

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

<b>N.D. Admin. Code Section 75-02-06-16, Ratesetting for Nursing Facilities, Rate Determinations (Pages 367 – 379)</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 section 75-02-06-16 is not the result of statutory changes made by the Legislative Assembly.
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 comment 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 \$1963.76.
6. The rule is necessary to allow an exception to the 90% occupancy limitation for certain units. The following specific change was made:  
Section 75-02-06-16. This section is amended to create an exception to 90% occupancy limitation on those facilities for which the Department must approve admissions to the units that were created to fill a specific need for services.
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 not adopted as emergency (interim final) rules under N.D.C.C. section 28-32-03.

Prepared by:

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



John Hoeven, Governor  
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED AMENDMENT TO  
N.D. ADMIN. CODE SECTION 75-02-06-16  
RATE DETERMINATIONS IN  
RATESETTING FOR NURSING HOME CARE**

The North Dakota Department of Human Services (the Department) held a public hearing on February 11, 2010, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code section 75-02-06-16, Rate Determinations in Ratesetting for Nursing Home Care.

Written comments on these proposed amendments could be offered through 5:00 p.m. on February 22, 2010.

No one attended or provided comments at the public hearing. One written comment was received within the comment period. The commentor was:

1. Shelly E. Peterson, President, North Dakota Long Term Care Association, 1900 North 11th Street, Bismarck, ND 58501

**SUMMARY OF COMMENTS**

**Comment:** Section 75-02-06-16 is amended to create an exception to the 90% occupancy limitation on those facilities in which the Department must approve admissions to the units that were created to fill a specific need for services. We support this rule change as written.

**Response:** No response required.

There will be no change to the proposed amendment.

Prepared by:

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

February 25, 2010

Cc: LeeAnn Thiel, Medical Services



John Hoeven, Governor  
Carol K. Olson, Executive Director

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## MEMO

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

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

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

**DATE:** January 4, 2010

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 75-02-06. This amendment is anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

### Purpose

The purpose of this rule is to allow an exception to the 90% occupancy limitation for the units that were created to fill a specific need for services because the Department must approve admissions to these units.

### Classes of Persons Who Will be Affected

Nursing facility operators and nursing facility residents will be affected by the proposed rule change since the change affects components of the ratesetting process for nursing facilities.

### Probable Impact

The estimated impact of providing an exception to the 90% occupancy limit is an increase of \$174,950, all of which will affect the Medicaid program.

### 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. The exception for the 90% occupancy limitation is necessary because the Department must approve admissions to the units that were created to fill a specific need for services and therefore the provider has no control over occupancy which affects the provider's revenues and coverage of costs.



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## MEMORANDUM

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

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

**DATE:** January 4, 2010

**SUBJECT:** Small Entity Regulatory Analysis Regarding Proposed Amendment 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 a proposed amendment to N.D. Admin. Code chapter 75-02-06. 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 rules' impact on small entities:

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

*The only small entities affected by the proposed amendment are licensed nursing facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually. The proposed amendment affects 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 amendment does 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 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 is 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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## MEMORANDUM

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

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

**DATE:** January 4, 2010

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

### 2. Costs For Compliance

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

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 amendment affects 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. The exception for the 90% occupancy limitation is necessary because the Department must approve admissions to the units that were created to fill a specific need for services and therefore the provider has no control over occupancy which affects the provider's revenues and coverage of costs.

John Hoeven, Governor  
Carol K. Olson, Executive Director


### **TAKINGS ASSESSMENT**

concerning proposed amendment to N.D. Admin. Code section 75-02-06-16.

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 4<sup>th</sup> day of January, 2010.

by:   
N.D. Dept. of Human Services

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

**SECTION 1. Subsection 3 of section 75-02-06-16 is amended as follows:**

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. 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, 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, the limit rate for each cost category is:
      - (a) For the direct care cost category, ninety-five dollars and fifty-seven cents;
      - (b) For the other direct care cost category, eighteen dollars and twenty-seven cents; and

- (c) For the indirect care cost category, forty-five dollars and twenty-three cents.
- (3) For rate years beginning on or after January 1, 2007, the limit rate for each cost category is calculated based on:
  - (a) For the direct care cost category, ninety-five dollars and fifty-seven cents multiplied by the adjustment factor determined under subsection 4;
  - (b) For the other direct care cost category, eighteen dollars and twenty-seven cents multiplied by the adjustment factor determined under subsection 4; and
  - (c) For the indirect care cost category, forty-five dollars and twenty-three 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.
- 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.

**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; July 1, 2010.

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

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