APPENDIX C

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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TO: Maggie Anderson, Executive Director

FROM: Legal Advisory Unit

RE: Estate Recovery/Medicaid Expansion

DATE: May 14, 2014

1. North Dakota's Medicaid estate recovery statute applies to persons who are eligible for expanded Medicaid under the modified adjusted gross income (MAGI) eligibility rules.

Medicaid is a voluntary federal-state program enacted as Title 19 of the Social Security Act. 42 U.S.C. § 1396 et.seq. Federal law requires the participating states to seek recovery of the Medicaid benefits paid from the estates of certain Medicaid beneficiaries. 42 U.S.C. § 1396 p(b). North Dakota's Medicaid estate recovery statute appears at N.D.C.C. § 50-24.1-07

The North Dakota statute requires recovery from the estate of the recipient or the estate of the recipient's surviving spouse. Recovery is required for benefits correctly provided:

1. On and after October 1, 1993, to individuals age fifty-five or older;
2. Before October 1, 1993, to individuals age sixty-five and older; and
3. Effective November 1, 2010, to permanently institutionalized individuals under age 55. Id.

A claim may not be enforced, nor may interest begin to accrue, during the lifetime of a surviving spouse or while there is a surviving child who is under the age of twenty-one years or is blind or permanently and totally disabled. Id. These categories follow federal law and are the only exemptions from North Dakota's Medicaid estate recovery statute. (The surviving spouse is frequently the "community spouse". "Community spouse" is

defined in NDAC section 75-02-02.1-24 as the spouse of an institutionalized spouse or the spouse of a home and community-based services spouse.) Estate recovery proceedings on a decedent's estate may begin upon the death of the surviving spouse, regardless of whether that spouse has since remarried.

Under current state and federal law, Medicaid estate recovery applies to persons who are eligible for traditional or expanded Medicaid under the MAGI eligibility rules. The state must seek recovery within the parameters of the recovery statute, for amounts at least equal to all of the medical assistance (Medicaid) payments made on the recipients behalf under our State Plan. See guidance letter to state Medicaid Directors from the Center for Medicare and Medicaid Services (CMS) dated February 21, 2014. (SMDL# 14-001/ACA 29). Individuals eligible for expanded Medicaid using the MAGI eligibility rules who are 55 years or older when they receive medical assistance are not exempt from the estate recovery rules.

2. The inclusion of Medicaid recipients determined eligible under MAGI eligibility rules creates some issues in the estate recovery process.

a. No Asset Inventory.

Pre Affordable Care Act Medicaid eligibility was determined using an "asset or resources" test. This allowed the eligibility worker to create an asset inventory which could later be utilized to find and chase assets in the estate recovery process. If an individual's Medicaid eligibility is determined using MAGI eligibility rules an asset test may not be applied for purposes of determining eligibility. The asset inventory will not be available for use in the estate recovery process involving the MAGI population.

b. Estate recovery may create a potential barrier to enrollment for some individuals.

Some Medicaid recipients determined eligible using MAGI eligibility rules may have limited income but substantial assets. They may not want to expose their assets to estate recovery. This may create a barrier to enrollment.

A state must comply with § 1917 of the Social Security Act which applies when Medicaid applicants seek long-term services and supports (LTSS). (What the federal government refers to as LTSS in this context are what we would normally think of as

Long Term Care benefits.) Section 1917 requires recovery if a Medicaid beneficiary is an inpatient of a nursing facility, intermediate care facility for the intellectually disabled, or other medical institution. As noted in the guidance letter to State Medicaid Directors "MAGI individuals who were 55 years or older when they received medical assistance are not exempt from the mandatory (i.e. LTSS) estate recovery provisions [of Section 1917]."

The health plans available to the Medicaid expansion population contain limited benefits for nursing home services and swing bed care. It is not clear whether these limited benefits would be considered LTSS subject to estate recovery. It is clear that all other covered Medicaid expenses, including associated premium payments for health coverage, are subject to estate recovery.

c. Legislation can exclude some benefits from estate recovery.

The state has some flexibility within the parameters of federal law; the Legislative Assembly may place some limitations upon estate recovery from Medicaid recipients whose eligibility was determined under MAGI eligibility rules. Generally speaking, a state may limit recovery based upon the eligibility categories in which the Medicaid beneficiaries are enrolled. While it is possible that LTSS are not a part of the health plan offered to these new Medicaid enrollees and this group could be excluded from estate recovery by statute, such an exclusion might require a different interpretation of what constitutes LTSS for estate recovery than the definition of LTSS used to trigger payment of Medicaid benefits. This could be problematic. If LTSS are a part of the health plan, the state could amend the estate recovery statute to limit estate recovery to LTSS expenditures for Medicaid recipients whose eligibility was determined under MAGI eligibility rules. This would eliminate estate recovery for health insurance premiums, general medical and prescription drug services, and other non-LTSS services covered under the State Plan for this expanded Medicaid population.

Legislation is generally prospective not retroactive. As a result, the present estate recovery rules would apply to the estate of a Medicaid recipient whose eligibility was determined under MAGI eligibility rules if that recipient dies prior to the effective date of any new legislation.

d. Notice of Estate Recovery.

Medicaid recipients whose eligibility for expanded Medicaid was determined under MAGI eligibility rules are receiving notice that the estate recovery rules apply to their cases. These individuals receive the following notice with their Health Care Reform Decision:

> "If an individual is enrolled in Medicaid or Medicaid Expansion coverage, all payments made on behalf of that individual after the individual turns 55 years of age are subject to Medicaid Estate recovery. This means that payments made on your behalf (including premium payments to Sanford Health Plan) are subject to estate recovery upon your death. If you want to dis-enroll from Medicaid or Medicaid Expansion coverage because of this, please call 1-855-794-7308. (Please note: if you are eligible for Medicaid coverage and you choose to end that coverage, there is a possibility that you may not be eligible for the Advance Premium Tax Credits to assist you in purchasing private insurance coverage through the Marketplace.)

If legislation is enacted to exclude some benefits from estate recovery for the Medicaid recipients eligible under Medicaid Expansion whose eligibility was determined under MAGI eligibility rules, this notice would need to be changed to mirror the legislative amendment.

e. Legislation to exclude the MAGI population from estate recovery would decrease future estate recoveries.

As previously noted some Medicaid recipients whose eligibility was determined under MAGI eligibility rules will have limited income but significant assets. The Medicaid health insurance payment for a Medicaid expansion enrollee will range from $700.00-$1,300.00 a month. At a minimum, at current rates, the Medicaid claim against the estate would accrue at $8,400.00 a year. Depending upon the coverage period, this expense, standing alone, may be substantial. In an estate with assets (a home, land, mineral rights), a part, if not all of the Medicaid claim may be recoverable through the estate recovery process.

3. Conclusion.

North Dakota's Medicaid estate recovery statute applies to Medicaid recipients whose eligibility was determined under MAGI eligibility rules, including those not previously eligible for traditional Medicaid. CMS has noted in its guidance letter that it:

> "intends to thoroughly explore options and to use any available authorities to eliminate recovery of Medicaid benefits consisting of items or services other than long term care and related services in the case of individuals who are determined eligible for Medicaid benefits under the MAGI methodology."

North Dakota could amend its estate recovery statutes to provide this same result. The amendments would only apply to estates where the death occurred after the effective date of the amendments. Due to the lack of asset information available for the Medicaid expansion recipients whose eligibility was determined under MAGI eligibility rules, it will be difficult to identify the expected estate recoveries from this population. Any exemption from estate recovery for Medicaid expansion recipients would decrease future estate recoveries.