

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

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| <b>N.D. Admin. Code Chapter<br/>75-02-06, Ratesetting for<br/>Nursing Home Care<br/>(Pages 53-89)</b> | <b>)<br/>)<br/>)<br/>)</b> | <b><u>REPORT OF THE</u><br/><u>DEPT. OF HUMAN SERVICES</u><br/><b>December 15, 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 75-02-06 are related, in part, to statutory changes made by the Legislative Assembly in 2011 House Bill No. 1169.
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 August 18, 2011. The record was held open until 5:00 p.m. on August 29, 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 \$2,415.40.
6. The proposed rules amend chapter 75-02-06. The following specific changes were made:

Section 75-02-06-12. Section 75-02-06-12 is amended to remove late charges as an offset against total allowable cost.

Section 75-02-06-12.1. Section 75-02-06-12.1 is amended to increase the allowable education expense limit per employee and to clarify when accrued salaries are a nonallowable cost, in response to 2011 House Bill No. 1169.

Section 75-02-06-16. Section 75-02-06-16 is amended to update the limit rates used in establishing rates.

Section 75-02-06-17. Section 75-02-06-17 is amended to define the resident classification categories under Resource Utilization Group – IV, which include changes for the receipt

of intravenous medications; splitting the special care category into two categories: special care high and special care low; classification of Parkinson's disease in the new special care low category; identifies treatments that impact the resident's classification only if the treatments are received while a resident; and the nonimpact of a physician's orders or visits on a resident's classification unless the orders relate to an insulin order change for diabetes.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed 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. These rules do have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department. The total Department costs are anticipated to be \$6,207,159 of which \$2,816,809 are general funds and \$3,390,350 are federal funds.
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:

Julie Leer  
Legal Advisory Unit  
North Dakota Department of Human Services  
December 15, 2011

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

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| 75-02-06-12   | Offsets to Costs   |
| 75-02-06-12.1 | Nonallowable Costs   |
| 75-02-06-13   | Cost Allocation and Classification [Repealed]                  |
| 75-02-06-14   | Resident Days  |
| 75-02-06-15   | Nursing Care [Repealed]  |
| 75-02-06-16   | Rate Determinations  |
| 75-02-06-16.1 | Adjustments for Salary and Benefit Enhancements [Repealed]     |
| 75-02-06-16.2 | One-Time Adjustments for Legislatively Approved Cost Increases |
| 75-02-06-17   | Classifications  |
| 75-02-06-18   | Reviewer Criteria [Repealed]                                   |
| 75-02-06-19   | Appeal From Facility Transfer or Discharge [Repealed]          |
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**SECTION 1.** 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, charges for private rooms, special services, and noncovered bed 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 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, 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; January 1, 2012.

**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 75-02-06-12.1 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:

1. Political contributions;
2. Salaries or expenses of a lobbyist;
3. Advertising designed to encourage potential residents to select a particular facility;
4. Fines or penalties, including interest charges on the penalty, bank overdraft charges, and late payment charges;
5. Legal and related expenses for challenges to decisions made by governmental agencies except for successful challenges as provided for in section 75-02-06-02.5;
6. Costs incurred for activities directly related to influencing employees with respect to unionization;
7. Cost of memberships in sports, health, fraternal, or social clubs or organizations, such as elks, country clubs, knights of columbus;
8. Assessments made by or the portion of dues charged by associations or professional organizations for lobbying costs, contributions to political action committees or campaigns, or litigation, except for successful challenges to decisions made by governmental agencies (including all dues unless an allocation of dues to such costs is provided);
9. Community contributions, employer sponsorship of sports teams, and dues to civic and business organizations, i.e., lions, chamber of commerce, or kiwanis, in excess of one thousand five hundred dollars per cost reporting period;
10. Home office costs not otherwise allowable if incurred directly by the facility;
11. Stockholder servicing costs incurred primarily for the benefit of stockholders or other investors that include annual meetings, annual reports and newsletters, accounting and legal fees for consolidating statements for security exchange commission purposes, stock transfer agent fees, and stockholder and investment analysis;
12. Corporate costs not related to resident care, including reorganization costs; costs associated with acquisition of capital stock, except otherwise allowable interest and depreciation expenses associated with a transaction described in subsection 3 of section 75-02-06-07; and costs relating to the issuance and sale of capital stock or other securities;

13. The full cost of items or services such as telephone, radio, and television, including cable hookups or satellite dishes, located in resident accommodations, excluding common areas, furnished solely for the personal comfort of the residents;
14. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose;
15. The cost of any equipment, whether owned or leased, not exclusively used by the facility except to the extent that the facility demonstrates, to the satisfaction of the department, that any particular use of equipment was related to resident care;
16. Costs, including, by way of illustration and not by way of limitation, legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies, attributed to the negotiation or settlement of the sale or purchase of any capital assets, whether by sale or merger, when the cost of the asset has been previously reported and included in the rate paid to any hospital or facility;
17. Costs incurred by the provider's subcontractors, or by the lessor of property that the provider leases, that are an element in the subcontractor's or lessor's charge to the provider, if the costs would not have been allowable had the costs been incurred by a provider directly furnishing the subcontracted services, or owning the leased property except no facility shall have a particular item of cost disallowed under this subsection if that cost arises out of a transaction completed before July 18, 1984;
18. The cost, in excess of charges, of providing meals and lodging to facility personnel living on premises;
19. Depreciation expense for facility assets not related to resident care;
20. Nonnursing facility operations and associated administration costs;
21. Direct costs or any amount claimed to medicare for medicare utilization review costs;
22. All costs for services paid directly by the department to an outside provider, such as prescription drugs;
23. Travel costs involving the use of vehicles not exclusively used by the facility except to the extent:
  - a. The facility supports vehicle travel costs with sufficient documentation to establish that the purpose of the travel is related to resident care;
  - b. Resident-care related vehicle travel costs do not exceed a standard mileage rate established by the internal revenue service; and
  - c. The facility documents all costs associated with a vehicle not exclusively used by the facility;
24. Travel costs other than vehicle-related costs unless supported, reasonable, and related to resident care;
25. Additional compensation paid to an employee, who is a member of the board of directors, for service on the board;



26. Fees paid to a member of a board of directors for meetings attended to the extent that the fees exceed the compensation paid, per day, to a member of the legislative council, pursuant to North Dakota Century Code section 54-35-10;
27. Travel costs associated with a board of directors meeting to the extent the meeting is held in a location where the organization has no facility;
28. The costs of deferred compensation and pension plans that discriminate in favor of certain employees, excluding the portion of the cost which relates to costs that benefit all eligible employees;
29. Employment benefits associated with salary costs not includable in a rate set under this chapter;
30. Premiums for top management personnel life insurance policies, except that the premiums must be allowed if the policy is included within a group policy provided for all employees, or if the policy is required as a condition of mortgage or loan and the mortgagee or lending institution is listed as the sole beneficiary;
31. Personal expenses of owners and employees, including vacations, personal travel, and entertainment;
32. Costs not adequately documented through written documentation, date of purchase, vendor name, listing of items or services purchased, cost of items purchased, account number to which the cost is posted, and a breakdown of any allocation of costs between accounts or facilities;
33. The following taxes:
  - a. Federal income and excess profit taxes, including any interest or penalties paid thereon;
  - b. State or local income and excess profit taxes;
  - c. Taxes in connection with financing, refinancing, or refunding operation, such as taxes on the issuance of bonds, property transfers, or issuance or transfer of stocks, which are generally either amortized over the life of the securities or depreciated over the life of the asset, but not recognized as tax expense;
  - d. Taxes, including real estate and sales tax, for which exemptions are available to the provider;
  - e. Taxes on property not used in the provision of covered services;
  - f. Taxes, including sales taxes, levied against the residents and collected and remitted by the provider; and
  - g. Self-employment (FICA) taxes applicable to persons including individual proprietors, partners, members of a joint venture;
34. The unvested portion of a facility's accrual for sick or annual leave;
35. The cost, including depreciation, of equipment or items purchased with funds received from a local or state agency, exclusive of any federal funds;
36. Hair care, other than routine hair care, furnished by the facility;
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;
  - (2) The allowable portion of a student loan relates to education expenses for materials, books, or tuition and does not include any interest expense;
  - (3) The education expenses were incurred as a result of the employee being enrolled in a course of study that prepared the employee for a position at the facility, and the employee is in that position; and
  - (4) The facility claims the amount of student loan repayment assistance at a rate that does not exceed two dollars and twenty-five cents per hour of work performed by the employee in the position for which the employee received education, provided the amount claimed per employee may not exceed the lesser of ~~one-half of the~~ allowable student loan or three thousand seven hundred fifty dollars per year, or an aggregate of fifteen thousand dollars, and in any event may not exceed ~~one-half of the~~ cost 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.

38. Repealed effective January 1, 1999.

39. Increased lease costs of a facility, unless:

- a. The lessor incurs increased costs related to the ownership of the facility or a resident-related asset;
- b. The increased costs related to the ownership are charged to the lessee; and



- c. The increased costs related to the ownership would be allowable had the costs been incurred directly by the lessee;
- 40. At the election of the provider, the direct and indirect costs of providing therapy services to nonnursing facility residents or medicare part B therapy services, including purchase of service fees and operating or property costs related to providing therapy services;
- 41. Costs associated with or paid for the acquisition of licensed nursing facility capacity;
- 42. Goodwill; and
- 43. Lease costs in excess of the amount allocable to the leased space as reported on the medicare cost report by a lessor who provides services to recipients of benefits under title XVIII or title XIX of the Social Security Act;
- 44. Salaries accrued at a facility's fiscal yearend but not paid within seventy-five days of the cost report yearend.

**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; January 1, 2012.

**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 75-02-06-16 is amended as follows:

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

- 1. For each cost category, the actual rate is calculated using allowable historical operating costs and adjustment factors provided for in subsection 4 divided by standardized resident days for the direct care cost category and resident days for other direct care, indirect care, and property cost categories. The actual rate as calculated is compared to the limit rate for each cost category to determine the lesser of the actual rate or the limit rate. The lesser rate is given the rate weight of one. The rate weight of one for direct care is then multiplied times the weight for each classification in subsection 5 of section 75-02-06-17 to establish the direct care rate for that classification. The lesser of the actual rate or the limit rate for other direct care, indirect care, and property costs, and the adjustments provided for in subsection 2 and 3 are then added to the direct care rate for each classification to arrive at the established rate for a given classification.
- 2. a. For a facility with an actual rate below the limit rate for indirect care costs, an incentive amount equal to seventy percent times the difference between the actual rate, exclusive of the adjustment factor, and the limit rate in effect at the end of the year immediately preceding the rate year, up to a maximum of two dollars and sixty cents or the difference between the actual rate, inclusive of the adjustment factor and the limit rate for indirect care costs, whichever is less, must be included as part of the indirect care cost rate.

- b. A facility shall receive an operating margin of three percent based on the lesser of the actual direct care and other direct care rates, exclusive of the adjustment factor, or the limit rate in effect at the end of the year immediately preceding the rate year. The three percent operating margin must be added to the rate for the direct care and other direct care cost categories.
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, 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, 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, ~~2010~~2012, the limit rate for each cost category is:
      - (a) For the direct care cost category, one hundred ~~fifteen~~ thirty-one dollars and ~~seventy-eight~~ fifty-nine cents;



- (b) For the other direct care cost category, ~~twenty-one~~ twenty-four dollars and ~~ninety-four~~ sixty-seven cents; and
  - (c) For the indirect care cost category, ~~fifty-five~~ sixty-two dollars and forty-two cents.
- ~~(3) For rate years beginning on or after January 1, 2011, the limit rate for each cost category is calculated based on:~~
  - ~~(a) For the direct care cost category, one hundred twenty-seven dollars and fifty cents multiplied by the adjustment factor determined under subsection 4;~~
  - ~~(b) For the other direct care cost category, twenty-three dollars and eighty-nine cents multiplied by the adjustment factor determined under subsection 4; and~~
  - ~~(c) For the indirect care cost category, sixty dollars and 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.
- 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.
- 4. An adjustment factor shall be used for purposes of adjusting historical costs for direct care, other direct care, and indirect care under subsection 1 and for purposes of adjusting the limit rates for direct care costs, other

direct care costs, and indirect care costs under subsection 3, but may not be used to adjust property costs under either subsection 1 or 3.

5. Rate adjustments.

a. Desk audit rate.

- (1) The cost report must be reviewed taking into consideration the prior year's adjustments. The facility must be notified by telephone or mail of any adjustments based on the desk review. Within seven working days after notification, the facility may submit information to explain why the desk adjustment should not be made. The department shall review the information and make appropriate adjustments.
- (2) The desk audit rate must be effective January first of each rate year unless the department specifically identifies an alternative effective date and must continue in effect until a final rate is established.
- (3) Until a final rate is effective, pursuant to paragraph 3 of subdivision b, private-pay rates may not exceed the desk audit rate except as provided for in section 75-02-06-22 or subdivision c.
- (4) The facility may request a reconsideration of the desk rate for purposes of establishing a pending decision rate. The request for reconsideration must be filed with the Department's medical services division within thirty days of the date of the rate notification and must contain the information required in subsection 1 of section 75-02-06-26. No decision on the request for reconsideration of the desk rate may be made by the department unless, after the facility has been notified that the desk rate is the final rate, the facility requests, in writing within thirty days of the rate notification, the department to issue a decision on that request for reconsideration.
- (5) The desk rate may be adjusted for special rates or one-time adjustments provided for in this section.
- (6) The desk rate may be adjusted to reflect errors, adjustments, or omissions for the report year that result in a change of at least ten cents per day for the rate weight of one.

b. Final rate.

- (1) The cost report may be field audited to establish a final rate. If no field audit is performed, the desk audit rate must become the final rate upon notification from the department. The final rate is effective January first of each rate year unless the department specifically identifies an alternative effective date.
- (2) The final rate must include any adjustments for nonallowable costs, errors, or omissions that result in a change from the desk audit rate of at least ten cents per day for the rate



weight of one that are found during a field audit or are reported by the facility within twelve months of the rate yearend.

- (3) The private-pay rate must be adjusted to the final rate no later than the first day of the second month following receipt of notification by the department of the final rate and is not retroactive except as provided for in subdivision c.
- (4) The final rate may be revised at any time for special rates or one-time adjustments provided for in this section.
- (5) If adjustments, errors, or omissions are found after a final rate has been established, the following procedures must be used:
  - (a) Adjustments, errors, or omissions found within twelve months of establishment of the final rate, not including subsequent revisions, resulting in a change of at least ten cents per day for the rate weight of one must result in a change to the final rate. The change must be applied retroactively as provided for in this section.
  - (b) Adjustments, errors, or omissions found later than twelve months after the establishment of the final rate, not including subsequent revisions, that would have resulted in a change of at least ten cents per day for the rate weight of one had they been included, must be included as an adjustment in the report year that the adjustment, error, or omission was found.
  - (c) Adjustments resulting from an audit of home office costs, that result in a change of at least ten cents per day for the rate weight of one, must be included as an adjustment in the report year in which the costs were incurred.
  - (d) The two report years immediately preceding the report year to which the adjustments, errors, or omissions apply may also be reviewed for similar adjustments, errors, or omissions.
- c. Pending decision rates for private-pay residents.
  - (1) If a facility has made a request for reconsideration, taken an administrative appeal, or taken a judicial appeal from a decision on an administrative appeal, and has provided information sufficient to allow the department to accurately calculate, on a per day basis, the effect of each of the disputed issues on the facility's rate, the department shall determine and issue a pending decision rate within thirty days of receipt of the request for reconsideration, administrative appeal, or judicial appeal. If the information furnished is insufficient to determine a pending decision rate, the department, within thirty days of receipt of the request for

reconsideration, shall inform the facility of the insufficiency and may identify information that would correct the insufficiency.

- (2) The department shall add the pending decision rate to the rate that would otherwise be set under this chapter, and, notwithstanding North Dakota Century Code section 50-24.4-19, the total must be the rate chargeable to private-pay residents until a final decision on the request for reconsideration or appeal is made and is no longer subject to further appeal. The pending decision rate is subject to any rate limitation that may apply.
- (3) The facility shall establish and maintain records that reflect the amount of any pending decision rate paid by each private-pay resident from the date the facility charges a private-pay resident the pending decision rate.
- (4) If the pending decision rate paid by a private-pay resident exceeds the final decision rate, the facility shall refund the difference, plus interest accrued at the legal rate from the date of notification of the pending decision rate, within sixty days after the final decision is no longer subject to appeal. If a facility fails to provide a timely refund to a living resident or former resident, the facility shall pay interest at three times the legal rate for the period after the refund is due. If a former resident is deceased, the facility shall pay the refund to a person lawfully administering the estate of the deceased former resident or lawfully acting as successor to the deceased former resident. If no person is lawfully administering the estate or lawfully acting as a successor, the facility may make any disposition of the refund permitted by law. Interest paid under this subsection is not an allowable cost.

- d. The final rate as established must be retroactive to the effective date of the desk rate, except with respect to rates paid by private-pay residents. A rate paid by a private-pay resident must be retroactively adjusted and the difference refunded to the resident, if the rate paid by the private-pay resident exceeds the final rate by at least twenty-five cents per day, except that a pending decision rate is not subject to adjustment or refund until a decision on the disputed amount is made.

6. Rate payments.

- a. The rate as established must be considered as payment for all accommodations and includes all items designated as routinely provided. No payments may be solicited or received from the resident or any other person to supplement the rate as established.
- b. The rate as established must be paid by the department only if the rate charged to private-pay residents for semiprivate



accommodations equals the established rate. If at any time the facility discounts rates for private-pay residents, the discounted rate must be the maximum chargeable to the department for the same bed type, i.e., hospital or leave days.

- c. If the established rate exceeds the rate charged to a private-pay resident, on any given date, the facility shall immediately report that fact to the department and charge the department at the lower rate. If payments were received at the higher rate, the facility shall, within thirty days, refund the overpayment. The refund must be the difference between the established rate and the rate charged the private-pay resident times the number of medical assistance resident days paid during the period in which the established rate exceeded the rate charged to private-pay residents, plus interest calculated at two percent over the Bank of North Dakota prime rate on any amount not repaid within thirty days. The refund provision also applies to all duplicate billings involving the department. Interest charges on these refunds are not allowable costs.
- d. Peer groupings, limitations, or adjustments based upon data received from or relating to more than one facility are effective for a rate period. Any change in the data used to establish peer groupings, limitations, or adjustments may not be used to change such peer groupings, limitations, or adjustments during the rate period, except with respect to the specific facility or facilities to which the data change relates.
- e. The established rate is paid based on a prospective ratesetting procedure. No retroactive settlements for actual costs incurred during the rate year that exceed the established rate may be made unless specifically provided for in this section.

7. Partial year.

- a. Rates for a facility changing ownership during the rate period are set under this subdivision.
  - (1) The rates established for direct care, other direct care, indirect care, operating margins, and incentives for the previous owner must be retained through the end of the rate period and the rates for the next rate period following the change in ownership must be established:
    - (a) For a facility with four or more months of operation under the new ownership during the report year, through use of a cost report for the period; and
    - (b) For a facility with less than four months of operation under the new ownership during the report year, by indexing the rates established for the previous owner forward using the adjustment factor in subsection 4; or if the change of ownership occurred after the report year end, but prior to the beginning of the next rate year, and the previous owner submits and allows

- audit of a cost report, by establishing a rate based on the previous owner's cost report.
- (2) Unless a facility elects to have a property rate established under paragraph 3, the rate established for property for the previous owner must be retained through the end of the rate period and the property rate for the next rate period following the change in ownership must be established:
    - (a) For a facility with four or more months of operation under the new ownership during the report year, through use of a cost report for the period; and
    - (b) For a facility with less than four months of operation under the new ownership during the report year, by using the rate established for the previous owner for the previous rate year; or if the change of ownership occurred after the report year end, but prior to the beginning of the next rate year, and the previous owner submits and allows audit of a cost report, by establishing a rate based on the previous owner's cost report.
  - (3) A facility may choose to have a property rate established, during the remainder of the rate year and the subsequent rate year, based on interest and principal payments on the allowable portion of debt to be expended during the rate years. The property rate must go into effect on the first of the month following notification by the department. The difference between a property rate established based on the facility's election and a property rate established based on paragraph 2, multiplied by actual census for the period, must be determined. The property rate paid in each of the twelve years, beginning with the first rate year following the use of a property rate established using this paragraph, may not exceed the property rate otherwise allowable, reduced by one-twelfth of that difference.
- b. For a new facility, the department shall establish an interim rate equal to the limit rates for direct care, other direct care, and indirect care in effect for the rate year in which the facility begins operation, plus the property rate. The property rate must be calculated using projected property costs and projected census. The interim rate must be in effect for no less than ten months and no more than eighteen months. Costs for the period in which the interim rate is effective must be used to establish a final rate. If the final rates for direct care, other direct care, and indirect care costs are less than the interim rates for those costs, a retroactive adjustment as provided for in subsection 5 must be made. A retroactive adjustment to the property rate must be made to adjust projected property costs to actual property costs. For the rate period following



submission of any partial year cost report by a facility, census used to establish rates for property and indirect care costs must be the greater of actual census, projected census, or census imputed at ninety-five percent of licensed beds.

- (1) If the effective date of the interim rate is on or after March first and on or before June thirtieth, the interim rate must be effective for the remainder of that rate year and must continue through June thirtieth of the subsequent rate year. The facility shall file by March first an interim cost report for the period ending December thirty-first of the year in which the facility first provides services. The interim cost report is used to establish the actual rate effective July first of the subsequent rate year. The partial year rate established based on the interim cost report must include applicable incentives, margins, phase-ins, and adjustment factors and may not be subject to any cost settle-up. The cost reports for the report year ending June thirtieth of the current and subsequent rate years must be used to determine the final rate for the periods that the interim rate was in effect.
- (2) If the effective date of the interim rate is on or after July first and on or before December thirty-first, the interim rate must remain in effect through the end of the subsequent rate year. The facility shall file a cost report for the partial report year ending June thirtieth of the subsequent rate year. This cost report must be used to establish the rate for the next subsequent rate year. The facility shall file by March first an interim cost report for the period July first through December thirty-first of the subsequent rate year. The interim cost report is used, along with the report year cost report, to determine the final rate for the periods the interim rate was in effect.
- (3) If the effective date of the interim rate is on or after January first and on or before February twenty-ninth, the interim rate must remain in effect through the end of the rate year in which the interim rate becomes effective. The facility shall file a cost report for the period ending June thirtieth of the current rate year. This cost report must be used to establish the rate for the subsequent rate year. The facility shall file by March first an interim cost report for the period July first through December thirty-first of the current rate year. The interim cost report is used, along with the report year cost report, to determine the final rate for the period that the interim rate was in effect.
- (4) The final rate for direct care, other direct care, and indirect care costs established under this subdivision must be limited

to the lesser of the limit rate for the current rate year or the actual rate.

- c. For a facility with renovations or replacements in excess of one hundred thousand dollars, and without a significant capacity increase, the rate established for direct care, other direct care, indirect care, operating margins, and incentive based on the last report year, plus a property rate calculated based on projected property costs and imputed census, must be applied to all licensed beds. The projected property rate must be effective on the first day of the month beginning after the date the project is completed and placed into service or the first day of the month beginning after the date the request for a projected property rate is received by the department, whichever is later. The property rate for the subsequent rate year must be based on projected property costs and imputed census, rather than on property costs actually incurred in the report year. Imputed census is based on the greater of actual census of all licensed beds existing before the renovation or ninety percent of the available licensed beds existing prior to renovation, plus ninety-five percent of the increase in licensed bed capacity and unavailable licensed beds existing prior to the renovation. Subsequent property rates must be adjusted using this methodology, except imputed census must be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.
- d. For a facility with a significant capacity increase, the rate established for direct care, other direct care, indirect care, operating margins, and incentive based on the last report year, must be applied to all licensed beds. An interim property rate must be established based on projected property costs and projected census. The interim property rate must be effective from the first day of the month beginning after the date in which the increase in licensed beds is issued by the state department of health or the first day of the month beginning after the date when the request for a projected property rate is made to the department, whichever is later, through the end of the rate year. The facility shall file by March first an interim property cost report following the rate year. The interim cost report is used to determine the final rate for property and to establish the amount for a retroactive cost settle-up. The final rate for property is limited to the lesser of the interim property rate or a rate based upon actual property costs. The property rate for the subsequent rate year must be based on projected property costs and census imputed as ninety-five percent of licensed beds, rather than on property costs actually incurred during the report year; and may not be subject to retroactive cost settle-up. Subsequent property rates must be adjusted using this



methodology, except imputed census must be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.

- e. For a facility with no significant capacity increase and no renovations or replacements in excess of one hundred thousand dollars, the established rate based on the report year must be applied throughout the rate year for all licensed beds.
- f. For a facility terminating its participation in the medical assistance program, whether voluntarily or involuntarily, the department may authorize the facility to receive continued payment until medical assistance residents can be relocated to facilities participating in the medical assistance program.
- g. At such time as twelve months of property costs are reflected in the report year, the difference between a projected property rate established using subdivision c or d and the property rate that would otherwise be established based on historical costs must be determined. The property rate paid in each of the twelve years, beginning with the first rate year following the use of a property rate established using subdivision c or d may not exceed the property rate otherwise allowable, reduced by one-twelfth of that difference.

8. One-time adjustments.

- a. Adjustments to meet certification standards.
  - (1) The department may provide for an increase in the established rate for additional costs incurred to meet certification standards. The survey conducted by the state department of health must clearly require that the facility take steps to correct deficiencies dealing with resident care. The plan of correction must identify the salary and other costs that must be increased to correct the deficiencies cited in the survey process.
  - (2) The facility shall submit a written request to the medical services division within thirty days of submitting the plan of correction to the state department of health. The request must:
    - (a) Include a statement that costs or staff numbers have not been reduced for the report year immediately preceding the state department of health's certification survey;
    - (b) Identify the number of new staff or additional staff hours and the associated costs required to meet the certification standards; and
    - (c) Provide a detailed list of any other costs necessary to meet survey standards.
  - (3) The department shall review the submitted information and may request additional documentation or conduct onsite

- visits. If an increase in costs is approved, the established rate must be adjusted to an amount not to exceed the limit rate.
- (4) Any additional funds provided must be used in accordance with the facility's written request to the department and are subject to audit. If the department determines the funds were not used for the intended purpose, an adjustment must be made in accordance with subsection 5.
- b. Adjustments for unforeseeable expenses.
- (1) The department may provide for an increase in the established rate for additional costs incurred to meet major unforeseeable expenses. The expenses must be resident related and must be beyond the control of those responsible for the management of the facility.
  - (2) Within sixty days after first incurring the unforeseeable expense, the facility shall submit a written request to the medical services division containing the following information:
    - (a) An explanation as to why the facility believes the expense was unforeseeable;
    - (b) An explanation as to why the facility believes the expense was beyond the managerial control of the facility; and
    - (c) A detailed breakdown of the unforeseeable expenses by expense line item.
  - (3) The department shall base its decision on whether the request clearly demonstrates that the economic or other factors that caused the expense were unexpected and arose because of conditions that could not have been anticipated by management based on its background and knowledge of nursing care industry and business trends.
  - (4) The department shall review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate must be adjusted upward not to exceed the limit rate.
  - (5) Any additional funds provided must be used to meet the unforeseeable expenses outlined in the facility's request to the department and are subject to audit. If the department determines that the funds were not used for the intended purpose, an adjustment must be made in accordance with subsection 5.
- c. Adjustment to historical operating costs.
- (1) A facility may receive a one-time adjustment to historical operating costs when the facility has been found to be significantly below care-related minimum standards described in subparagraph a of paragraph 2 and when it has

been determined the facility cannot meet the minimum standards through reallocation of costs and efficiency incentives.

- (2) The following conditions must be met before a facility can receive the adjustment:
    - (a) The facility shall document, based on nursing hours and standardized resident days, the facility cannot provide a minimum of one and two-tenths nursing hours per standardized resident day;
    - (b) The facility shall document all available resources, including efficiency incentives, if used to increase nursing hours, are not sufficient to meet the minimum standards; and
    - (c) The facility shall submit a written plan describing how the facility will meet the minimum standard if the adjustment is received, including the number and type of staff to be added to the current staff and the projected cost for salary and fringe benefits for the additional staff.
  - (3) The adjustment must be calculated based on the costs necessary to increase nursing hours to the minimum standards less any operating margins and incentives included when calculating the established rate. The net increase must be divided by standardized resident days and the amount calculated must be added to the rate. This rate is subject to any rate limitations that may apply.
  - (4) If the facility fails to implement the plan to increase nursing hours to one and two-tenths hours per standardized resident day, the amount included as the adjustment must be adjusted in accordance with the methodologies set forth in subsection 5.
  - (5) If the cost of implementing the plan exceeds the amount included as the adjustment, no retroactive settlement may be made.
- d. Adjustments for disaster recovery costs when evacuation of residents occurs.
- (1) A facility may incur certain costs when recovering from a disaster such as a flood, tornado, or fire. If evacuation of residents was necessary because of the disaster, actual recovery costs during the evacuation period, net of insurance recoveries, may be considered as deferred charges and allocated over a number of periods that benefit from the costs.
  - (2) When a facility has evacuated residents and capitalizes recovery costs as a deferred charge, the recovery costs must be recognized as allowable costs amortized over sixty



- consecutive months beginning with the sixth month after the first resident is readmitted to the facility.
- (3) Recovery costs must be identified as startup costs and included as passthrough costs for report purposes. Recovery costs are not subject to any limitations except as provided in paragraph 4.
  - (4) If a facility evacuates residents, the ninety percent occupancy limitation may not be applied during the recovery period or for the first six months following the month the facility readmits the first resident.
  - (5) Insurance recoveries relating to the disaster recovery period must be reported as a reduction of recovery costs. Insurance recoveries received after the first month of the sixty-month amortization period must be included as a reduction of deferred charges not yet amortized, except that the reduction for insurance recoveries may occur only at the beginning of a rate year.
9. Under no circumstances, including an appeal or judicial decision to the effect a rate was erroneously established, may a rate adjustment be made to any rate established under this chapter, unless the cumulative impact of all adjustments not already included in the established rate equals or exceeds ten cents per day for the rate weight of one.

**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; January 1, 2012.

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

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

**SECTION 4.** Section 75-02-06-17 is amended as follows:

**75-02-06-17. Classifications.**

1. A facility shall complete a resident assessment for any resident occupying a licensed facility bed, except a respite care, hospice inpatient respite care, or hospice general care resident.
2. A resident must be classified in one of ~~thirty-four~~ forty-eight classifications based on the resident assessment. If a resident assessment is not performed in accordance with subsection 3, except for a respite care, hospice inpatient respite care, or hospice general inpatient care resident, the resident must be included in group BC4 AAA, not classified, until the next required resident assessment is performed in accordance with subsection 3. For purposes of determining standardized resident days, any resident day classified as group BC4 AAA must be assigned the relative weight of one. A resident, except for a respite care, hospice inpatient respite care, or hospice general inpatient care resident, who has

not been classified, must be billed at the group BC4 AAA established rate. The case-mix weight for establishing the rate for group BC4 AAA is .62 0.45. Days for a respite care, hospice inpatient respite care, or hospice general inpatient care resident who is not classified must be given a weight of one when determining standardized resident days. Therapeutic, hospital, or institutional leave days that are resident days must be given a weight of .62 0.45 when determining standardized resident days.

3. Resident assessments must be completed as follows:
  - a. The facility shall assess the resident within the first fourteen days after any admission or return from an acute hospital stay.
  - b. The facility shall assess the resident quarterly after any admission or return from an acute hospital stay. The quarterly assessment reference period ends on the day of the third subsequent month corresponding to the day of admission or return from an acute hospital stay, except if that month does not have a corresponding date, the quarterly assessment reference period ends on the first day of the next month. The assessment reference period begins seven days prior to the ending date of a quarterly assessment period. The assessment reference date used for the resident assessment instrument must be within the assessment reference period.
  - c. An assessment must be submitted upon initiation of rehabilitation therapy if initiation of rehabilitation therapy occurs outside of the quarterly assessment reference period established in subdivision b.
  - d. An assessment must be submitted upon discontinuation of rehabilitation therapy if discontinuation of rehabilitation therapy occurs outside of the quarterly assessment reference period established in subdivision b.
4. The resident classification is based on resident characteristics and health status recorded on the resident assessment instrument, including the ability to perform activities of daily living, diagnoses, and treatment received. The resident is first classified in one of seven major categories. The resident is then classified into subdivisions of each major category based on the resident's activities of daily living score and whether nursing rehabilitation services are needed or the resident has signs of depression.
5. For purposes of this section:
  - a. A resident's activities of daily living score used in determining the resident's classification is based on the amount of assistance, as described in the resident assessment instrument, the resident needs to complete the activities of bed mobility, transferring, toileting, and eating;
  - b. A resident has a need for nursing rehabilitation services if the resident receives two or more of the following for at least fifteen minutes per day for at least six of the seven days preceding the assessment:
    - (1) Passive or active range of motion;



- (2) Amputation or prosthesis care;
  - (3) Splint or brace assistance;
  - (4) Dressing or grooming training;
  - (5) Eating or swallowing training;
  - (6) Bed mobility or walking training;
  - (7) Transfer training;
  - (8) Communication training; or
  - (9) ~~Any scheduled toileting or bladder retraining program~~  
Urinary toileting, bladder, or bowel training program; and
- c. A resident has signs of depression if the resident exhibits at least three of the following resident's total severity score for depression is at least ten based on the following:
- (1) ~~Negative statements~~ Little interest or pleasure in doing things;
  - (2) ~~Repetitive questions~~ Feeling down, depressed, or hopeless;
  - (3) ~~Repetitive verbalization~~ Trouble falling or staying asleep, sleeping too much;
  - (4) ~~Persistent anger with self and others~~ Feeling tired or having little energy;
  - (5) ~~Self-deprecation~~ Poor appetite or overeating;
  - (6) ~~Expressions of unrealistic fears~~ Feeling bad or failure or let self or others down;
  - (7) ~~Recurrent statements that something terrible is to happen~~ Trouble concentrating on things;
  - (8) ~~Repetitive health complaints~~ Moving or speaking slowly or being fidgety or restless;
  - (9) ~~Repetitive anxious complaints or concerns of nonhealth-related issues~~ Thoughts better off dead or hurting self; or
  - (10) Unpleasant mood in morning; Short-tempered, easily annoyed.
  - (11) ~~Insomnia or changes in usual sleep patterns;~~
  - (12) ~~Sad, pained, or worried facial expression;~~
  - (13) ~~Crying or tearfulness;~~
  - (14) ~~Repetitive physical movements;~~
  - (15) ~~Withdrawal from activities of interest; or~~
  - (16) ~~Reduced social interaction.~~
6. The major categories in hierarchical order are:
- a. Rehabilitation category. To qualify for the rehabilitation category, a resident must receive rehabilitation therapy. A resident who qualifies for the rehabilitation category is assigned a subcategory based on the resident's activities of daily living score. The rehabilitation category may be assigned within a classification period based on initiation or discontinuation dates if therapies are begun or discontinued on any date not within an assessment reference period.
  - b. Extensive services category.

- (1) To qualify for the extensive services category, a resident must have an activities of daily living score of at least seven two and have: within the fourteen days preceding the assessment, received tracheostomy care, required a ventilator, respirator, or infection isolation while a resident.
    - (a) ~~Within the fourteen days preceding the assessment, received tracheostomy care or required a ventilator, respirator, or suctioning; or~~
    - (b) ~~Within the seven days preceding the assessment, received intravenous medications or intravenous feeding provided and administered by staff within the facility; and~~
  - (2) ~~A resident who qualifies for the extensive services category must have assigned a qualifier score of zero to five based on:~~
    - (a) ~~The presence of a clinical criteria that qualifies the resident for the special care category, clinically complex category, or impaired cognition category;~~
    - (b) ~~Whether the resident received intravenous medications or intravenous feeding provided and administered by staff within the facility;~~
    - (c) ~~Whether the resident received tracheostomy care and suctioning; or~~
    - (d) ~~Whether the resident required a ventilator or respirator.~~
- c. Special care high category.
- (1) To qualify for the special care high category, a resident must have ~~one or more of the conditions for the extensive care category with an activities of daily living score of less than seven or have at least one of the following conditions or treatments with an activities of daily living score of at least seven~~ two:
    - (a) ~~Multiple sclerosis, cerebral palsy, or quadriplegia with an activities of daily living score of at least ten~~ Comatose and completely dependent for activities of daily living;
    - (b) ~~Respiratory therapy seven days a week~~ Septicemia;
    - (c) ~~Treatment for pressure or stasis ulcers on two or more body sites~~ Diabetes with;
      - i. Insulin injections seven days a week; and
      - ii. Insulin order changes on two or more days;
    - (d) ~~Surgical wound or open lesion with treatment~~ Quadriplegia with an activities of daily living score of at least five;
    - (e) ~~Tube feedings that comprise at least twenty-six percent of daily caloric requirements and at least five~~



- ~~hundred and one milliliters of fluid through the tube per day, and be aphasic~~ Chronic obstructive pulmonary disease and shortness of breath when lying flat;
- (f) ~~Radiation therapy;~~ or A fever in combination with:
- i. Pneumonia;
  - ii. Vomiting;
  - iii. Weight loss; or
  - iv. Tube feedings that comprise at least:
    1. Twenty-six percent of daily caloric requirements and at least five hundred and one milliliters of fluid through the tube per day; or
    2. Fifty-one percent of daily caloric requirements.
- (g) ~~A fever in combination with dehydration, pneumonia, vomiting, weight loss, or tube feeding. Parenteral or intravenous feedings provided in and administered in and by the nursing facility; or~~
- (h) Respiratory therapy seven days a week.
- (2) A resident who qualifies for the special care high category is assigned a subcategory based on the resident's activities of daily living score and whether the resident has signs of depression.
- d. Special care low category.
- (1) To qualify for the special care low category, a resident must have at least one of the following conditions or treatments with an activities of daily living score of at least two:
- (a) Multiple sclerosis, cerebral palsy, or Parkinson's disease with an activities of daily living score of at least five;
  - (b) Respiratory failure and oxygen therapy while a resident administered continuously for at least two hours or intermittently with at least two applications of at least thirty minutes each within the facility in the fourteen days preceding the assessment;
  - (c) Tube feedings that comprise at least:
    - i. Twenty-six percent of daily caloric requirements and at least five hundred and one milliliters of fluid through the tube per day; or
    - ii. Fifty-one percent of daily caloric requirements.
  - (d) Two or more stage two pressure ulcers with two or more skin treatments;
  - (e) Stage three or four pressure ulcer with two or more skin treatments;



- (f) Two or more venous or arterial ulcers with two or more skin treatments;
  - (g) One stage two pressure ulcer and one venous or arterial ulcer with two or more skin treatments;
  - (h) Foot infection, diabetic foot ulcer or other open lesion of foot with application of dressings to the foot;
  - (i) Radiation treatment while a resident; or
  - (j) Dialysis treatment while a resident.
  - (2) A resident who qualifies for the special care low category is assigned a subcategory based on the resident's activities of daily living score and whether the resident has signs of depression.
- e. Clinically complex category.
- (1) To qualify for the clinically complex category, a resident must have one or more of the conditions for the extensive services or special care category categories with an activities of daily living score of ~~less than seven~~ zero or one or have at least one of the following conditions, treatments, or circumstances:
    - (a) Comatose Pneumonia;
    - (b) Burns Hemiplegia/hemiparesis with an activities of daily living score of at least five;
    - (c) Septicemia Surgical wounds or open lesions with at least one skin treatment;
    - (d) Pneumonia Burns;
    - (e) Internal bleeding Chemotherapy while a resident;
    - (f) Dehydration Oxygen therapy while a resident administered continuously for at least two hours or intermittently with at least two applications of at least thirty minutes each within the facility in the fourteen days preceding the assessment;
    - (g) Dialysis Intravenous medication provided, instilled and administered by staff within the facility while a resident; or
    - (h) Hemiplegia with an activities of daily living score of at least ten; Transfusions while a resident.
    - (i) Chemotherapy;
    - (j) Tube feedings that comprise at least twenty-six percent of daily caloric requirements and at least five hundred and one milliliters of fluid through the tube per day;
    - (k) Transfusions;
    - (l) Foot wound with treatment;
    - (m) Diabetes mellitus, with injections seven days per week and two or more physician order changes in the fourteen days preceding the assessment;

- (n) ~~Oxygen therapy administered continuously for at least two hours or intermittently with at least two applications of at least thirty minutes each within the facility in the fourteen days preceding the assessment; or~~
    - (o) ~~Within the fourteen days preceding the assessment, at least one physician visit with at least four order changes or at least two physician visits with at least two order changes.~~
  - (2) A resident who qualifies for the clinically complex category is assigned a subcategory based on the resident's activities of daily living score and whether the resident has signs of depression.
- f. Impaired cognition Behavioral symptoms and cognitive performance category. To qualify for the impaired cognition behavioral symptoms and cognitive performance category, a resident must have a cognition performance scale score of three, four, or five and an activities of daily living score of less than eleven six. A resident who qualifies for the impaired cognition category is assigned a subcategory based on the resident's activities of daily living score and the resident's need for nursing rehabilitation services.
  - (1) To qualify for the behavioral symptoms and cognitive performance category, a resident must either;
    - a) Be cognitively impaired based on one of the following;
      - i. A brief interview of mental status score of less than ten;
      - ii. Coma and completely dependent for activities of daily living;
      - iii. Severely impaired cognitive skills; or
      - iv. Have a severe problem being understood or severe cognitive skills problem and two or more of the following;
        - 1. Problem being understood;
        - 2. Short-term memory problem; or
        - 3. Cognitive skills problem.
    - b) Exhibit behavioral symptoms with one or more of the following symptoms;
      - i. Hallucinations;
      - ii. Delusions; or
      - iii. Physical or verbal behavior symptoms directed toward others on at least four days in the seven days preceding the assessment;
      - iv. Other behavioral symptoms not directed toward others on at least four days in the seven days preceding the assessment;



- v. Rejection of care on at least four days in the seven days preceding the assessment; or
      - vi. Wandering on at least four days in the seven days preceding the assessment.
    - (2) A resident who qualifies for the behavioral symptoms and cognitive performance category is assigned a subcategory based on the resident's activities of daily living score and the resident's need for nursing rehabilitation services.
  - g. Behavior only category.
    - (1) ~~To qualify for the behavior only category, a resident must have exhibited, in four of the seven days preceding the assessment, one or more of the following behaviors:~~
      - (a) ~~Resisting care;~~
      - (b) ~~Combateness;~~
      - (c) ~~Physical abuse;~~
      - (d) ~~Verbal abuse;~~
      - (e) ~~Wandering; or~~
      - (f) ~~Hallucinating or having delusions.~~
    - (2) ~~A resident who qualifies for the behavior only category is assigned a subcategory based on the resident's activities of daily living score and the resident's need for nursing rehabilitation services.~~
  - h. Reduced physical functioning category. To qualify for the reduced physical functioning category, a resident may not qualify for any other group. A resident who qualifies for the reduced physical functioning category is assigned a subcategory based on the resident's activities of daily living score and the resident's need for nursing rehabilitation services.
7. Except as provided in subsection 2, each resident must be classified into a case-mix class with the corresponding group label, activities of daily living score, other criteria, and case-mix weight as follows:
- a. Rehabilitation with an activities of daily living score of fifteen or sixteen (group RAE); case-mix weight: 1.65.
  - b. ~~Rehabilitation with an activities of daily living score of seventeen or eighteen~~ between eleven and fourteen, inclusive (group RAD); case-mix weight: 1.79-1.58.
  - c. ~~Rehabilitation with an activities of daily living score between fourteen six and sixteen ten, inclusive (group RAC); case-mix weight: 1.54~~ 1.36.
  - d. ~~Rehabilitation with an activities of daily living score between nine two and thirteen five, inclusive (group RAB); case-mix weight: 1.26~~ 1.10.
  - e. ~~Rehabilitation with an activities of daily living score between four and eight of zero or one, inclusive (group RAA); case-mix weight: 1.07~~ 0.82.

- f. Extensive services with an activities of daily living score of at least ~~seven and a qualifier score of four or five~~ two and received tracheostomy care and ventilator or respirator care (group SE3 ES3); case-mix weight: ~~2.62~~ 3.00.
- g. Extensive services with an activities of daily living score of at least ~~seven and a qualifier score of two or three~~ two and received tracheostomy, ventilator, or respirator care (group SE2 ES2); case-mix weight: ~~4.72~~ 2.23.
- h. Extensive services with an activities of daily living score of at least ~~seven and a qualifier score of zero or one~~ two and required infection isolation (group SE1 ES1); case-mix weight: ~~4.56~~ 2.22.
- i. Special care high with depression and an activities of daily living score of ~~seventeen fifteen or eighteen~~ sixteen (group SSG HE2); case-mix weight: ~~4.50~~ 1.88.
- j. Special care high with an activities of daily living score of ~~seventeen fifteen or eighteen~~ sixteen (group SSB HE1); case-mix weight: ~~4.39~~ 1.47.
- k. Special care high with depression and an activities of daily living score between ~~seven eleven~~ and fourteen, inclusive, or ~~extensive services with an activities of daily living score of less than seven~~ (group SSA HD2); case-mix weight: ~~4.33~~ 1.69.
- l. Special care high with an activities of daily living score between eleven and fourteen, inclusive, (group HD1); case-mix weight: 1.33.
- m. Special care high with depression and an activities of daily living score between six and ten, inclusive, (group HC2); case-mix weight: 1.57.
- n. Special care high with an activities of daily living score between six and ten, inclusive, (group HC1); case-mix weight: 1.23.
- o. Special care high with depression and an activities of daily living score between two and five, inclusive, (group HB2); case-mix weight: 1.55.
- p. Special care high with an activities of daily living score between two and five, inclusive, (group HB1); case-mix weight: 1.22.
- q. Special care low with depression and an activities of daily living score of fifteen or sixteen (group LE2); case-mix weight: 1.61.
- r. Special care low with an activities of daily living score of fifteen or sixteen (group LE1); case-mix weight: 1.26.
- s. Special care low with depression and an activities of daily living score between eleven and fourteen, inclusive, (group LD2); case-mix weight: 1.54.
- t. Special care low with an activities of daily living score between eleven and fourteen, inclusive, (group LD1); case-mix weight: 1.21.
- u. Special care low with depression and an activities of daily living score between six and ten, inclusive, (group LC2); case-mix weight: 1.30.



- v. Special care low with an activities of daily living score between six and ten, inclusive, (group LC1); case-mix weight: 1.02.
- w. Special care low with depression and an activities of daily living score between two and five, inclusive, (group LB2); case-mix weight: 1.21.
- x. Special care low with an activities of daily living score between two and five, inclusive, (group LB1); case-mix weight: 0.95.
- y. Clinically complex with depression and an activities of daily living score of ~~seventeen~~ fifteen or ~~eighteen~~ sixteen (group GG2 CE2); case-mix weight: ~~1.46~~ 1.39.
- z. Clinically complex with an activities of daily living score of ~~seventeen~~ fifteen or ~~eighteen~~ sixteen (group GG4 CE1); case-mix weight: ~~1.27~~ 1.25.
- aa. Clinically complex with depression and an activities of daily living score between ~~twelve~~ eleven and ~~sixteen~~ fourteen, inclusive (group GB2 CD2); case-mix weight: ~~1.18~~ 1.29.
- bb. Clinically complex with an activities of daily living score between ~~twelve~~ eleven and ~~sixteen~~ fourteen, inclusive (group GB4 CD1); case-mix weight: ~~1.17~~ 1.15.
- cc. Clinically complex with depression and an activities of daily living score between ~~four~~ six and ~~eleven~~ ten, inclusive (group GA2 CC2); case-mix weight: 1.08.
- dd. Clinically complex with an activities of daily living score between ~~four~~ six and ~~eleven~~ ten, inclusive, or ~~special care with an activities of daily living score of less than seven~~ (group GA4 CC1); case-mix weight: ~~1.02~~ 0.96.
- ee. Clinically complex with depression and an activities of daily living score between two and five, inclusive, (group CB2); case-mix weight: 0.95.
- ff. Clinically complex and an activities of daily living score between two and five, inclusive (group CB1); case-mix weight: 0.85.
- gg. Clinically complex with depression and an activities of daily living score of zero or one (group CA2); case-mix weight: 0.73.
- hh. Clinically complex and an activities of daily living score of zero or one (group CA1); case-mix weight: 0.65.
- ii. ~~Impaired cognition~~ Behavioral symptoms and cognitive performance with nursing rehabilitation and an activities of daily living score between ~~six~~ two and ~~ten~~ five, inclusive (group IB2 BB2); case-mix weight: ~~.98~~ 0.81.
- jj. ~~Impaired cognition~~ Behavioral symptoms and cognitive performance with an activities of daily living score between ~~six~~ two and ~~ten~~ five, inclusive (group IB4 BB1); case-mix weight: ~~.88~~ 0.75.
- kk. ~~Impaired cognition~~ Behavioral symptoms and cognitive performance with nursing rehabilitation and an activities of daily living score of ~~four~~ zero or ~~five~~ one (group IA2 BA2); case-mix weight: ~~.80~~ 0.58.

- ll. ~~Impaired cognition~~ Behavioral symptoms and cognitive performance with an activities of daily living score of four zero or five one (group IA1 BA1); case-mix weight: ~~.67~~ 0.53.
  - mm. ~~Behavior only with nursing rehabilitation and an activities of daily living score between six and ten, inclusive (group BB2); case-mix weight: .97.~~
  - nn. ~~Behavior only with an activities of daily living score between six and ten, inclusive (group BB1); case-mix weight: .85.~~
  - oo. ~~Behavior only with nursing rehabilitation and an activities of daily living score of four or five (group BA2); case-mix weight: .69.~~
  - pp. ~~Behavior only with an activities of daily living score of four or five (group BA1); case-mix weight: .63.~~
  - qq. ~~Reduced physical functioning with nursing rehabilitation and an activities of daily living score between sixteen and eighteen of fifteen or sixteen, inclusive (group PE2); case-mix weight: 4.04~~ 1.25.
  - rr. ~~Reduced physical functioning with an activities of daily living score between sixteen and eighteen of fifteen or sixteen, inclusive (group PE1); case-mix weight: .96~~ 1.17.
  - ss. ~~Reduced physical functioning with nursing rehabilitation and an activities of daily living score between eleven and fifteen~~ fourteen, inclusive (group PD2); case-mix weight: ~~.95~~ 1.15.
  - tt. ~~Reduced physical functioning with an activities of daily living score between eleven and fifteen~~ fourteen, inclusive (group PD1); case-mix weight: ~~.87~~ 1.06.
  - uu. ~~Reduced physical functioning with nursing rehabilitation and an activities of daily living score of nine or ten between six and ten, inclusive (group PC2); case-mix weight: .86~~ 0.91.
  - vv. ~~Reduced physical functioning with an activities of daily living score of nine or ten between six and ten, inclusive (group PC1); case-mix weight: .84~~ 0.85.
  - ww. ~~Reduced physical functioning with nursing rehabilitation and an activities of daily living score between six two and eight five, inclusive (group PB2); case-mix weight: .75~~ 0.70.
  - xx. ~~Reduced physical functioning with an activities of daily living score between six two and eight five, inclusive (group PB1); case-mix weight: .68~~ 0.65.
  - yy. ~~Reduced physical functioning with nursing rehabilitation and an activities of daily living score of four zero or five one (group PA2); case-mix weight: .66~~ 0.49.
  - zz. ~~Reduced physical functioning with an activities of daily living score of four zero or five one (group PA1); case-mix weight: .62~~ 0.45.
8. The classification is effective the date the resident assessment must be completed in all cases except an admission or for a return from an acute hospital stay. The classification for an admission or for a return is effective the date of the admission or return.



9. A facility complying with any provision of this section that requires a resident assessment must use the minimum data set in a resident assessment instrument that conforms to standards for a resident classification system described in 42 CFR 413.333.

**History:** Effective September 1, 1987; amended effective January 1, 1990; November 22, 1993; January 1, 1996; January 1, 1998; January 1, 1999; January 1, 2000; July 2, 2002; October 1, 2010; January 1, 2012.

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

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

Jack Dalrymple, Governor  
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED AMENDMENTS TO  
N.D. ADMIN. CODE CHAPTER 75-02-06  
RATESETTING FOR NURSING HOME CARE**

The North Dakota Department of Human Services (the Department) held a public hearing on August 18, 2011, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care.

Written comments on these proposed amendments could be offered through 5:00 p.m. on August 29, 2011.

No one attended the public hearing. Several written comments were received within the comment period. The commentors were:

1. Barbara Fischer, 225 W Reno Ave, Bismarck, ND 58504;
2. Shelly Peterson, ND Long Term Care Association, 1900 N 11<sup>th</sup> St, Bismarck, ND 58501

**SUMMARY OF COMMENTS**

**Comment:** 75-02-06-16(3)(d)(3); "The proposed amendments have the limit rates for the rate year January 1, 2013 calculated as the limit rates for January 1, 2012 increased by the adjustment factor. This contradicts N.D.C.C. 50-24.4-10(7) which requires 'A new base period must be established at least every four years beginning with the cost report period June 30, 2006.' The June 30, 2006 cost was used to rebase the limit rates effective January 1, 2009, therefore, the June 30, 2010 cost report should be used to rebase the limits for the rate year beginning January 1, 2013 based on the four year requirement. The proposed amendments for calculation of the limit rate for each category beginning January 1, 2013 should include the rebasing that must occur for 2013 and the date and referencing in subparagraph 3 should be changed to 2014 and the appropriate reference to the 2013 rebased limits or delete 75-02-06-16(3)(d)(3) in its entirety."

**Response:** Paragraph 3 of subdivision 75-02-06-16(3)(d) has been overstruck in the proposed rules.

**Comment:** "Rebasing – NDCC 50-24.4-10(7) requires a new base period must be established at least every four years beginning with the cost report period June 30, 2006. The limits you have proposed for January 1, 2013 do not take into account rebasing as required in the NDCC. According to NDCC language, the January 1, 2013 rates should be adjusted using the June 30, 2010 cost report and then inflation adjustments applied."



It is recommended the proposed amendments for calculation of the limit rate for each category beginning January 1, 2013 include rebasing using the June 30, 2010 cost report."

**Response:** Paragraph 3 of subdivision 75-02-06-16(3)(d) has been overstruck in the proposed rules. The limit rates for rate years beginning on or after January 1, 2013 will be addressed in future rulemaking.

**Comment:** 75-02-06-17(6)(b)(1); "The qualifications for the subcategories within extensive services need to be identified. There is no indication of how an individual is assigned ES1, ES2, or ES3. Language such as 'A resident who qualifies for the extensive services category is assigned a subcategory based on ...' should be added to clarify how assignment to the subcategories occurs."

**Response:** The qualifiers for assignment of a subcategory within extensive services is identified in North Dakota Administrative Code section 75-02-06-17(7)(f) thru (h). No changes made.

**Comment:** 75-02-06-17(6)(f); "'impaired cognition' in the first sentence needs to be amended to 'behavioral symptoms and cognitive performance' as identified in the title of this category."

**Response:** Agree. The applicable subdivision has been changed.

**Comment:** 75-02-06-17(6)(f)(1)(iv)(c); "semicolon or needs to replace the period at the end of Cognitive skills problems to make this statement grammatically correct as NDAC 75-02-06-17(6)(f)(1) states '...a resident must either' necessitating an 'or' between subparagraphs (a) and (b)."

**Response:** Punctuation in 75-02-06-17(6)(f)(1)(iv)(c) is correct as written. No changes needed.

**Comment:** 75-02-06-17(6)(f)(1)(b)(ii); "the 'or' needs to be deleted as the list does not end with (iii)."

**Response:** Agree. The 'or' has been overstruck.

**Comment:** 75-02-06-17(7)(f) thru NDAC 75-02-06-17(7)(h); "the 'activities of daily living score of at least two' is the same for all three of the Extensive Services classifications. The qualifiers for each of the subcategories should be included to distinguish each subcategory as the split to the subcategory is not dependent upon differing ADL scores."

**Response:** Agree. The applicable subdivisions have been changed to include qualifiers.

**Comment:** 75-02-06-17(7)(ee) and 75-02-06-17(7)(ff); "The activities of daily living score for group CB2 and CB1 repeats the activities of daily living score CC2 and CC1 in subparagraphs (cc) and (dd). The ADL scores for CB2 and CB1 should be replaced with 'the activities of daily living scores between two and five, inclusive' for both classifications as these ADL scores are not used in any of the other clinically complex classifications."

**Response:** Agree. The applicable subdivisions have been changed.

**Comment:** "Emergency/Evacuations – The sub-section on adjustments for disaster recovery costs when evacuation of residents occurs needs to be updated and revised to reflect current needs and practice. On July 1, 2011 CMS approved a new State Plan Amendment (SPA), providing for sending and receiving facilities to be fairly compensated during an evacuation. The proposed rules should be updated to reflect the current SPA.

An evacuation is difficult on residents and facilities. It can be financially devastating for facilities. Earlier this year we submitted revised draft rules to address disasters and evacuations. We completed that process because the Department indicated they would be open and receptive to such rules that could better address disaster recovery efforts. Later it was determined you could not proceed forward with Emergency Rules to address this issue and indicated you would need to go through the regular rule making process for this issue.

We are anticipating additional flooding and possible facility evacuations in 2012. The current rules do not adequately address this issue. We request this section be updated with the same language reflected in the current SPA."

**Response:** Notification of approval of the State Plan Amendment was not received until July 22, 2011. The State Plan Amendment is effective July 1, 2011 and expires November 30, 2011. No changes to administrative code were made because the State Plan Amendment expires before the effective date of these proposed rules. No changes made.

Prepared by:



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

In Consultation with: LeeAnn Thiel, Medical Services

October 17, 2011

Cc: LeeAnn Thiel, Medical Services



## MEMO

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

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

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

**DATE:** June 29, 2011

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

### Purpose

The amendments update the list of items to be excluded as an offset to costs on the cost report. The amendments update the allowable education expense pursuant to 2011 HB 1169. The amendments identify accrued salaries not paid within 75 days of the cost report yearend to be a nonallowable cost. The amendments identify the limit rates applicable to each cost category as of January 1, 2012. The amendments increase the number of resident classifications to 48 and define the criteria and relative weights for resident classification under Resource Utilization Group (RUG) IV. RUG IV has a better emphasis on resident needs. The current RUG III classification case mix is based on a 1996 time study. This study is no longer reflective of current practices, resident mix, staff mix, and available technologies in nursing facilities.

### Classes of Persons Who Will be Affected

Nursing facility operators and nursing facility residents will be affected by the proposed rule changes since some of the changes affect the classifications of residents which are used for payment and the changes to allowable education expense and limit rates used to establish nursing facility rates.

### Probable Impact



The estimated impact of the change to remove late charges as an exclusion to be offset to costs is zero.

The estimated impact for calendar year 2012 for the change to education expense is an increase of \$164,548 of which \$80,209 will affect private pay individuals and \$84,339 will affect the Medicaid program.

The estimated impact for salaries accrued but not paid within 75 days of a facility's fiscal yearend is expected to be zero.

The estimated impact for calendar year 2012 for the change in the limit rates is an increase of \$11.4 million of which \$5.3 million will affect private pay individuals and \$6.1 million will affect the Medicaid program.

The estimated impact in the aggregate of the changes to resident classification categories is expected to be minimal.

#### 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 amendments to update the resident assessment categories coincide with the implementation of a new resident assessment classification system.

Jack Dalrymple, Governor  
Carol K. Olson, Executive Director

## MEMORANDUM

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

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

**DATE:** June 29, 2011

**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

*The only small entities affected by the proposed amendments are licensed nursing facilities that 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.*



Jack Dalrymple, Governor  
Carol K. Olson, Executive Director

## MEMORANDUM

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

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

**DATE:** June 29, 2011

**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 participating in the Medicaid program that have gross annual revenue less than \$2.5 million.

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 the proposed amendment affect the rate calculation used to establish the rates payable by individuals in nursing facilities and the assignment of the classification based on resident characteristics used to establish a resident's payment rate.

### 3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule is an estimated additional \$5.3 million for calendar year 2012 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 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. The amendments to update the resident assessment categories coincide with the implementation of a new resident assessment classification system.

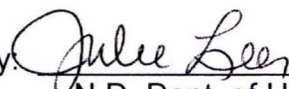
## TAKINGS ASSESSMENT

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 29<sup>th</sup> day of June, 2011.

by:   
N.D. Dept. of Human Services