

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

N.D. Admin. Code Section 75-02-02.1-31, Eligibility for Medicaid (Pages 184-188)))))	<u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> March 9, 2010
-----------------------------------------------------------------------------------------------------	------------------	-----------------------------------------------------------------------------------------

.....

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

1. The proposed amendment to N.D. Admin. Code section 75-02-02.1-31 is in response to 2009 HB 1300 which allows a modified irrevocable trust to continue to be irrevocable under North Dakota Century Code section 59-12-11.
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 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 December 22, 2009. The record was held open until 5:00 p.m. on January 4, 2010, to allow written comments to be submitted. None were received. 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 \$1,903.28.
6. The proposed rule amends section 75-02-02.1-31. The following specific change was made:

Section 75-02-02.1-31. Section 75-02-02.1-31 is amended to allow a modified trust to be irrevocable for purposes of determining Medicaid eligibility, if the trust is modified under North Dakota Century Code section 59-12-11.
7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendment is 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. A constitutional takings assessment was prepared and is attached to this report.
10. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Julie Leer
Legal Advisory Unit
North Dakota Department of Human Services
March 9, 2010

CHAPTER 75-02-02.1
ELIGIBILITY FOR MEDICAID

SECTION 1. Subsection 3 of section 75-02-02.1-31 is amended as follows:

75-02-02.1-31. Trusts.

3. Trusts may be categorized in many ways, but the revocability of a trust is a fundamental characteristic. A revocable trust is a trust that the grantor, or someone acting at the request, direction, or influence of the grantor, has the power to revoke, remove from, or otherwise end the trust. An irrevocable trust is a trust that may not be revoked in any way by the grantor or anyone acting at the request, direction, or influence of the grantor. The determination of trust revocability is not based solely on trust terms stating the trust is irrevocable. A trust is treated as revocable, regardless of its terms, if:
- a. The trust reserves a power to amend to the grantor, or grants a power to amend to some other person, unless the power to amend is limited to authority to terminate the trust for impossibility of administration, and the trust also provides for distribution of the trust assets to the primary beneficiary, free of trust;
 - b. The grantor and the beneficiaries consent to the revocation;
 - c. The grantor is also the sole beneficiary of the trust;
 - d. The grantor of a trust and all trust beneficiaries are part of a medicaid unit;
 - e. The grantor is a parent, and beneficiaries of the trust include only the grantor, the grantor's spouse, or the grantor's minor children;
 - f. The trust has been amended subsequent to its establishment, unless the trust was amended under North Dakota Century Code section 59-12-11;
 - g. The trust provides for termination and disbursement to the grantor upon conditions relating to the grantor during the grantor's lifetime; or
 - h. The trust provides for revocation or amendment only upon order of a court.

History: Effective December 1, 1991; amended effective December 1, 1991; October 1, 1993; July 1, 2003; April 1, 2008; April 1, 2010.

General Authority: NDCC 50-06-16, 50-24.1-04

Law Implemented: NDCC 50-24.1-02; 42 USC 1396a(k)



John Hoeven, Governor
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-02-02.1
ELIGIBILITY FOR MEDICAID**

The North Dakota Department of Human Services (the Department) held a public hearing on December 22, 2009, in Bismarck, ND, concerning a proposed amendments to N.D. Administrative Code Chapter 75-02-02.1, Eligibility for Medicaid.

Written comments on these proposed amendments could be offered through 5:00 p.m. on January 4, 2010.

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.

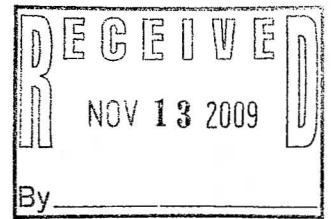
There will be no change to the proposed amendment as no comments were received.

Prepared by:

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

January 5, 2010

Cc: Curtis Volesky, Medical Services



November 13, 2009

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit

FROM: Curtis Volesky, Director, Medicaid Eligibility Policy *CW*

SUBJECT: Regulatory Analysis for N.D. Admin. Code ch. 75-02-02.1, Eligibility for Medicaid

.....

To fulfill the requirements of N.D.C.C. § 28-32-08, the following regulatory analysis of proposed N.D. Administrative Code chapters 75-02-02.1, Eligibility for Medicaid are provided. The impacts of the proposed amendments are not expected to exceed \$50,000.

Purpose:

The proposed rule implements a change in the trust provisions for irrevocable trusts that are modified per N.D.C.C. 59-12-11. This change will allow properly modified trusts to still be considered an irrevocable trust for Medicaid purposes.

Classes of persons affected:

The only persons affected by this change are aged and disabled applicants and recipients who are subject to the Medicaid asset limitations.

Probable Impact:

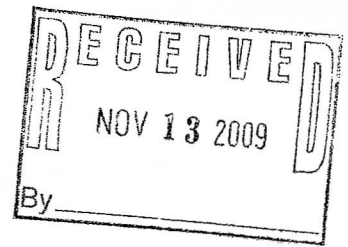
The change implemented by this rule change will allow an irrevocable trust that is modified by the court in accordance with N.D.C.C. 59-12-11 to remain irrevocable for Medicaid purposes, and will allow trust beneficiaries to remain eligible for or qualify for Medicaid. Any impact would be on the Medicaid program by allowing trust beneficiaries to remain or become eligible. The change affects a very narrow subset of trusts, so no measurable impact is anticipated.

Probable costs:

Because this rule change affects a very narrow subset of trusts, no measurable fiscal impact to the Medicaid program is anticipated.

Alternative methods:

There are no alternative methods.



MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit
FROM: Curtis Volesky, Director, Medicaid Eligibility *CV*
DATE: November 13, 2009
SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-02.1, Eligibility for Medicaid

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 ch. 75-02-02.1. The proposed rule is designed to implement a state law change authorized during the 2009 legislative session.

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 this proposed amendment are small political subdivisions consisting of the County Social Service Boards of counties with populations of fewer than five thousand people. Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations of fewer than five thousand people are responsible for locally administered economic assistance programs, including Medicaid. N.D.C.C. § 50-01.2-03.2(1)(a). The County Social Service Boards must meet, or assist the North Dakota Department of Human Services in meeting, compliance and reporting requirements imposed by federal and state laws. Those requirements must be uniformly applied throughout the state. The proposed amendments will not alter in any material way any required compliance or reporting requirement of County Social Service Boards. For these reasons, establishment of less stringent compliance or reporting requirements for these small entities was not considered.

Small Entity Regulatory Analysis

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

The proposed amendment will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of County Social Service Boards. For this reason, and because Medicaid policy must be uniformly applied throughout the state, 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

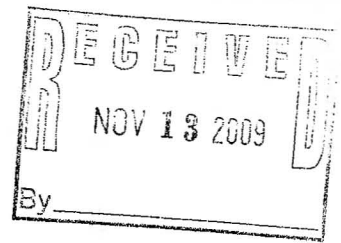
The proposed amendment will not alter in any material way any required compliance or reporting requirement of County Social Service Boards. For this reason, and because Medicaid policy must be uniformly applied throughout the state, neither consolidation nor simplification of compliance or reporting requirements for these small entities was considered.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rule

The County Social Service Boards are responsible for meeting performance standards as well as operational standards imposed by federal and state law. The proposed amendment does not impose any design standards or impose any additional operational standards, and will not alter in any material way any required performance standards or operational standards for County Social Service Boards. For this reason, and because Medicaid policy must be uniformly applied throughout the state, establishment of new performance standards to replace operational standards were not considered.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rule

Because Medicaid policy must be uniformly applied throughout the state, the proposed rule does not exempt County Social Service Boards of counties with populations of fewer than five thousand people from all or any part of the requirements contained in the proposed rule.



MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Curtis Volesky, Director, Medicaid Eligibility *CV*

DATE: November 13, 2009

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-02.1, Eligibility for Medicaid

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 ch. 75-02-02.1. The proposed rule is designed to implement a change authorized during the 2009 legislative session. 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 rules are: The only small entities affected by this proposed amendment are small political subdivisions consisting of the County Social Service Boards of counties with populations with less than five thousand. Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations with less than five thousand are responsible for locally administered economic assistance programs, including Medicaid. N.D.C.C. § 50-01.2-03.2(1)(a). Medicaid policies and practices must be uniformly applied throughout the state. See 42 U.S.C. § 1396a(a)(1), which requires that a state plan for medical assistance (Medicaid) must "provide that it shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them."

The following small entities may also be subject to the rule: None.

2. Costs for Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: The rule change is technical in nature and no additional administrative or other costs will be incurred by County Social Service Boards due to the proposed amendment.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: None.

The probable benefit to private persons and consumers who are affected by the proposed rule: The proposed rule will allow an irrevocable trust that is modified by the court in accordance with N.D.C.C. 59-12-11 to remain irrevocable for Medicaid purposes, and will allow trust beneficiaries to remain eligible for or qualify for Medicaid.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: The rule change affects a very narrow subset of trusts so no measurable fiscal impact to the Medicaid program is anticipated.

5. Alternative Methods

There are no applicable alternative methods to be considered.

John Hoeven, Governor
Carol K. Olson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendments to N.D. Admin. Code chapter 75-02-02.1.

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 13th day of November, 2009.

by: 
N.D. Dept. of Human Services