

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

<b>N.D. Admin. Code Chapter 75-02-06, Ratesetting for Nursing Facilities (Pages 355 – 367)</b>	) ) ) )	<b><u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> <b>June 10, 2010</b></b>
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For its report, the North Dakota Department of Human Services states:

1. The proposed amendments to N.D. Admin. Code chapter 75-02-06 is the result of 2009 House Bills 1012, 1303, and 1307 that increased the number of days for allowable bad debt expenses and reports the expense in the property cost category, and increased the allowable education expense amount per individual and establishes a minimum work requirement for those participating in the education assistance. Additionally, the proposed amendments reflect the decision to exclude late charges as offsets to cost as allowed under 2007 Senate Bill No. 2210.
2. The proposed amendments to N.D. Admin. Code chapter 75-02-06 are not related to any 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 boards, 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 February 11, 2010. The record was held open until 5:00 p.m. on February 22, 2010, to allow written comments to be submitted. A summary of the comments received 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 \$2023.12.
6. The rule changes address legislative intent included in HB 1012, 1303 and 1307. The exclusion of late charges as an offset to income is a result of 2007 SB 2210. The following specific changes were made:

Section 75-02-06-02.5. This section is amended to add allowable bad debt expense and education expense to property-related costs and other passthrough costs.

Section 75-02-06-10. This section is amended to increase the

maximum allowable bad debt expense from one hundred twenty to one hundred eighty days of resident care per rate year or an aggregate of three hundred sixty days of resident care for any one individual.

Section 75-02-06-12. This section is amended to clarify noncovered bed hold days as an offset to costs and to include late charges as an offset to costs. Additionally, "other cost-related income" is amended to include the amount related to the default of a contractual agreement related to education expense assistance.

Section 75-02-06-12.1. This section is amended to clarify the circumstances under which the cost of education is a non-allowable cost.

Section 75-02-06-16. This section is amended to reflect the rate increases anticipated by 2009 House Bill No. 1012.

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. A constitutional takings assessment was prepared and is attached to this report.
10. These rules were adopted as emergency (interim final) rules under N.D.C.C. section 28-32-03. The statutory ground for declaring the rules to be an emergency is that they are reasonably necessary to avoid a delay in implementing an appropriations measure. A copy of the Governor's approval of the emergency status of the rules is

attached.

Prepared by:

Julie Leer  
Legal Advisory Unit  
North Dakota Department of Human Services  
June 10, 2010



**CHAPTER 75-02-06**  
**RATESETTING FOR NURSING HOME CARE**

**SECTION 1.** Section 75-02-06-02.5 is amended as follows:

**75-02-06-02.5. Property costs.** Property-related costs and other passthrough costs include only those costs identified in this section:

1. Depreciation.
2. Interest expense on capital debt.
3. Property taxes including special assessments as provided for in section 75-02-06-09.
4. Lease and rental costs.
5. Startup costs.
6. Reasonable legal and related expenses:
  - a. Incurred or as a result of a successful challenge to a decision by a governmental agency, made on or after January 1, 1990, regarding a rate year beginning on or after January 1, 1990;
  - b. Related to legal services furnished on or after January 1, 1990; and
  - c. In the case of a partially successful challenge, not in excess of an amount determined by developing a ratio of total amounts claimed successfully to total amounts claimed in the partially successful challenge and applying that ratio to the total legal expenses paid.
7. Allowable bad debt expense under section 75-02-06-10 in the report year in which bad debt is determined to be uncollectible with no likelihood of future recovery.
8. Education expense allowed under section 75-02-06-12.1 in the report year in which it is expended.

**History:** Effective January 1, 1990; amended effective November 22, 1993; January 1, 1996; January 1, 2010.

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

**SECTION 2.** Section 75-02-06-10 is amended as follows:

**75-02-06-10. Bad debts.**

1. Bad debts for charges incurred on or after January 1, 1990, and fees paid for the collection of those bad debts, are allowable, provided all the requirements of this subsection are met.
  - a. The bad debt must result from nonpayment of the payment rate or part of the payment rate.
  - b. The facility shall document that reasonable collection efforts have been made, the debt was uncollectible, and there is no likelihood of future recovery. Reasonable collection efforts include pursuing all avenues of collection available to the facility, including liens and judgments. In instances where the bad debt is owed by a person determined to have made a disqualifying transfer or assignment of

property for the purpose of securing eligibility for medical assistance benefits, the facility shall document that it has made all reasonable efforts to secure payment from the transferee, including the bringing of an action for a transfer in fraud of creditors.

- c. The collection fee may not exceed the amount of the bad debt.
  - d. The bad debt may not result from the facility's failure to comply with federal and state laws, state rules, and federal regulations.
  - e. The bad debt may not result from nonpayment of a private room rate in excess of the established rate, charges for special services not included in the established rate, or charges for bed hold days not billable to the medical assistance program under subsections 3, 4, 5, and 6 of section 75-02-06-14.
  - f. The facility shall have an aggressive policy of avoiding bad debt expense that limits potential bad debts. The facility shall document that the facility has taken action to limit bad debts for individuals who refuse to make payment.
- 2. Allowable bad debt expense may not exceed one hundred ~~twenty eight~~ days of resident care per year or an aggregate of three hundred sixty days of resident care for any one individual.
  - 3. Finance charges on bad debts allowable under subsections 1 and 2 are allowable only if the finance charges have been offset as interest income.

**History:** Effective September 1, 1980; amended effective December 1, 1983; January 1, 1990; November 22, 1993; January 1, 1996; January 1, 1998; January 1, 2010.

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

**SECTION 3.** Section 75-02-06-12 is amended as follows:

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

- 1. Several items of income must be considered as offsets against various costs as recorded in the books of the facility. Income in any form received by the facility, with the exception of an established rate, income from payments made under the Workforce Investment Act, bed reduction incentive payments, donations, the deferred portion of patronage dividends credited to the facility and not previously offset, ~~and income from charges for private rooms, special services, or noncovered bed holds hold days, and late charges~~ must be offset up to the total of the appropriate actual allowable cost. If actual costs are not identifiable, income must be offset up to the total of costs described in this section. If costs relating to income are reported in more than one cost category, the income must be offset in the ratio of the costs in each cost category. Sources of income include:
  - a. "Activities income". Income from the activities department and the gift shop must be offset to activity costs.



- b. "Dietary income". Amounts received from or on behalf of employees, guests, or other nonresidents for lunches, meals, or snacks must be offset to dietary and food costs.
- c. "Drugs or supplies income". Amounts received from employees, doctors, or others not admitted as residents must be offset to nursing supplies. Medicare part B income for drugs and supplies must be offset to nursing supplies.
- d. "Insurance recoveries income". Any amount received from insurance for a loss incurred must be offset against the appropriate cost category, regardless of when or if the cost is incurred, if the facility did not adjust the basis for depreciable assets.
- e. "Interest or investment income". Interest received on investments, except amounts earned on funded depreciation or from earnings on gifts where the identity remains intact, must be offset to interest expense.
- f. "Laundry income". All amounts received for laundry services rendered to or on behalf of employees, doctors, or others must be offset to laundry costs.
- g. "Private duty nurse income". Income received for the providing of a private duty nurse must be offset to nursing salaries.
- h. "Rentals of facility space income". Income received from outside sources for the use of facility space and equipment must be offset to property costs.
- i. "Telegraph and telephone income". Income received from residents, guests, or employees must be offset to administration costs. Income from emergency answering services need not be offset.
- j. "Therapy income". Except for income from medicare part A, income from therapy services, including medicare part B income, must be offset to therapy costs unless the provider has elected to make therapy costs nonallowable under subsection 40 of section 75-02-06-12.1.
- k. "Vending income". Income from the sale of beverages, candy, or other items must be offset to the cost of the vending items or, if the cost is not identified, all vending income must be offset to the cost category where vending costs are recorded.
- l. "Bad debt recovery". Income for bad debts previously claimed must be offset to administrative property costs in total in the year of recovery.
- m. "Other cost-related income". Miscellaneous income, including amounts generated through the sale of a previously expensed or depreciated item, e.g., such as supplies or equipment, or the amount related to the default of a contractual agreement related to education expense assistance, must be offset, in total, to the cost category where the item was expensed or depreciated.

2. Payments to a provider by its vendor must ordinarily be treated as purchase discounts, allowances, refunds, or rebates, even though these payments may be treated as "contributions" or "unrestricted grants" by the provider and the vendor. Payments that represent a true donation or grant need not be treated as purchase discounts, allowances, refunds, or rebates. Examples of payments that represent a true donation or grant include contributions made by a vendor in response to building or other fundraising campaigns in which communitywide contributions are solicited or when the volume or value of purchases is so nominal that no relationship to the contribution can be inferred. The provider shall provide verification, satisfactory to the department, to support a claim that a payment represents a true donation.
3. When an owner, agent, or employee of a provider directly receives from a vendor monetary payments or goods or services for the owner's, agent's, or employee's own personal use as a result of the provider's purchases from the vendor, the value of the payments, goods, or services constitutes a type of refund or rebate and must be applied as a reduction of the provider's costs for goods or services purchased from the vendor.
4. When the purchasing function for a provider is performed by a central unit or organization, all discounts, allowances, refunds, and rebates must be credited to the costs of the provider and may not be treated as income by the central unit or organization or used to reduce the administrative costs of the central unit or organization.
5. Purchase discounts, allowances, refunds, and rebates are reductions of the cost of whatever was purchased.
6. For purposes of this section, "medicare part B income" means the interim payment made by medicare during the report year plus any cost settlement payments made to the provider or due from the provider for previous periods which are made during the report year and which have not been reported to the department prior to June 30, 1997.

**History:** Effective September 1, 1980; amended effective December 1, 1983; October 1, 1984; September 1, 1987; June 1, 1988; January 1, 1990; January 1, 1992; November 22, 1993; January 1, 1996; January 1, 1998; January 1, 2002; January 1, 2010.

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

**SECTION 4.** Subsection 37 of section 75-02-06-12.1 is amended as follows:

**75-02-06-12.1. Nonallowable costs.** Costs not related to resident care are costs not appropriate or necessary and proper in developing and maintaining the operation of resident care facilities and activities. These costs are not allowed in computing the rates. Nonallowable costs include:

37. The cost of education unless:



- a. The facility is claiming an amount for repayment of an employee's student loans related to educational expenses incurred by the employee prior to the current cost report year provided:
  - (1) The education was provided by an accredited academic or technical educational facility;
  - b. (2) The allowable portion of a student loan relates to education expenses ~~were~~ for materials, books, or tuition and does not include any interest expense;
  - c. (3) The education expenses were incurred as a result of the employee ~~was being~~ enrolled in a course of study intended ~~to prepare that prepared~~ the employee for a position at the facility, and the employee is in that position; and
  - d. (4) The facility claims the ~~cost of the education~~ amount of student loan repayment assistance at a rate that does not exceed ~~one dollar~~ two dollars and twenty-five cents per hour of work performed by the employee in the position for which the employee received education ~~at the facility's expense~~, provided the amount claimed per employee may not exceed ~~two~~ the lesser of one-half of the allowable student loan or three thousand seven hundred fifty dollars per year, or an aggregate of ~~eight~~ fifteen thousand dollars, and in any event may not exceed one-half the cost ~~to the facility~~ of the employee's education.
- b. The facility is claiming education expense for an individual who is currently enrolled in an accredited academic or technical educational facility provided:
  - (1) The education expense is for materials, books, or tuition;
  - (2) The facility claims the education expense, annually, in an amount not to exceed the lesser of one-half of the individual's education expense incurred during the cost report year or three thousand seven hundred fifty dollars;
  - (3) The aggregate amount of education expense claimed for an individual over multiple cost report periods does not exceed fifteen thousand dollars; and
  - (4) The facility has a contract with the individual which stipulates a minimum commitment to work for the facility of one thousand six hundred sixty-four hours of employment after completion of the education program for each year education expense assistance was provided, as well as a repayment plan if the individual does not fulfill the contract obligations.

**History:** Effective January 1, 1990; amended effective January 1, 1992; November 1, 1992; November 22, 1993; January 1, 1996; July 1, 1996; January 1, 1998; January 1, 1999; January 1, 2010.

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)

**SECTION 5.** Subsection 3 of section 75-02-06-16 is amended as follows:

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

**3. Limitations.**

- a. The department shall accumulate and analyze statistics on costs incurred by facilities. Statistics may be used to establish reasonable ceiling limitations and incentives for efficiency and economy based on reasonable determination of standards of operations necessary for efficient delivery of needed services. Limitations and incentives may be established on the basis of cost of comparable facilities and services and may be applied as ceilings on the overall costs of providing services or on specific areas of operations. The department may implement ceilings at any time based upon information available.
- b. The department shall review, on an ongoing basis, aggregate payments to facilities to determine that payments do not exceed an amount that can reasonably be estimated would have been paid for those services under medicare payment principles. If aggregate payments to facilities exceed estimated payments under medicare, the department may make adjustments to rates to establish the upper limitations so that aggregate payments do not exceed an amount that can be estimated would have been paid under medicare payment principles.
- c. All facilities except those nongeriatric facilities for individuals with physical disabilities or units within a nursing facility providing geropsychiatric services described in North Dakota Century Code section 50-24.4-13 must be used to establish a limit rate for the direct care, other direct care, and indirect care cost categories. The base year is the report year ended June 30, ~~2003~~ 2006. Base year costs may not be adjusted in any manner or for any reason not provided for in this subsection.
- d. The limit rate for each of the cost categories must be established as follows:
  - (1) Historical costs for the report year ended June 30, ~~2003~~ 2006, as adjusted, must be used to establish rates for all facilities in the direct care, other direct care, and indirect care cost categories. The rates as established must be ranked from low to high for each cost category.
  - (2) For the rate year beginning January 1, ~~2006~~ 2010, the limit rate for each cost category is:
    - (a) For the direct care cost category, ~~ninety-five one hundred fifteen~~ ninety-five one hundred fifteen dollars and ~~fifty-seven seventy-eight~~ fifty-seven seventy-eight cents;
    - (b) For the other direct care cost category, ~~eighteen twenty-one~~ eighteen twenty-one dollars and ~~twenty-seven ninety-four~~ twenty-seven ninety-four cents; and



- (c) For the indirect care cost category, ~~forty-five~~ fifty-five dollars and ~~twenty-three~~ forty-two cents.
- (3) For rate years beginning on or after January 1, ~~2007~~ 2011, the limit rate for each cost category is calculated based on:
  - (a) For the direct care cost category, ~~ninety-five~~ one hundred twenty-seven dollars and ~~fifty-seven~~ fifty cents multiplied by the adjustment factor determined under subsection 4;
  - (b) For the other direct care cost category, ~~eighteen~~ twenty-three dollars and ~~twenty-seven~~ eighty-nine cents multiplied by the adjustment factor determined under subsection 4; and
  - (c) For the indirect care cost category, ~~forty-five~~ sixty dollars and ~~twenty-three~~ fifty-seven cents multiplied by the adjustment factor determined under subsection 4.
- e. A facility with an actual rate that exceeds the limit rate for a cost category shall receive the limit rate.
- 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.

**History:** Effective September 1, 1980; amended effective July 1, 1981; December 1, 1983; July 1, 1984; September 1, 1987; January 1, 1990; April 1, 1991; January 1, 1992; November 1, 1992; November 22, 1993; January 1, 1996; January 1, 1998; January 1, 1999; January 1, 2000; January 1, 2002; July 2, 2003; December 1, 2005; January 1, 2010.

**General Authority:** NDCC 50-24.1-04, 50-24.4-02

**Law Implemented:** NDCC 50-24.4; 42 USC 1396a(a)(13)



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John Hoeven, Governor  
Carol K. Olson, Executive Director

**TO:** Julie Leer, Director, Legal Advisory Unit  
**FROM:** LeeAnn Thiel, Administrator Medicaid Payment and Reimbursement Services, Medical Services  
**SUBJECT:** Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-06  
**DATE:** December 17, 2009

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

#### Purpose

The amendments exclude late charges and non-covered bed hold days as offsets to costs. The amendments update the allowable bad debts expense pursuant to HB 1303 and the allowable education expense pursuant to HB 1307. The amendments establish June 30, 2006 as the base period for calculating limits and identify the limit rates applicable to each cost category as of January 1, 2010 and 2011.

#### Classes of Persons Who Will be Affected

Nursing facility operators and nursing facility residents will be affected by the proposed rule changes since the changes affect allowable bad debt expense, allowable education expense, and limit rates used to establish nursing facility rates.

#### Probable Impact

The estimated impact of excluding late charges and non-covered bed hold days as offsets against costs is zero.

The estimated impact of the changes for bad debts expense and education expense cannot be determined because of lack of data.

The estimated impact for calendar year 2010 for the change in the limit rates is an increase of \$2.8 million of which \$1.2 million will affect private pay individuals and \$1.6 million will affect the Medicaid program.

#### 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. The proposed amendments relating to limit rates, bad debts, education expenses, and late charges are necessary pursuant to; an appropriation in 2009 HB 1012, 2009 HB 1303, 2009 HB 1307, and 2007 SB 2210. Therefore, the Department does not have the authority to consider any other alternatives.



John Hoeven, Governor  
Carol K. Olson, Executive Director

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## MEMORANDUM

**TO:** Julie Leer, Director, Legal Advisory Unit

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

**DATE:** December 17, 2009

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

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

*Consider: Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?*

*The only small entities affected by the proposed amendments are licensed nursing facilities that are either non-profit organizations or 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.*



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John Hoeven, Governor  
Carol K. Olson, Executive Director

**TO:** Julie Leer, Director, Legal Advisory Unit

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

**DATE:** December 17, 2009

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

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 75-02-06. 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 that have gross annual revenue less than \$2.5 million or are non-profit organizations and who participate in the Medicaid program. 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 only the rate calculation used to establish the rates payable by individuals in nursing 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 an estimated additional \$1.2 million for calendar year 2010 for the change in the limit rates. 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 rule because they are subject to rate equalization.

#### 4. Probable Effect on State Revenue

The probable effect of the proposed rule 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. The proposed amendments relating to limit rates, bad debts, education expenses, and late charges are necessary pursuant to; an appropriation in 2009 HB 1012, 2009 HB 1303, 2009 HB 1307, and 2007 SB 2210. Therefore, the Department does not have the authority to consider any other alternatives.

John Hoeven, Governor  
Carol K. Olson, 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 17<sup>th</sup> day of December, 2009.

by:   
N.D. Dept. of Human Services



— State of —  
**North Dakota**  
*Office of the Governor*

**John Hoeven**  
*Governor*

December 21, 2009

Carol Olson  
Executive Director  
Department of Human Services  
600 East Boulevard Ave  
Bismarck, ND 58505-0250

Dear Carol,

On December 18, 2009, I received your request for approval of emergency rulemaking to amend North Dakota Administrative Code chapter 75-02-06 relating to rate setting for nursing home care.

I have reviewed the request pursuant to N.D.C.C. § 28-32-03 and find that emergency rulemaking is reasonably necessary to avoid a delay in implementing an appropriations measure.

Sincerely,

A handwritten signature in black ink, appearing to be "John Hoeven", is written over the printed name and title.

**John Hoeven**  
Governor

38:34:58