

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 September 18, 2014. The record was held open until 5:00 p.m. on September 29, 2014, to allow written comments to be submitted. One set of written comments was received. The "Summary of Comments" is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,019.54.
6. The proposed rules amend chapter 75-02-04.1. The following specific changes were made:

Section 75-02-04.1-01. Section 75-02-04.1-01 is amended to add certain military housing allowances and nonrecurring capital gains as exclusions from gross income, to account for a one-half child tax credit in calculating net income, to clarify that health insurance policies or health service contracts include coverage for dental and vision care, to increase the deduction for lodging expense, and to allow a deduction from gross income for personal mileage between work locations that

is not reimbursed by the employer. Pursuant to comments received, this section was changed further to clarify the deduction for mileage expense and to clarify that the documentation requirement applies to the entire provision that includes the mileage expense.

Section 75-02-04.1-05. Section 75-02-04.1-05 is amended to set forth conditions under which an obligor can offset self-employment income with self-employment losses from another business, as long as the self-employment activity is legitimate and not deliberately run at a loss or as a hobby. Pursuant to a comment received, this section was changed to clarify that "statewide average earnings" refers to North Dakota statewide average earnings.

Section 75-02-04.1-07. Section 75-02-04.1-07 is amended to update the list of subsections that provide for exceptions to imputing income, to extend the "look-back" period from 24 months to the current partial calendar year and the previous two full calendar years when imputing income based on prior earnings rather than actual income, to establish a methodology for imputing income when an obligor is both a minor and has a disability or is both incarcerated and has a disability, and to change the imputation provisions for an obligor who fails to provide income information in a proceeding to establish a child support obligation. Pursuant to comments received, this section was changed further to clarify when income may not be imputed to an incarcerated obligor and to clarify

that "statewide average earnings" refers to North Dakota statewide average earnings.

Section 75-02-04.1-08.1. Section 75-02-04.1-08.1 is amended to clarify adjustments for extended parenting time are not authorized when the parents have equal residential responsibility.

Section 75-02-04.1-08.2. Section 75-02-04.1-08.2 is amended to expand the current rule regarding equal physical custody to include those cases where some, but not all, of the siblings are shared equally.

Section 75-02-04.1-09. Section 75-02-04.1-09 is amended to specify that a deviation for a high-income obligor must be based on demonstrated needs of the child, to increase the amount that is considered to be "high-income" from \$12,500 to \$25,000 per month, to address an obligor's reduced ability to provide support when the obligor is maintaining two households because the obligor is in the military on a temporary duty assignment, and to clarify how a deviation must be applied in cases involving split or equal residential responsibility. Pursuant to a comment received, this section was further changed to clarify what is included in "demonstrated needs of the child".

Section 75-02-04.1-10. Section 75-02-04.1-10 is amended to increase the table of presumptively correct child support amounts to include monthly increments of up to \$25,000.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The impact of the proposed amendments cannot be precisely determined, but they may 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. The estimated fiscal impact resulting from the implementation of the proposed amendments was anticipated in the Department's budget. The estimated fiscal impact is \$59,367, of which \$20,185 is general fund.
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
June 10, 2015

Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS
RECEIVED IN REGARD TO PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CH. 75-02-04.1
CHILD SUPPORT GUIDELINES**

The North Dakota Department of Human Services (the Department) held a public hearing on September 18, 2014, in Bismarck, concerning proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. Department staff attended the public hearing. One member of the public attended the hearing but did not offer any comments.

Written comments on the proposed amendments could be offered through 5:00 p.m., on September 29, 2014. Written comments were received from:

Paulette Oberst, assistant director for policy and lead attorney for the Child Support division of the Department, P.O. Box 7190, Bismarck, ND 58507-7190.

Comments Regarding N.D. Admin. Code § 75-02-04.1-01

-01(4)(a)(6)

Comment: A proposed new provision authorizing an exclusion from gross income for nonrecurring capital gains met with resistance from some of the Child Support staff who served on the guidelines drafting advisory committee. Several scenarios have been identified where excluding a nonrecurring capital gain from the obligor's gross income could have a detrimental effect on the child. For example, assume that an obligor realizes a nonrecurring capital gain sufficient to allow the obligor to quit his or her job and live off the cash received from the transaction. The obligor deposits the cash in a savings account, which pays only a paltry amount of interest. If the capital gain itself is excluded from gross income and only the interest is included, the resulting child support amount is not really reflective of the obligor's true ability to provide support.

Response: No change is proposed based on this comment. Although opinion was divided when the guidelines drafting advisory committee considered this issue, a majority of the committee supported the change. Among the reasons given for the change is that, although a capital gain is treated as income for tax purposes, the cash received is more in the nature of an asset than income and, accordingly, should not be includible in gross income for guidelines purposes. Recognizing that reasonable minds can differ and that no member of the public submitted comments objecting to the change, the wishes of the majority of the advisory committee will not be overridden.

For an obligor who lives off the proceeds of a nonrecurring capital gain, we note that the existing child support guidelines already allow for imputation of income based on earnings history and for a deviation when an obligor has an increased ability to pay child support by securing income from assets.

-01(6)(h)

Comment: A proposed new provision allowing for a deduction from gross income for certain non-commuting mileage expenses includes a requirement that the number of miles driven be documented. Existing provisions within the same subdivision (i.e., employee expenses for special equipment or clothing and for lodging) do not similarly have a documentation requirement. For consistency within the subdivision, and because we think documentation is a best practice, we suggest that the documentation requirement be applied to the entire subdivision.

Response: A change will be made based on this comment to clarify that the documentation requirement applies to the entire subdivision.

Comment: With respect to the proposed new provision allowing for a deduction from gross income for certain non-commuting mileage expenses computed at the rate of \$0.56 per mile, a question has arisen about whether a deduction is allowed if the obligor is partially reimbursed for these expenses (e.g., if the employer reimburses at the rate of \$0.50 per mile). We recognize that a proposed change to the "lead-in" language to this subdivision clarifies that deductions are only allowed for unreimbursed employee expenses so perhaps it is already clear that the obligor would be entitled to a deduction only for the portion of mileage expenses that are not reimbursed. The purpose of this comment is to preserve the issue so that consideration can be given to whether additional refinements to the language are needed.

Response: A change will be made based on this comment to clarify that the deduction for the mileage expense is limited to \$0.56 per mile. This will align with how the deduction for lodging is expressed. In the example given, if the employer reimburses the obligor for the applicable mileage at the rate of \$0.50 per mile, the deduction for guidelines purposes is \$0.06 per mile (i.e., the unreimbursed portion).

Revised proposed amendment:

Employee Subject to documentation, unreimbursed employee expenses for special:

(1) Special equipment or clothing required as a condition of employment or for lodging;

(2) Lodging expenses incurred when engaged in travel required as a condition of employment (limited to ~~sixty-three~~ eighty-three dollars per night); or

- (3) Non-commuting mileage incurred for driving a personal vehicle between work locations when required as a condition of employment, limited to fifty-six cents per mile, less any actual mileage reimbursement from the employer; and

Comments Regarding N.D. Admin. Code § 75-02-04.1-07

-07(8)

Comment: We believe that further refinements are needed to make it clear that income is not be imputed to an incarcerated obligor who also has a disability. As drafted, the preclusion of imputation is premised on the obligor receiving certain types of disability payments (e.g., SSI payments or social security disability payments). It is our understanding that certain disability payments are discontinued when the recipient becomes incarcerated. If so, conditioning the preclusion of imputation on the obligor's continued receipt of disability payments will not have the intended effect. We believe further changes should be made to clarify that income may not be imputed if the obligor had been approved for disability payments and would be receiving those payments but for the incarceration.

Response: A change will be made based on this comment to clarify that income may not be imputed to an obligor who is incarcerated but had been approved for and would be receiving disability payments but for the incarceration.

Revised proposed amendment:

- a. If Unless subdivision d applies, if an obligor is incarcerated, monthly gross income based on earning capacity may not be imputed under subsection 3:
- (1) In an amount greater than one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for less than one year;
 - (2) In an amount greater than eighty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least one year but less than two years;
 - (3) In an amount greater than sixty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least two years but less than three years;
 - (4) In an amount greater than forty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least three years but less than four years;

- (5) In an amount greater than twenty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least four years but less than five years; or
 - (6) In any amount if the obligor has been incarcerated for at least five years.
- b. For purposes of this subsection, "incarcerated" means physically confined to a prison, jail, or other correctional facility.
 - c. In determining the length of time an obligor has been incarcerated for purposes of applying subdivision a, only continuous periods of actual confinement may be considered except that any periods representing work release may not be considered.
 - d. If an incarcerated obligor is receiving or, immediately prior to incarceration, was receiving any payment listed in subdivision b of subsection 7, income may not be imputed in any amount.

-07(9)

Comment: We suggest that the language be further refined to clarify that "statewide" refers to North Dakota. Since the term is used elsewhere in section -07 as well as in section -05, we further suggest that conforming changes be made as necessary.

Response: A change will be made based on this comment. In a recent decision, the Supreme Court held that the term "statewide average earnings" is ambiguous and looked to the rulemaking history to conclude that a North Dakota statewide average is required. See Johnson v. Lerud, 2014 ND 235, 857 N.W.2d 92. To remove the ambiguity from the guidelines themselves, changes will be made to preface "statewide" with "North Dakota" throughout sections -05 and -07.

Revised proposed amendments:

-05(6)(b)

An amount equal to six-tenths of North Dakota statewide average earnings for persons with similar work history and occupational qualifications; or

-05(7)(b)

An amount equal to six-tenths of North Dakota statewide average earnings for persons with similar work history and occupational qualifications; or

-07(1)(b)

An obligor is "underemployed" if the obligor's gross income from earnings is significantly less than the North Dakota statewide average earnings for persons with similar work history and occupational qualifications.

-07(2)(a)

Six-tenths of the North Dakota statewide average earnings for persons with similar work history and occupational qualifications; or

-07(3)(b)

An amount equal to six-tenths of the North Dakota statewide average earnings for persons with similar work history and occupational qualifications.

-07(9)(b)

An amount equal to one hundred percent of the North Dakota statewide average earnings for persons with similar work history and occupational qualifications.

Comment Regarding N.D. Admin. Code § 75-02-04.1-09

-09(2)(b):

Comment: We support conditioning this rebuttal reason on "demonstrated needs of the child." Since it is possible, and even likely, that a child's needs arose out of activities that the child participated in while the family was intact, we suggest that this rebuttal reason also take into consideration the pre-divorce standard of living of the family.

Response: A change will be made based on this comment to clarify that "demonstrated needs" includes, as applicable, needs arising from activities in which the child participated while the family was intact.

Revised proposed amendment:

-09(2)(b)

The increased ability of an obligor with a net monthly income which exceeds twelve twenty-five thousand five-hundred dollars, to provide additional child support based on demonstrated needs of the child, including, if applicable, needs arising from activities in which a child participated while the child's family was intact;

Prepared by: Paulette Oberst, Assistant Director for Policy and Lead Attorney, Child Support Division, North Dakota Department of Human Services

Date: April 7, 2015



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

MEMORANDUM

To: Julie Leer, Director, Legal Advisory Unit

From: Paulette Oberst, Assistant Director for Policy and Lead Attorney *Paulette Oberst*

Date: July 22, 2014

Subject: Regulatory Analysis to Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines

The following regulatory analysis of the proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines, is provided to fulfill the requirements of N.D.C.C. § 28-32-08. The fiscal impact of the proposed amendments cannot be precisely calculated but it may exceed \$50,000.

Purpose

The proposed rules revise definitions relating to exclusions and deductions from gross income; revise language relating to net income from self-employment (specifically, to address the treatment of self-employment losses); revise the determination of imputed income based on earning capacity in several situations (such as when an obligor is uncooperative in providing financial information for the purpose of establishing an obligation or when an obligor is both incarcerated and has a disability); revise language relating to extended parenting time to clarify that it is not authorized when the parents have equal residential responsibility for their children; revise language relating to equal residential responsibility to provide a methodology for calculating support when equal residential responsibility is ordered for some, but not all, of the children; revise the criteria for rebuttal of the guideline amount (for example, a new rebuttal criterion is created for situations where the obligor has a reduced ability to pay support due to a temporary duty assignment for the military); and revise the schedule of child support amounts (for example, the schedule is extended to cover net monthly incomes up to \$25,000).

Federal regulations (45 C.F.R. § 302.56(e)) require that the State review, and, if appropriate, revise child support guidelines at least once every four years to ensure that their application results in the determination of appropriate child support award amounts. Also, state law (N.D.C.C. § 14-09-09.7(5)) requires the Department of Human Services to institute a new rulemaking proceeding relating to the child support

guidelines to ensure that application of the guidelines results in the determination of appropriate child support award amounts. The law requires the initial rulemaking proceeding to be commenced by August 1, 1998, and subsequent rulemaking proceedings to be commenced at least once every four years thereafter.

Classes Of Persons Who Will Probably Be Affected By The Proposed Amendments

1. Child support obligors whose child support obligations are being established or modified.
2. Child support obligees whose child support awards are being established or modified.
3. Children who are covered by a child support award that is being established or modified (i.e., children of obligors and obligees).

Probable Impact

Some of the proposed amendments will affect the calculation of a support amount, thus affecting the amount an obligor may be ordered to pay and the amount an obligee may be ordered to receive. Some of the proposed amendments could cause a lower support amount to be determined, some could cause a higher support amount to be determined, and some could cause a higher or lower support amount to be determined depending on specifics of the case.

Probable Cost Of Implementation And Enforcement

It is anticipated that there could be some effect on state revenues. This is chiefly due to the fact that child support is assigned to the State in certain cases (i.e., where the family is receiving TANF or the child is in foster care). Also, it is possible that since support amounts could be affected, there could be an effect on families' ability to be self-sufficient. For example, a higher support amount could allow a family to remain self-sufficient instead of eligible for public assistance. A lower support amount could decrease a family's ability to be self-sufficient and increase the likelihood of eligibility for public assistance.

It is impossible to calculate the amount of the effect at this time.

Alternative Methods That Were Considered

The review of the child support guidelines, which led to the proposed amendments, was undertaken by a drafting advisory committee convened by the Department of Human Services. This committee discussed issues that had been identified with respect to the guidelines, discussed various alternatives for addressing the issues, and provided

recommendations to the Department. The committee's discussions are detailed in committee meeting minutes.

Conclusion

The proposed amendments will affect obligors, obligees, and their children, and could affect state revenues. Some persons may be affected positively and others may be affected negatively.

It is imperative that application of the guidelines results in the determination of appropriate child support award amounts. Thus, periodic review and amendment of the guidelines is required and necessary.



Jack Dalrymple, Governor
Maggie D. Anderson, Interim Executive Director

MEMORANDUM

To: Julie Leer, Director, Legal Advisory Unit

From: Paulette Oberst, Assistant Director for Policy and Lead Attorney *Paulette Oberst*

Date: July 22, 2014

Subject: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1(2). This regulatory analysis pertains to proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. In accordance with federal law (42 U.S.C. § 667), each state must establish guidelines for child support award amounts within the state. The guidelines must be reviewed at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

Consistent with public health, safety, and welfare, the Department of Human Services 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 impact of the proposed amendments on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The proposed amendments will not alter in any material way any compliance or reporting requirements of small entities. Therefore, establishment of less stringent compliance or reporting requirements for 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 in any material way any required schedules or deadlines for compliance or reporting requirements of small entities. Therefore, the

establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities was not considered.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required compliance or reporting requirements of small entities. Therefore, neither consolidation nor simplification of compliance or reporting requirements for small entities was 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 impose any design standards or any additional operational standards and will not alter in any material way any required performance standards or operational standards for small entities. Therefore, establishment of new performance standards to replace operational standards was not considered.

5. Exemption of Small Entities from all or any Part of the Requirements Contained in the Proposed Rules

The proposed amendments do not impose any requirements on small entities. Therefore, exempting small entities from all or part of the requirements contained in the proposed amendments was not considered.



Jack Dalrymple, Governor
Maggie D. Anderson, Interim Executive Director

MEMORANDUM

To: Julie Leer, Director, Legal Advisory Unit

From: Paulette Oberst, Assistant Director for Policy and Lead Attorney. *Paulette Oberst*

Date: July 22, 2014

Subject: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code ch. 75-02-04.1; Child Support Guidelines

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1(3). This impact statement pertains to proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. In accordance with federal law (42 U.S.C. § 667), each state must establish guidelines for child support award amounts within the state. The guidelines must be reviewed at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

The proposed amendments are not anticipated to have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Amendments

Persons who will probably be significantly affected by the proposed amendments are child support obligors, obligees, and their children. With respect to small entities, the proposed amendments may have an effect on law firms. However, any impact on small entities is expected to be inconsequential.

2. Administrative and Other Costs for Compliance with the Proposed Amendments

Obligors will incur child support obligations based on application of the guidelines. Both obligors and obligees might incur attorney's fees related to pursuing modifications of the child support amount as a result of changes to the guidelines. Staff at law firms might incur inconsequential training costs in order to become familiar with the proposed amendments.

3. Probable Costs and Benefits to Private Persons and Consumers Affected by the Proposed Amendments

Obligors will incur child support obligations based on application of the guidelines.

Obligees and children will receive child support awards based on application of the guidelines.

Both obligors and obligees might incur attorney's fees related to pursuing modification of the child support amount as a result of changes to the guidelines. Law firms may experience increased revenues from representing obligors and obligees who are pursuing modification of the child support amount.

Staff at private law firms might incur inconsequential training costs in order to become familiar with the proposed amendments.

The amount of child support awarded could affect families' ability to be self-sufficient. Depending on the degree of self-sufficiency, the likelihood that a family will be eligible for public assistance could either increase or decrease. In turn, the degree of eligibility for public assistance could affect the amount that is paid in taxes to the state general fund. There could be costs to taxpayers in the form of increased taxes or there could be benefits to taxpayers in the form of no increase or a decrease in taxes.

It is impossible to quantify any costs and benefits at this time.

4. Probable Effect of the Proposed Amendments on State Revenues

There could be some effect on state revenues. This is chiefly due to the fact that child support is assigned to North Dakota in certain cases (i.e., where the family is receiving TANF or the child is in foster care). Also, it is possible that since support amounts could be affected, there could be an effect on families' ability to be self-sufficient which, in turn, could affect the likelihood of eligibility for public assistance.

It is impossible to quantify the effect on state revenues at this time.

5. Less Intrusive or Less Costly Alternative Methods of Achieving the Purpose of the Proposed Amendments

The review of the child support guidelines, which led to the proposed amendments, was undertaken by a drafting advisory committee convened by the Department of Human Services. The committee discussed identified issues and various alternatives for addressing the issues and then provided recommendations to the Department. The committee's discussions are detailed in committee meeting minutes.

TAKINGS ASSESSMENT

Concerning Proposed Amendments to N.D. Admin. Code chapter 75-02-04.1.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.

2. The purpose of this proposed rulemaking is to implement recommendations for changes to the child support guidelines to ensure that application of the guidelines results in the determination of appropriate child support award amounts. The recommendations for proposed amendments resulted from the periodic review of the guidelines as required by federal law (42 U.S.C. § 667), federal regulation (45 C.F.R. § 302.56(e)), and state law (N.D.C.C. § 14-09-09.7(5)).

3. The reasons this proposed rulemaking 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.

By:

Paulette Oberst

Paulette Oberst, Assistant Director for Policy and Lead Attorney

7/22/14

Date