

STATE OF MINNESOTA
COUNTY OF RAMSEY

BEFORE THE MINNESOTA
BOARD OF PHARMACY

In the Matter of the Proposed
Rule Amendment Relating to Fees
for Licensure of Pharmacists,
Pharmacist Renewals and
Reciprocity, and to Mail Order
Sales

STATEMENT OF NEED AND
REASONABLENESS

The Minnesota Board of Pharmacy (Board), pursuant to Minn. Stat. section 14.22, and 14.23 and Minn. Rules part 1400.0500 hereby affirmatively presents the needs for and facts establishing the reasonableness of the above-captioned proposed amendments to portions of the Board's rule. The statutory authority for these proposed rule changes is contained in Minn. Stat. section 214.06, which requires the Board adjust fees so that the total fees collected "...will as closely as possible equal anticipated expenditures during the fiscal biennium" and Minn. Stat. section 151.06, subdivision 1 (9), which authorizes the Board to make and publish uniform rules and regulations to enforce the provisions of the statute.

The rules captioned above are being adopted according to the procedures set forth in Minn. Stat. section 16A.128. A copy of the approval of the Commissioner of Finance relative to the proposed fees is incorporated herein.

Minnesota rules part 6800.1150 is the Board's current rule addressing pharmacist renewal and licensure fees. Minnesota rules part 6800.1300 is the Board's current rule on reciprocity fees. Minnesota rules part 6800.2800 is the Board's current rule on mail order sale.

The Board is proposing to amend the rules relating to fees in order to establish fees that will ensure that the Board generates sufficient revenue to cover its expenditures over each biennium as is required by Chapter 214.06.

It has been determined that Minn. Stat. Section 14.11 does not apply to this proposed rule, therefore, the Statement of Need and Reasonableness does not address the topic referenced in that statute.

The last time that pharmacist renewal fees were increased was in 1985. At that time the fee was increased to its present level of \$50. Since the Board's total number of licensees in all categories has remained relatively constant the rising costs of operation of the Board has necessitated this fee increase.

General Board expenses associated with the operation of the Board are paid for through appropriations from the legislature. During each biennium, the Board is required to establish its fees in such a manner that the revenues received from licensing fees will, as closely as possible, approximate the appropriation granted the Board by the legislature. In Fiscal Year 88 the Board came very close to a zero balance when comparing expenditures with receipts. It is anticipated that, unless fees are increased a deficit will occur in Fiscal Year 89, which is the second year of the present biennium, and on into the future.

The table below indicates the amount of additional revenue anticipated from the proposed fee increases.

TABLE 1

FEE TITLE	PRESENT FEE	PROPOSED FEE	# PAYING FEE	ADD'TNL REVENUE GENERATED
Original Licensure Fee	\$50	\$65	117	\$1,755
Pharmacist Renewal	\$50	\$65	4,364	\$65,460
Reciprocity Fee	\$150	\$165	78	\$1,170

It should be noted that the Board is proposing no increase in the money generated due to late renewal of licenses. This is due partly to the small number of licensees paying late and partly due to the fact that the fee for late payment is intended as a deterrant to late payments rather than as a revenue producer.

Minn. Rule 6800.2800 is being proposed for repeal upon advice of the Board's legal counsel. The rule, as it presently exists, addresses the issue of mail order sales by regulating advertising of mail order services by Minnesota licensed pharmacists. The Board has been advised that Minn. Rule 6800.2800, which bans advertising of mail order sales of prescription drugs poses both first amendment and anti-trust difficulties.

The rule would not be subject to anti-trust challenge if the Board's enabling statute authorizes the Board to impose such restraints. A review of the enabling statute (Minn. Stat. Section 151.06, subdivision 1) leads to the observation that nowhere in that section are mail order sales or advertising specifically mentioned. Various subsections, however, allow license revocation for violation of Board regulations, section 151.06, subdivision 1 (6) (i), and for conduct endangering public health, 151.06, sub. 1 (6) (e); and allow the Board to regulate the practice of pharmacy, section 151.06, sub. 1 (1). Such broad, non-specific statutory authority

does not sufficiently express legislative authorization to make potentially anti-competitive Board rules immune as state action. It is hence unlikely that the portion of the rule dealing with advertising and mail order sales are exempt from the anti-trust laws.

The first amendment to the US Constitution has been interpreted as protecting some commercial speech. Specifically, states cannot forbid truthful advertising relating to lawful activities. It is for these reasons that the Board now takes the position that Minn. Rule 6800.2800 must be repealed.

Whenever an agency proposes a new rule or seeks to amend an existing rule, Minn. Stat. Section 14.115 requires the agency to consider whether the rule change will have an impact on small businesses. If the agency determines that they will, the agency must consider whether certain methods, set forth in subdivision 2 of the statute, could be adopted to reduce the impact of the rule changes on small businesses. The statute requires the agency to document in its statement of need and reasonableness how it considered these methods and the feasibility of adopting any of the specific methods.

In addition to the licensure of pharmacists, the Board licenses pharmacies, drug manufacturers, and drug wholesalers. The Board has reviewed the impact, if any, its proposed rule changes would have on such business. Since virtually all of the pharmacies in Minnesota qualify under the statutes as "small business" almost everything that the Board does impacts on "small business".

Minn. Stat. Section 14.115, subdivision 2, enumerates the following five methods an agency must consider to reduce the impact of the rules on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small business;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small business;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule, and;
- (e) exemption of small businesses from any or all requirements.

The provisions in the proposed rules relating to licensure fees do not impact on small business in that they address license fees of pharmacists personally as opposed to license fees applicable to the business. The Board's proposed rule relating to mail order sales does impact on small business but there are no compliance or reporting requirements attached to the Board's proposal and for that reason items (a) through (e) are not applicable in the instant case.

In summary, the Board believes its proposed fee change is needed and reasonable in order to meet the statutory requirement of balancing income and expenditures and believes that the repeal of Minn. Rule 6800.2800 is both needed and reasonable in view of the seemingly anticompetitive nature

of the rule and of the constitutional protections against infringement of commercial free speech.


Attached is a copy of the approval of the fee increase from the Department of Finance.

DEPARTMENT : MINNESOTA BOARD OF PHARMACY

STATE OF MINNESOTA

Office Memorandum

DATE : June 14, 1988

TO : Bruce T. Reddemann, Director
Budget Operations & Support
Department of FinanceFROM : David E. Holmstrom 
Executive Director

PHONE : 642-0541

SUBJECT : Approval of Fee Increase

A request is hereby made for approval of a fee increase as follows:

	PRESENT	PROPOSED
Original Pharmacist Licensure	\$50.00	\$65.00
Pharmacist Renewal	\$50.00	\$65.00

The fee increase is needed to cover an anticipated FY 1989 shortfall in receipts. We currently anticipate approximately a \$10,000 shortfall for FY88 and a shortfall of approximately \$20-25,000 for FY89 unless fees are raised.

It is anticipated that the proposed fee increase will generate approximately \$60,000. The Board considered a smaller increase at this time but then would be faced with another increase in a year or two. They opted, instead, to go with a larger increase in one step. This increase should preclude the necessity of another increase during the FY 90-91 biennium. The last increase in this fee was in 1985.

Enclosed is a copy of a memo to John Schorn, Executive Budget Officer, wherein the need for and commitment to this proposed increase was previously discussed.

The Board's total fee structure will now be as follows:

Source Code	Fee Title	Present Fee	#	\$ Generated	New Fee	#	New \$ Generated
000001	Pharmacist Renewal	50.00	4364	\$218200.	65.00	4364	\$283660.
000002	Pharmacy License (New)	100.00	110	\$ 11000.			
000002	Pharmacy Renewal	100.00	11026	\$102600.			
000003	Wholesaler Renewal	100.00	240	\$ 24000.			
000004	Manufacturer Renewal	100.00	152	\$ 15200.			

000007	Exam Fee	200.00	134	\$ 26800.			
000007	Partial Exam Fee	100.00	18	\$ 1800.			
000008	Original Licensure Fee	50.00	117	\$ 5850.	65.00	117	\$ 7605.
000009	Reciprocity Fee	150.00	78	\$ 11700.	165.00	78	\$ 12870.
000010	Internship Registration	20.00	137	\$ 2740.			

Total increase of
(\$15 x 4364 = 65460, \$15 x 117 = 1755 and \$15 x 78 = \$1170): \$68,385.

FY88 Receipts: \$420,000.

Total Anticipated Receipts (FY 89): \$488,385.

Since approval of this request must be included as part of the Statement of Need and Reasonableness required for adoption of a new rule your prompt attention to this request for approval would be greatly appreciated.

Thank you for your assistance.

DEH:pe

APPROVED



DATED

7-12-88