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These classes: physicians, surgeons, certified nurse midwives, licensed psychologists and licensed consulting psychologists, hospitals, nursing homes and perfusionists were activated pursuant to 62F.04 because medical malpractice insurance was not available in the voluntary market.

62F.04 Subd. 1A requires that the commissioner reauthorize the issuance of insurance for additional two year periods for those classes that continue to be unable to obtain medical malpractice coverage in the voluntary market. The commissioner has determined that members of the above listed classes continue to be unable to obtain medical malpractice insurance in the voluntary market, and accordingly would reauthorize the issuance of medical malpractice insurance to the listed classes for an additional two year period ending two years from the effective date of the adoption of these rules.

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

In the Matter of the Proposed
Rules Regarding Availability
of Medical Malpractice Insurance.

STATEMENT OF NEED
AND REASONABLENESS

In 1976, Minnesota Statutes Chapter 62F was enacted creating the Minnesota Joint Underwriting Association, or "JUA" for the issuance of medical malpractice insurance coverage to physicians, hospitals and other health care providers who are unable to obtain such coverage in the voluntary market. A Board of Directors of the JUA was appointed and a Plan of Operation adopted by the Board pursuant to Chapter 62F.

Pursuant to Minn. Stat. 62F.04 (1984) the JUA is not authorized to issue insurance coverage until such time as the Commissioner of Commerce determines that medical malpractice insurance is unavailable to physicians, hospitals and other health care providers from insurers issuing coverage in the voluntary market. The Commissioner's determination of the unavailability of coverage is required to be made "after a hearing". While the statute fails to specify whether a

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rulemaking hearing is the intended forum for the Commissioner's determination, the Commissioner has elected to proceed in that manner.

Recent information available to the Department of Commerce indicates a current inability of health care providers to obtain medical malpractice insurance in the voluntary market. This information may be summarized as follows:

1. Exhibit A constitutes a petition submitted to the Minnesota Medical Malpractice Joint Underwriting Association to continue to provide coverage to licensed psychologists and/or licensed consulting psychologists to obtain medical malpractice insurance.
2. Exhibit B constitutes minutes of the February 13, 1992 Board of Directors meeting for the Minnesota Medical Malpractice Joint Underwriting Association where the industry members stated that coverage is not available to independent nurse midwives, independent licensed psychologists or licensed consulting psychologists, or independent certified blood perfusionists.
3. Exhibit C constitutes an application from a hospital/nursing home submitted to the Minnesota Medical Malpractice Joint Underwriting Association after the standard market rejected the risk for lack of general liability coverage.

The above information establishes that there is a need for the MMMJUA to begin the process of issuance of coverage to current and future medical provider applicants unable to obtain medical malpractice in the voluntary market. Pursuant to Statute 62F.04, this need may only be met upon the Commissioner's determination that medical malpractice insurance is unavailable to Minnesota medical providers. The information available to the Department indicates to the Commissioner that such insurance is unavailable. The proposed rule authorizes the Minnesota Medical Malpractice Joint Underwriting Association to fulfill its statutory purpose by issuance of the subject policies.

The rule is reasonable in that it is issued only after the statutory requirement that a need be established by

hearing and then the JUA authorized to issue policies. The rule limits itself to only doing what is statutorily prescribed.

Small business consideration

There are two groups that may be affected by these rules, insurers and health care providers. Insurers are affected because they may be assessed for any shortages the JUA has. Few if any insurers would be classified as small businesses. However, even if they were it would be inequitable to excuse them from participation or otherwise reduce their share of the burden and might impair the legality of the assessment mechanism. Also, since the assessment is based upon the insurers market share there is built into the JUA an accommodation to smaller businesses.

The only impact that the rule has on health providers is to make insurance available that they would not otherwise be able to obtain. The department has been unable to discover any correlation between size and who is able to obtain insurance and who is not. It is the Department's belief that the vast majority of health care providers affected by these rules would be small businesses so that this was always a part of the consideration. The purpose of Minn. Stat. 14.115, to reduce regulatory burdens on small business is not clearly applicable here since what is being done is to eliminate another burden, the inability to obtain insurance. The only "burden" imposed is to make filings and applications of the same general type as would be necessary to obtain insurance from a private carrier. These requirements are normal, prudent business needs and not unduly burdensome. Further, failure to obtain such information might cause the JUA to make inappropriate discussion as to rates and other factors that would jeopardize the financial stability of the JUA. For these reasons, health care providers who are small businesses are treated to same as any other health provider. It should be noted too that the nature of the rule is such that it, in and of itself, imposes no burden on any business, small or otherwise, it merely enables the JUA to begin operation.