STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

In the Matter of Proposed Rules
Governing Liqour Liability
Market Assistance Program

STATEMENT OF NEED AND
REASONABLENESS OF
PROPOSED RULES

STATEMENT OF AUTHORITY

Minnesota Statute § 340.11, subdivision 21 and 23 provides for mandatory liquor liability insurance as a condition of licensing for liquor vendors. These subdivisions also provide for the creation and operation of a liquor liability assigned risk plan. Chapter 320, Laws of Minnesota 1983 also required the creation of a market assistance program for those liquor vendors who were having difficulty in obtaining the required coverage. Use of this market assistance program was permissive in the original legislation and not a prerequisite for eligibility for the assigned risk plan.

When the events of late 1984 created the necessity for the implementation of the assigned risk plan (as discussed in the Statement of Need and Reasonableness for the Assigned Risk Plan) the insurance industry became convinced that for the market assistance program to be effective when the assigned risk plan became operational the program had to be a prerequisite for participation in the assigned risk plan. Absent this requirement the insurance industry felt the market assistance program would not be used and liquor vendors who could have obtained coverage in the private market would instead obtain coverage from the assigned risk plan. Accordingly negotiations began between the insurance industry representatives, liquor vendor representatives and the Department of Commerce. As a

result of those negotiations certain changes in Minnesota Statute § 340.11, subdivision 21 and 23 were agreed upon. In addition, the same parties also agreed upon the rules for the market assistance plan and the liquor liability assigned risk plan to carry out § 340.11, subdivisions 21 and 23. These three items were interlocking parts of an agreement between the parties. The statutory changes were part of H.F. 265 which was passed by the 1985 Legislature and enacted into law as Chapter -----, Session Laws of 1985. The market assistance program is now a prerequisite to eligibility for the assigned risk plan. The proposed rules carry out the statute as amended and result from the aforementioned agreement.

Minnesota Rules 2782.0100 PURPOSE

This section specifies the purpose of Chapter 2782; to establish the market assistance program required by Minnesota Statute § 340.11, subdivision 21. The establishment of the program is mandated by Statute and this rule merely restates the statutory directive.

Minnesota Rules 2782.0200 DEFINITIONS

This part contains the definitions to be used in this chapter. Subparts 2, 3, 4, 5, 6, 7 and 8 are identical to the definitions found in the liquor liability assigned risk plan. The following statement of the need and reasonableness of the definitions is also

identical to that found in the statement of need and reasonableness for the assigned risk plan rules as to those subparts (Chapter 2783 Minnesota Rules).

Subpart 1. Scope. This section states the obvious that the terms defined in the chapter have the meanings given them unless the context clearly indicates something to the contrary.

Subpart 2. Administrator. This repeats the obvious that the term "Administrator" means the person selected according to this chapter to administer the Assigned Risk Plan. This would be the person or persons authorized to be hired by the Commissioner for the purpose of administering the plan pursuant to Minnesota Statute § 340.11, subd. 23(3).

Subpart 3. Applicant. This definition states the obvious that an "applicant" is someone applying for coverage. Comments about the rules however indicated that for the sake of removing an ambiguity a formal definition should be included in the rule.

Subpart 4. Assigned Risk Plan. This explicitly defines the use of this term to mean only that plan set up pursuant to the provisions of Minnesota Statute § 340.11, subd. 23, Assigned Risk Plan is not specifically defined in either of the referenced subdivisions of the statute. It is clear that the use of the term in the statute contemplates the definition contained in subpart 4.

Subpart 5. Commissioner. The term Commissioner for purposes of Chapters 2782 and 2783 relates only to the Commissioner of Commerce. This is consistent with the enabling legislation previously cited.

Subpart 6. Liquor Vendor. Since the Assigned Risk Plan pertains only to liquor vendors required to prove financial responsibility pursuant to Minnesota Statute § 340.11, subd. 21 and it is possible that there might be other liquor vendors not required to meet that requirement, for the purposes of clarity it was deemed appropriate that liquor vendor as used in Chapters 2782 and 2783 be limited to those vendors subject to Minnesota Statute § 340.11, subd. 21.

Subpart 7. Loss. Since one of the criteria for calculating the premium to be charged a liquor vendor who obtains coverage pursuant to the liquor liability assigned risk plan is the losses that other insurers may have suffered during the past five years in regard to that vendor, it was deemed appropriate to include a definition of loss in this section. Loss is a term widely used in the insurance industry. In its broad sense it is understood by most people in the industry. However, the Department has determined that loss when used to calculate rates in regard to liquor liability is not so capable of clear interpretation. Lewis E. David's Dictionary of Insurance, Sixth Revised Edition, Page 185 contains the following definition of loss. "The basis for a claim for indemnity or damages under the terms of an insurance policy. Any diminution or quantity,

quality or value of property. With reference to policies of indemnity, this term means a valid claim for recovery thereunder. In its application to liability policies, the term refers to payments made in behalf of the insured. (See Claim.)" In regard to the definition of claim found in the same dictionary on Page 57, that definition is "A demand by an individual or corporation to recover under a policy of insurance for loss which may come within that policy or may be a demand by an individual against an insured for damages covered by a policy held by him. In the latter case, such claims are referred to the insurance company for handling on behalf of the insured in accordance with the contract terms. A demand for payment under an insurance contract or bond. The estimated or actual amount of a loss."

Based upon Departmental communication with people engaged in the writing of liquor liability coverage and others with knowledge of the area it was deemed that the broad definition of loss would be unfair to liquor vendors. It also did not reflect the actual practice throughout the industry. The problem with the broad definition of loss is that it would include every claim whether the claim was deemed to be valid or not by the insurer. Therefore the more limited definition found in the rule which states that only losses for which payment has been made or money reserved would be included for rating purposes was used. This definition means that the "losses" used in the calculation of the premium to be paid by a liquor vendor would be only those "losses" which are indicative of the risk posed by that liquor vendor to the Assigned Risk Plan. Only including losses which

have some validity would not penalize the liquor vendor by including in the calculation of his premium facetious claims that are not indicative of the risk the vendor would pose to the assigned risk plan.

Subpart 8. Market Assistance Program. While this definition may seem to be so obvious as to be unnecesary it was included to assure that there was no confusion as to what was meant by the term and that it was limited to the plan established under the referenced statute.

Subpart 9. Monoline Liquor Liability Policy. Monoline and multiline liquor liability insurance policies are the only two ways that this type of coverage is written. Some companies only want to write the one type and not the other and don't want to be forced to offer the other type. Some liquor vendors do not want to be forced to buy on a multiline basis when all they want to do is obtain the mandated coverage. Accordingly, the rules contain a number of provisions seeking to resolve these problems. Because of the concern of the affected groups clearly defining the terms was imperative. While everyone generally understood the terms no existing definition was found in statute or industry usage.

The definition of monoline liquor liability policy restricts the definition to only liquor liability insurance so as to not have an application beyond the intended use. It states the obvious that monoline means only one type of coverage.

Subpart 10. Multiline Liquor Liability Policy. For the reasons stated in regard to subpart 9 a definition of multiline liquor liability policy was also necessary. Multiline obviously means more than one type of coverage. This definition further limits that definition by requiring that liquor liability insurance coverage be one of the types of coverage.

Subpart 11. Premium. This definition incorporates the commonly understood concept that a premium is the price charged for coverage under an insurance policy. Appropriate modifications were made to the definition for the fact that this premium relates to liquor vendors and an assigned risk plan.

Subpart 12. Rate. Rate is usually defined in variations of the following "the cost of insurance per unit; used as a means or base for the determination of premiums." In this particular instance this generally understood concept was used. It was modified to reflect its use in the context of the assigned risk plan and Chapter 2783. Rate means the cost of coverage under the assigned risk plan per $100 of annual liquor sales.

Subpart 13. Rating Plan. This definition may also appear to be obvious but for the purposes of clarity a definition of rating plan is included. It states that the plan is the method for calculation of rates to be charged and includes the criteria to be applied when calculating the rates to be charged.

Subpart 14. Violations. The liability being insured against under the Liquor Liability Assigned Risk Plan is created primarily by Minnesota Statute § 340.95. The statute premises liability on the illegal selling or bartering of intoxicating liquors or nonintoxicating malt liquors, thereby causing the intoxication of a person who thereafter causes injury to a third party. Because the concept of a violation of the liquor laws is part of liquor liability insurance it is appropriate for purposes of clarity to specify which violations are to be considered in regard to the Liquor Liability Assigned Risk Plan. Accordingly, those violations are specified by this rule so that as much information as possible in regard to the operation of the plan is included in the rules pertaining to the assigned risk plan.

Minnesota Rules 2782.0300 MARKET ASSISTANCE PROGRAM COMMITTEE

This Part creates the committee mandated by Minnesota Statute § 340.11, subdivision 21 as amended by Chapter -----, Session Laws of 1985. The committee must be representative of insurance carriers and producers, liquor vendors and the public, with no less than one-half the members representing casualty insurers and surplus lines agents and brokers. The later requirement was determinative of the size of the committee since representation on the committee by those insurers and brokers currently the most actively involved was deemed a necessity. To accomplish this at least 6 positions were required. The other six positions were divided equally among the other groups

required to be represented. While the size of the committee may be larger than appropriate for optimum effectiveness it is the smallest number that will include those most actively involved currently in the market and satisfy the statutory requirements.

The other provisions of this subpart provide the means for replacing members and sets the term of office. Because of changes in employment members may no longer be representative of the group they were appointed to represent. Since the participation of all representated groups is critical to the effective operation of the group it was felt to be imperative that such persons be immediately replaced by someone truely representative of their group.

For the same reasons a one year term was specified to allow for changes in employment and to allow for the replacement of those whose ardor for participation might have begun to wane. Fresh infusions of energy by new members would keep the program viable and would allow companies and groups not part of the original committee to have their chance to participate. June 1 was arbitrarily picked as the date for the members term to begin as it was the 1st day of the month closest to the effective date of the statutory changes.

Minnesota Rules 2782.0500 MEETINGS

As the program will only operate when there is a request for assistance regularly scheduled meetings would be unnecessary. Accordingly the mechanism for calling meetings allows the committee to only meet when necessary and then to meet as quickly and as often as the situation merits and the committee deems appropriate.

Minnesota Rules 2782.0500 ELIGIBILITY FOR ASSISTANCE

Minnesota Statute § 340.11, subdivision 23, as amended by Chapter ----, Session Laws of 1985 requires that the application for coverage to the assigned risk plan also be filed with the Market Assistance Program.

As the Market Assistance Program has no mailing address or place of business to file the application at, a filing with the Department of Commerce, with the Department then forwarding the application to wherever the committee might from time to time direct, was deemed to be the simplest way for applicants to satisfy this requirement. While the working address of the committee would likely change with each change in officers, the Department would always be aware of the change and act accordingly. Applicants would not be aware of the changes and would find it difficult to locate the program for purposes of satisfying this requirement.

Minnesota Rules 2782.0600 DISPOSITION OF APPLICATION

This rules specifies how the application is to be dealt with and constitutes the essence of the program.

None of the actions referred to in Subpart 1 of this rule are mandatory but rather list the possible ways of solving the problem of lack of availability, beginning with the simplest-having the most

recent insurer extend coverage-to the least attractive from the position of the participants-asking participants to extend coverage to the applicant.

Making the last alternative as fair as possible is accomplished by the creation of the list of participants in Subpart 2. So that all participants share equally in the burden their position on the list is continually rotating.

Sharing of the burden of offering coverage to applicants is critical to the program so Subpart 4 requires all participants to quote at least one out of every three applications. If the burden of offering coverage was felt to unfairly fall on any participant or group of participants their continued participation in the program would be unlikely.

The requirement that each participant quote on at least one of every three applications was deemed necessary to assure that participation in the program represented a sincere commitment to assist in solving the problem of lack of availability of liquor liability insurance. This requirement demands that participants actively share part of the burden of extending coverage and not merely be in the program without ever extending coverage or only extending coverage to very good risks. Agreeing to be part of the program, by virtue of this subpart, means that the participant will willingly shoulder an equal part of the burden the rest of the participants are carrying. Since participation in the program is not mandatory no one has to incur this obligation. But if they do chose to participate they do so with equal risk.

Subparts 3 and 5 merely specify the method in which applications are handled. It is arguably unnecessary to spell out such obvious and mundane aspects of the program but they are specified so that there is no question that all participants know how the process is handled and that the process is fair.

Subpart 6 of this rule contains critical requirements for both the market assistance program and the liquor liability assigned risk plan. To participate in the assigned risk plan an applicant must be rejected for insurance and fail to obtain coverage through the market assistance program. These requirements may seem simple but defining what constitutes rejection or failure to obtain coverage becomes a difficult criteria which this section and the definitions found in 2782.0200 seek to alleviate.

Liquor vendors and insurers have differing goals, needs and outlooks which must be accomodated. Insurers do not want to be required to offer a type of coverage, monoline for example, because they participate in the program that they would not normally offer. Liquor vendors on the other hand don't want to be forced to buy all their insurance, (multiline coverage) through an insurer when all they want is liquor liability coverage (monoline).

This subpart allows a participant to quote on their normal basis, for example--multiline only--even if the applicant has asked for monoline. If the applicant cannot receive coverage for monoline only as they requested the statute deems this to be a notice of refusal which allows the applicant to seek coverage from the assigned risk plan

The rest of the subpart describes the mechanical process for completing the work on the application and follows the concept already set forth whereby as many of the procedures as possible are spelled out so that the possibility of confusion is reduced. This is done even where describing this in a rule might be deemed unnecessarily over descriptive or repetitive of the statute.

For the same reason, the question of the payment of a commission to the agent is also dealt with. This subpart does not require the payment of a fee or commission by the insurer but it also does not preclude it. Agency contracts between the insurer and the agent may already require that a fee be paid.

Insurers are thus not compelled to pay fees to agents with whom they have no prior contractual relationship. Also much of the work normally done by the agent is done by the committee and the insurer.

Agents are also not required to work for free so payment of a fee by the applicant is allowable if negotiated before the application so the applicant's coverage can't be held hostage to the payment of a fee after coverage is offered.

Subpart 7 merely precludes the applicant from shopping for a better offer. The common purpose of the liquor liability market assistance program and the liquor liability assigned risk plan is to provide coverage, not the best price. Therefore once coverage is offered the duties of both the program and the plan to the applicant have been satisfied.

Subpart 8 relates what might be done if all else fails. All actions specified are permissive and the likelihood of their being successful is not great after all other methods have already been

unsuccessfully employed. They are set forth to allow the committee one last effort to obtain coverage before turning the applicant over to the assigned risk plan.

Subpart 9 is intended to assure that the needs of insurers and liquor vendors are both met. Insurers want to be able to use the Market Assistance Program to place liquor vendors through the private market and not through the assigned risk plan. Liquor vendors want to be assured they have the statutorily required coverage so they may continue in business. This subpart gives the market assistance program a minimum of 15 business days to place the applicant. If the applicant requires coverage before the 15 days are up the assigned risk plan may extend it subject to cancellation if coverage is obtained through the Market Assistance Program within the required time. Liquor vendors are assured of coverage and the insurers have an adequate amount of time to proceed under the Market Assistance Program.

Subpart 10 merely specifies when failure to place must be acknowledged to the applicants. The 24 hour period is long enough for the assigned risk plan to act since they received the application at the same time as the Market Assistance Program. It also prevents the liquor vendor from coming down to the very last minute and not knowing who he will have coverage with or if he will have coverage. This requirement is subject to Subpart 9 provided the applicant is notified of that.

Minnesota Rules 2787.0700 PROGRAM PARTICIPATION

These sections merely provide how to begin and end participation in the program. The 90 day period for termination was deemed to be the minimum needed to allow for an orderly withdrawal and adjustment of the list of insurers and pending applications. Because the committee only meets from time to time as needed, some period of time was deemed necessary to allow the committee to act upon the withdrawal. Withdrawal effective immediately upon receipt of notice would greatly impair the committee's ability to carry out its obligations and might unnecessarily require it to meet immediately on numerous occasions merely to make the adjustments withdrawal would require. The ability to deal with several adjustments at one meeting and to seek replacements prior to when withdrawal is effective would be aided by a longer withdrawal period. 90 days was felt to be the time period most conducive to those ends while least onerous to the withdrawing participant.

Minnesota Rules 2782.0800 REPORTS

The Commissioner needs to know how the program is working and what problem areas exist if any. A report was felt to be the best way to do this. If problems begin to emerge which cannot be monitored on an annual basis reports on a more frequent basis made be requested to keep the commissioner abreast of matters.

IMPACT ON SMALL BUSINESS

Pursuant to Minn. Stat. § 14.115, subd. 2 the Department has considered the feasibility of modifying the rules to lessen any negative effects on small business. In making that determination, the Department concluded that the primary impact of the rules falls on two groups. The first being insurers and the second liquor vendors. For the most part insurers would not fall within the classification of small businesses. The effect of the rules in addition would fall upon the insurers primarily in regard to the assessment for any unfunded obligation of the plan. As the assessment provision is statutory and is only incorporated within the rule for reference purposes, there would be little, if any, possibility of modifying the assessment's effect on insurers since it is not within the power of the Department to by rule amend the statute.

As to liquor vendors, it was determined that all liquor vendors in the State of Minnesota would have a possibility of being involved with the Liquor Liability Assigned Risk Plan. Further, virtually all liquor vendors would be classified as small businesses. Therefore, as to the impact of the Liquor Liability Assigned Risk Plan on small businesses, which in this case are the liquor vendors, the Department acted as if all liquor vendors were small businesses. The impact on liquor vendors of any part of these rules always contemplated that these liquor vendors would be small businesses.

Accordingly, items A, B, C, D and E of Subpart 2 were all considered in the promulgation of these rules and as it was deemed liquor vendors as a class were likely to be small businesses no separate standards were prepared for small businesses. No higher standards were set for non-small business liquor vendors.

As to the participation of the liquor vendors in the promulgation of the rules, the testimony of the liquor vendors at the hearing conducted by the Department before the issuance of the order establishing the Assigned Risk Plan and all related testimony and communications by liquor vendors has been considered in adopting these rules. In addition, the participation of various groups who represent liquor vendors was solicited. Notification of the rulemaking was published in the State Register. Meetings were held with representatives of the liquor industry and comments from them incorporated in the rules.

The impact of the Assigned Risk Plan was part of the hearing conducted by the Commissioner prior to the issuance of the Order. Direct notification of small businesses affected by the rule was determined to be not feasible because of the cost of mailing notices to more than 5,000 liquor vendors. In addition the rulemaking process and the Assigned Risk Plan in general have been and are the subject of extensive coverage in newspapers throughtout the state which have given a greater awareness to liquor vendors and the general public of the Assigned Risk Plan and the process of promulgating rules for it than any method the Department could have used.

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June 18, 1985

Mr. Richard G. Gomsrud
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State of Minnesota
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St. Paul, MN 55101

Dear Mr. Gomsrud:

This letter regards the proposed liquor liability market assistance program rules to be adopted through the Administrative Procedure Act process.

As we previously discussed, prospective members of the program need to evaluate prospective participation in same. We request that you inform the Antitrust Division of the Minnesota Attorney General's Office as to relevent aspects of the program (including a copy) and request that they inform you of their enforcement intentions under the Minnesota Antitrust laws in relation thereto. Our request, of course, assumes that operation, in fact, will be within the program parameters as approved by the Commissioner.

As you know, the rationale for requesting such a letter is that the Minnesota antitrust law is not necessarily governed by the recent U.S. Supreme Court decisions about state action and does not include a McCarran-Ferguson type exemption. The state antitrust law has its own exemption. Therefore, while we can evaluate the market assistance program under the federal anti-trust laws, we lack sufficient guidance under the state antitrust laws.

In addition, if it is desired to attempt to implement the proposed program prior to the rules becoming effective, we need Attorney General's Office review and indication of their enforcement intentions.

Your assistance in this matter is appreciated.

With kind regards, I am

Sincerely,

Ralph J. Marlatt,
President

RJM:cw

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June 18, 1985

Mr. Richard G. Gomsrud
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Re: Proposed Market Assistance Plan
and Assigned Risk Plan Rules

Dear Mr. Gomsrud:

This letter is written regarding the captioned rulemaking proceedings which have been/or will be noticed for hearing as noncontroversial rules. The Insurance Federation of Minnesota and its 73 member companies support these rules.

The Laws of Minnesota, 1985 Chapter 309, contains the statutory authorization for the captioned rules. This authorization together with the two sets of rules constitute, in our view, an appropriate compromise with all affected parties. The compromise statute and rules should have the net effect of relieving the perceived dram shop insurance availability problem in Minnesota. As a part of a reasonable compromise on a difficult issue, we would support the need for and resonableness of these rules if they are adopted and implemented as drafted.

With kind regards, I am

Sincerely,

Ralph J. Marlatt,
President

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