

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

<b>N.D. Admin. Code Chapter 75-02-07.1, Ratesetting for Basic Care (Pages 29-65)</b>	<b>) ) ) )</b>	<b><u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> <b>September 12, 2011</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 75-02-07.1 are not related to statutory changes made by the Legislative Assembly.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department of Human Services uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on June 16, 2011. The record was held open until 5:00 p.m. on June 27, 2011, 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 \$2,156.52.
6. The proposed rules amend chapter 75-02-07.1. The following specific changes were made:

Section 75-02-07.1-01. Section 75-02-07.1-01 is amended to revise the definition of "adjustment factor", "depreciation guidelines", "facility", "in-house resident day", "institution for mental disease", "limit rate", "personal care rate", "resident day", "room and board rate", "routine hair care", and "specialized facility for individuals with mental disease", and to delete the definition for "statewide minimum room and board rate."

Section 75-02-07.1-02. Section 75-02-07.1-02 is amended to allow a cost report to be filed based on a June thirtieth report year.

Section 75-02-07.1-04. Section 75-02-07.1-04 is amended

to clarify outdated language.

Section 75-02-07.1-06. Section 75-02-07.1-06 is amended to clarify cost categories included in direct care costs and to clarify existing language.

Section 75-02-07.1-09. Section 75-02-07.1-09 is amended to identify salary cost categories consistent with proposed amendments to 75-02-07.1-06.

Section 75-02-07.1-14. Section 75-02-07.1-14 is amended to increase the maximum salary for top management personnel, to clarify existing language, and to remove the subsection identifying how to calculate the increase in the consumer price index.

Section 75-02-07.1-15. Section 75-02-07.1-15 is amended to identify per bed cost limitations to be used to determine total allowable cost basis of buildings and fixed equipment for certain facilities.

Section 75-02-07.1-20. Section 75-02-07.1-20 is amended to identify rates used to establish the facility's room and board rate and to remove the provision relative to the impact of the statewide room and board rate on the actual room and board rate and the personal care rate.

Section 75-02-07.1-21. Section 75-02-07.1-21 is amended to identify that the adjustment factor will be used to adjust certain costs and how costs reported for a period other than twelve months will be adjusted.

Section 75-02-07.1-22. Section 75-02-07.1-22 is amended to remove all but the first subsection relative to rate limitations.

Section 75-02-07.1-24. Section 75-02-07.1-24 is amended to clarify existing language in subsection 2.

Section 75-02-07.1-25. Section 75-02-07.1-25 is amended to clarify deadlines for filing cost reports.

Section 75-02-07.1-26. Section 75-02-07.1-26 is amended to require the department to increase rates as established within this chapter or as approved by the legislative assembly.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed amendments are not expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. These rules do not have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department.
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  
September 12, 2011

Jack Dalrymple, Governor  
Carol K. Olson, Executive Director

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

The North Dakota Department of Human Services held a public hearing on Thursday, June 16, 2011, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapter 75-02-07.1, Ratesetting for Basic Care.

Written comments on these proposed amendments could be offered through 5:00 p.m. on Monday, June 27, 2011.

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

1. Shelly Peterson, President, ND Long Term Care Association, 1900 N 19<sup>th</sup> St, Bismarck, ND 58501

**SUMMARY OF COMMENTS**

**Comment:** The rate calculation described in Section 8 amending NDAC 75-02-07.1-20 is inconsistent with the amended definitions of Personal Care Rate and Room and Board Rate described in Section 1 amending NDAC 75-02-07.1-01. To be consistent with the definition for Personal Care Rate the following language is suggested ... "The lesser of the actual rates or the limit rates for the direct [personal] care and indirect [personal] care [costs] ~~costs~~ ~~cost~~ ~~categories~~ and the operating margin [for personal care]..." The definition of the Room and board rate includes "the operating margin for room and board" and to be consistent with the definition this following language is suggested ... "The rates for property costs [and], food and plant costs, and the lesser of the actual rates or the limit rates for direct room and board [and] indirect room and board costs [, and the operating margin for room and board] are added to establish the facility's room and board rate."

Without the corrections to the rate calculation, the personal care rate calculation is ambiguous as it does not distinguish between the personal care rate versus the room and board rate for Direct and Indirect Care. In addition, by not including the room and board operating margin in the room and board rate calculation the established payment rate will be understated.

**Response:**

Agree with comment. Proposed changes to the proposed amendments to subsection 1 of section 75-02-07.1-20 are changed to address this comment as follows: "For each cost category, the actual rate is calculated using allowable historical operating costs plus adjustment factors provided for in section 75-02-07.1-21 for the direct care, indirect care, and food and plant cost categories, divided by in-house resident days for the direct care and



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Summary of Comments  
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indirect care cost categories and resident days for the food and plant and property cost categories. The actual rate as calculated for direct care and indirect care is compared to the limit rate for each category to determine the lesser of the actual rate or the limit rate. The lesser of the actual rates or the limit rates for the direct personal care and indirect personal care costs and the operating margin provided for in section 75-02-07.1-22 are added to establish the facility's personal care rate. The rates for property costs and, food and plant costs, the operating margin for room and board, and the lesser of the actual rates or the limit rates for direct room and board and indirect room and board costs are added to establish the facility's room and board rate. The sum of the personal care rate and the actual room and board rate is the facility's established rate."

Also, subsection 7 of section 75-02-07.1-22 should not have been stricken; it defines the operating margin. That subsection has been restored and is now subsection 2 of section 75-02-07.1-22.

Prepared by:



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

In Consultation with: LeeAnn Thiel, Medical Services

July 12, 2011

Cc: LeeAnn Thiel, Medical Services



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Jack Dalrymple, Governor  
Carol K. Olson, Executive Director

## MEMO

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

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

**RE:** Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-07.1

**DATE:** December 10, 2010

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 Article 75-02-07.1. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

### Purpose

The amendments are general clean up so that administrative code mirrors the calculation used to apply funding sources to payment for personal care and room and board which are supported by the Medicaid State Plan.

### Classes of Persons Who Will be Affected

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

### Probable Impact

The estimated impact of the changes is zero.

### 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.





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## MEMORANDUM

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

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

**DATE:** December 10, 2010

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

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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 75-02-07.1. 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

*The only small entities affected by the proposed amendments are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program. The proposed amendments affect components of the ratesetting processes for basic care facilities that are applied to costs reported by the entities. Because all costs must be considered when establishing limits used in the rate setting process, facilities, including facilities that are considered to be small entities, must file a uniform annual cost report. The proposed amendments do not alter the uniform cost reporting requirements necessary to establish the rates for all basic care facilities in the state that choose to participate in Medicaid and therefore establishment of less stringent compliance or reporting requirements for these small entities was not considered.*

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

*The proposed 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 basic care facilities that choose to participate in Medicaid and have a rate established for payment of services. Entities choosing not to participate in Medicaid would not be impacted by the proposed 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:** December 10, 2010

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

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-02-07.1. 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 licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program.

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

### 2. Costs For Compliance

Administrative and other costs required of basic care 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 basic care facilities and do not affect compliance requirements.

### 3. Costs and Benefits

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

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

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

#### 4. Probable Effect on State Revenue

The probable effect of the proposed rules 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.



Jack Dalrymple, Governor  
Carol K. Olson, Executive Director

### **TAKINGS ASSESSMENT**

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

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 10<sup>th</sup> day of December, 2010.

by: Julie Leen  
N.D. Dept. of Human Services