMENDMENTS TO
N.D.ADMIN.CODE CHAPTER 75-02-05

TO: Rules Administrator, Department of Human Services
State Capitol, Judicial Wing
600 E. Boulevard Avenue, Bismarck, ND 58505-0250
Via Email to Reagan Volkman: rvolkman@nd.gov

FROM: Marina Spahr, Director of Medicaid Fraud Control Unit
Assistant Attorney General

DATE: September 17, 2021

RE: Comment to Proposed Amendments of
N.D.ADMIN. Code Chapter 75-02-05

MFCU agrees with the suggested changes and requests that definitions of the terms *"original claim"* and *"final claim"* be added to avoid confusion.

If you have any questions, please let me know.

Sincerely,

Marina Spahr

Marina Spahr
Director MFCU
Assistant Attorney General
ND Lic# 05068

MEMO

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Corey Kjos, Medicaid Operations

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-05, Provider Integrity

DATE: July 21, 2021

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 Chapter 75-02-05. These amendments are not 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 chapter 75-02-05. Federal law does not mandate the proposed rules.

Classes of Persons Who Will be Affected

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

- Providers enrolled to provide services to individuals eligible for the North Dakota Medicaid program

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Providers that fail to comply with section 75-02-05-04(6) may not receive payment.
- Providers will receive timely payment for services within the appropriation, which should allow for quicker resolution.

Probable Cost of Implementation

There are no expected costs of implementation.

Consideration of Alternative Methods

There are no alternative methods that would ensure consistent understanding and application of rules governing provider integrity.

M E M O R A N D U M

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Corey Kjos, Medicaid Operations

DATE: July 21, 2021

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-05.

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 75-02-05. Federal law does not mandate the proposed rules.

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 providers enrolled to provide services within the North Dakota Medicaid program. There is no stringent compliance or reporting requirements within the proposed rule changes.

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

The proposed amendment adjusts the time period for a provider to submit its claim and final claim adjustments. Otherwise, the proposed amendments will not alter in any material way any required schedules or deadlines for compliance or reporting requirements of small enrolled Medicaid providers. The proposed rule permits the Department to grant a variance to extend the deadline for a provider to submit a final claim adjustment. 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 Medicaid providers. For this reason, the establishment of simplified 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 impose any design standards or impose any additional operational standards or operational standards for enrolled Medicaid providers. 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 proposed rules do not exempt small entities from the requirements. The proposed rule permits the Department to grant a variance to extend the deadline for a provider to submit a final claim adjustment.

M E M O R A N D U M

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Corey Kjos, Medicaid Operations

DATE: July 21, 2021

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-05.

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 chapter 75-02-05. 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 providers enrolled with the North Dakota Medicaid program.

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 expected for the proposed rules.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No effects on state revenue expected because of the proposed rules.

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 will not experience administrative costs or other costs; therefore, alternative methods were not necessary.

FISCAL IMPACT

The anticipated fiscal impact resulting from the implementation of the proposed amendments is nominal.

NORTH Dakota | Human Services
Be Legendary.™

TAKINGS ASSESSMENT
concerning proposed amendment to N.D. Admin. Code chapter 75-02-05.

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 21st day of July, 2021.

by: _____
N.D. Dept. of Human Services

LEGAL ADVISORY UNIT

600 E Boulevard Ave Dept 325 | Bismarck ND 58505-0250

701.328.2311 | Fax 701.328.2173 | 800.472.2622 | 711 (TTY) | www.nd.gov/dhs