

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Proposed Rules
Relating to Currency Exchange Rates
JUDGE

REPORT OF THE
ADMINISTRATIVE-LAW

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on June 26, 1990, at 9:30 a.m. in the Department of Commerce hearing room at 133 East Seventh Street, St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 to hear public comment, to determine whether the Department of Commerce (Department) has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Carolyn Ham, Special Assistant Attorney General, 1100 Bremer Tower, St. Paul, Minnesota 55101, appeared on behalf of the Department at the hearing. The agency panel appearing in support of the rules consisted of Elissa G. Mautner, Staff Attorney, Ryan Terry, CPA and Consultant to the Department, and Lenore Scheffler-Rice, Director of Licensing.

Approximately sixty persons attended the hearing. Twenty-two persons signed the hearing register. The Administrative Law Judge received fourteen exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments through July 16, 1990. Pursuant to Minn. Stat. § 14.15, subd. 1, three business days were then allowed for the filing of responsive comments. On July 19, 1990, the record was closed. Six comments were received during the initial period; two comments were received during the response period. On July 30, 1990, the Department filed a letter replying to a motion that certain portions of its post-hearing comments be stricken.

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On April 2, 1990, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On May 21, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 2680.

3. On May 14, 1990, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. on May 29, 1990, 27 days prior to the hearing, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete and the Affidavit of Mailing the Notice to all persons on the Agency's list.
- (c) An Affidavit of Additional Notice.
- (d) A copy of the State Register containing the proposed rules.

5. In its cover letter to the filings of May 29, 1990, the Department stated that it would be represented at the hearing by the Attorney General's office, and went on to state: "If testimony is deemed necessary, we anticipate that Elissa G. Mautner, Department counsel, will testify on behalf of the Department. At the present time, the Department has not finalized its decision as to whether additional witnesses will be called."

6. On May 30, 1990, 26 days prior to the hearing, the Department filed the following documents with the Administrative Law Judge:

- (a) A copy of a Notice to Solicit Outside Opinion Regarding Proposed Rules as issued by the Commissioner of Commerce and as published on December 4, 1989, at 14 State Register 1352. No materials were received in response to the Notice.
- (b) Copies of requests for a public hearing received by the Department in response to a Notice of Intent to Adopt a Rule Without Public Hearing published on February 5, 1990, at 14 State Register 1966.

7. The documents listed above were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing. Nobody asked to inspect the file during that period.

8. The Department failed to comply with the requirements of Minn. Rule 1400.0600 G in that it did not file the names of agency personnel who would represent the agency and the names of other witnesses who would appear on its behalf at least twenty-five days prior to the hearing. However, because no

one inspected the documents filed by the Department, no one was prejudiced thereby. The Administrative Law Judge finds that the Department's failure is insubstantial and not a defect in the rulemaking proceeding.

9. Minn. Stat. § 14.11, subd. 1, requires proposals of rules requiring the expenditure of public funds in excess of \$100,000 per year by local public bodies to accompany the Notice of Intent to Adopt Rules with an estimate of the total cost to local public bodies for the two-year period following adoption of the rules. The rules proposed here will not require any expenditure of funds by a local public body.

10. Minn. Stat. § 14.11, subd. 2, requires proposals of rules that may have a direct and substantial adverse impact on agricultural land in the state to comply with additional statutory requirements. These rules have no impact on agricultural land.

11. Minn. Stat. § 14.115, subd. 4 requires agencies to provide an opportunity for small businesses to participate in the rulemaking process by

including a statement of the impact on small businesses in any advanced notice of proposed rulemaking, publishing notice of proposed rulemaking in publications likely to be obtained by affected small businesses, direct notification of small businesses that may be affected by a rule or conducting public hearings concerning the impact of the rule on small businesses. In this case, the Department, in addition to the normal notice requirements of Minn. Stat. § 14.14, mailed an additional Notice of Hearing to Mr. Theodore Mondale "in order for him to forward such notice to those persons who filed a joint request for public hearing at the behest of the UnBank Company." Affidavit of Mailing Additional Discretionary Notice of Hearing.

12. The ALJ finds that the Department complied with the requirements of Minn. Stat. § 14.115, subd. 4, with regard to the proposed rules. Providing additional notice to Mr. Mondale, who was known to be a representative of at least a portion of the currency exchanges in Minnesota was adequate. Direct notice to the small number of currency exchanges licensed by the state would have been preferable, but the attendance at the hearing by a significant number of the currency exchanges indicates that most did receive notice of the hearing and that their interests were adequately represented.

Nature of the Proposed Rules

13. Two new rules are proposed: Minn. Rule 2872.0100, which establishes presumptively fair and reasonable fees for check cashing, and 2872.0200, which requires the posting of fees and specifies the content of the posted notice.

14. The presumptively fair and reasonable fees are one percent of the face amount or 50cents for checks issued by a government entity up to \$500, and one and one-half percent of the face amount or 50cents for other checks. When a currency exchange files its fees with the Department as it is required to do under Minn. Stat. § 53A.07, if those fees do not exceed the presumptively fair and reasonable amounts, the Department will approve them. If they exceed those amounts, the fees "may be disapproved by the Commissioner as not fair

and reasonable based on a consideration of the standards in Minnesota Statutes, § 53A.07, subd. 3."

15. The posting requirement requires two signs made of certain materials, of no less than a certain size, with letters of a certain size, indicating in increments of one cent up to certain maximums the amounts charged for various size checks, together with a notice of the minimum fee charged.

Statutory_Background and Authority

16. Currency exchanges came under regulation by the State of Minnesota on August 1, 1989, the effective date of Minn. Stat. Ch. 53A. Minn. Laws 1989, Ch. 247, § 16. Currency exchanges are defined by Minn. Stat. § 53A.01 as persons engaged in the business of cashing checks, drafts, money orders or travelers checks for a fee. (The term "person" includes all forms of business organizations; Minn. Stat. § 645.44, subd. 7.) The definition of currency exchange specifically excludes persons who cash checks incidentally to their primary business if the charge does not exceed \$1.00 or one percent of the value of the check.

17. Under Minn. Stat. § 53A.02, currency exchanges must be licensed by the Commissioner of Commerce (Commissioner). The Commissioner may take disciplinary action against any currency exchange license for reasons and upon the procedures set forth in Minn. Stat. § 53A.06.

18. Minn. Stat. § 53A.07 requires that fees charged for check-cashing services must be filed with and approved by the Commissioner. Minn. Stat.

53A.07, subd. 3 provides:

Standards; unreasonable fees prohibited. The commissioner may disapprove the fees filed by a currency exchange if they are not fair and reasonable. In determining whether a fee is fair and reasonable, the commissioner shall take into consideration:

- (1) rates charged in the past for cashing of checks by those persons and organizations providing check cashing services in the state of Minnesota;
- (2) the income, cost, and experience of the operations of currency exchanges existing prior to this enactment or in other states under similar conditions or regulations;
- (3) the amount of risk involved in the type of check to be cashed and the location where the currency exchange operates;
- (4) the general cost of doing business, insurance costs, security costs, banking fees, and other costs associated with the operations of the particular currency exchange;
- (5) a reasonable profit for a currency exchange operation; and
- (6) any other matter the commissioner deems appropriate.

The commissioner shall set a separate rate, consistent with the above standards, for checks issued by a government entity in an amount up to \$500 to be cashed by a currency exchange.

19. Minn. Stat. § 53A.12 states that the Commissioner may adopt rules under Minn. Stat. Ch. 14 "as may be necessary to administer and enforce" Minn. Stat. Ch. 53A. Minn. Stat. § 45.023 states that the Commissioner may adopt rules "whenever necessary or proper in discharging the commissioner's official responsibilities." In its Statement of Need and Reasonableness (SONAR) the Department cites both of these statutes as its authority to adopt the proposed

rules. In its post-hearing comments, Ex. Q, the Department also points to the provision at the end of Minn. Stat. § 53A.07 requiring the Commissioner to set a separate rate for government checks up to \$500 and notes that "prima facie rates" are used to facilitate rate approvals for credit life insurance under Minn. Rule 2760.0300. The Department argues that even though the statutes did not specifically authorize the Commissioner to establish credit life insurance rates, Administrative Law Judge Jon Lunde recognized that setting the rates was a lawful means to simplify the rate approval process in the Report of the Administrative Law Judge, In the Matter of the Proposed Amendments to the Rule 5 Relating to the Sale of Credit life insurance, OAH Docket No.

8-1004-1908-1, February 10, 1988. (The Lunde Report). A copy of the Lunde Report has been included in the record by the ALJ as Ex. U. Actually, Judge Lunde stated:

The statute does not empower the Commissioner to set rates for credit life insurers, but only authorizes him to approve or disapprove of rates requested by them. Consequently, when the Commissioner decided to simplify the approval process, he chose to adopt prima facie rates that could be approved without a detailed review. Since the Commissioner already has existing rules governing prime facie rates, it must be assumed that they are authorized and that he has the power to amend them.

Lunde Report, Finding 7. In another finding, Judge Lunde stated:

"Since the Administrative Law Judge has no authority to consider the validity of a duly adopted rule, it must be presumed that prima facie rates are authorized under Section 62B.07." Lunde Report, Finding 28.

20. The Minnesota Currency Exchange Association argues that the only authority expressed granted by the Legislature to establish rates is that provided by Minn. Stat. § 53A.07 requiring the Commissioner to set a separate rate for government checks up to \$500 and that going beyond that is a clear violation of the enabling legislation. In support of this position, Mr. Mondale testified as to his view of the legislative history of the provision. He had lobbied on behalf of the currency exchanges and worked closely with the author and other interested persons in developing the Act. His clients were in favor of licensure and reasonable rate regulation because they were aware of the poor image of the industry in light of recent press reports. The original bill had a rate limit of two percent for government checks. But that issue was hotly debated and removed in committee. It was the industry's position that the rate was too low to sustain business. The legislative solution was to take the matter out of the political arena and to allow the Department to set the rate in a non-political setting and in consideration of all the relevant factors. However, there was never any debate about setting any type of presumptive rate other than for government checks. Ex. T, Attachment 1 at 142-143.

21. The ALJ finds that Minn. Stat. §§ 53A.12 and 45.023 provide sufficient statutory authority for the Department to adopt the proposed rules. The proposed rules were at least intended to implement and make specific the law enforced by the Department and parts of them are required by Minn. Stat. Ch. 53A itself. Minn. Stat. § 53A.07 requires the Commissioner to set a separate rate for government checks. Setting a single rate that applies

to all currency exchanges is adopting a rule. The fact that the statute refers to a "separate" rate for government checks indicates that other rates are also to be set. If, as Mr. Mondale believes, the Legislature intended that only a rate for government checks was to be set, the word "separate" should have been left out. The intent of the Legislature is to be determined primarily by the words it actually uses. Minn. Stat. § 645.16. Similarly, Minn. Stat. § 53A.13, subd. 1, requires that the fees be prominently displayed "in the fashion required by the commissioner." Any such requirements, again, would constitute a rule that must be adopted under the rulemaking procedures. In *Re Hibbing Taconite Co.*, 431 N.W.2d 885 (Minn. App. 1988). These statutory provisions require that rules be adopted, but they do not, technically, provide the authority. However, because rulemaking is appropriate and necessary to administer and enforce Minn. Stat. Ch. 53A, the statutory authority is provided by Minn. Stat. § 53A.12, and Minn. Stat. § 45.023.

Small Business Considerations

22. Minn. Stat. § 14.115, subd. 2, requires an agency proposing rules that may affect small businesses to consider certain methods for reducing the impact of its rules on small businesses and to document how it has considered those methods in its SONAR. It would appear that all currency exchanges in Minnesota are small businesses as that term is defined in Minn. Stat. § 14.115, subd. 1.

23. Minn. Stat. § 14.115, subd. 2, requires the agency to consider the following methods:

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

The Administrative Law Judge did not consider this provision of Minn. Stat. § 53A.07 in denying a prehearing motion by the UnBank Company that the hearing be postponed or cancelled for failure of the Department to comply with Minn. Stat. § 14.12. The Administrative Law Judge now concludes that § 53A.07 does require the adoption of rules by the Department. Thus, the Department's failure to initiate rulemaking proceedings within 180 days of the effective date of the statute violated Minn. Stat. § 14.12. Nonetheless, as stated in the order denying the motion to postpone, that failure is not a defect in the rulemaking proceeding here. The remedy provided by the statute is that the agency must report its failure to the Legislative Commission to Review Administrative Rules, other appropriate committees of the Legislature and the Governor.

24. In its SONAR, the Department made the following comments regarding the small business considerations:

Minn. Stats. section 14.115 provides that the impact on small businesses be considered in the development of proposed rules. Subdivision 2 of that section lists five possible methods for reducing the impact of the rules. The only relevant provision to the rules at issue is subdivision 2(a) which requires the agency to consider less stringent compliance standards for small businesses. Subdivision 3, however, states that any relaxation of the rules for small businesses shall not be incorporated into the rules if "doing so would be contrary to the statutory objectives that are the basis of the proposed rulemaking." The purpose of the currency exchange rules is to unify currency exchange fees and protect the public from rate gouging. A blanket relaxation of the requirements of the rules for small businesses would defeat the purpose of the rules, and is also unnecessary. Since the rules set out a rebuttable presumption, small businesses that wish to charge rates in excess of those established in the rules, may present evidence of their reasonableness to the commissioner. Based upon consideration of the purpose of the rules and the rebuttable presumption incorporated therein, the commissioner concludes that compliance with the proposed rules would not unduly burden small businesses and that the rules are necessary to achieve the legislative purposes.

25. Since apparently all the persons affected by the rules are small businesses, the Department is probably correct that relaxation of the requirements of the rules for small businesses is inappropriate. However, that does not relieve the Department from the obligation to consider methods for reducing rule impact on small businesses. In fact, since all the affected persons are small businesses, the statute applies with even greater force.

26. With regard to proposed Minn. Rule 2872.0100, which establishes the presumptively fair and reasonable rates, the Department is correct that Minn. Stat. § 14.115, subd. 2(a) is the only clause that is applicable. Clause (b) does not apply because the rule does not deal with schedules or deadlines; clause (c) does not apply because the rule does not deal with reporting requirements and is already designed to simplify compliance requirements; and

clause (d) does not apply because the rule does not establish design or operational standards. The real purpose of these rules is to establish a simplified procedure for determining that the fees charged are fair and reasonable. That, in theory, benefits both the Department and the affected businesses. The Department is also correct that small businesses should not have a different level of presumptively fair and reasonable rates than large businesses in light of the apparent purposes of the statute and the standards set forth in Minn. Stat. § 53A.07. Therefore, the ALJ finds that the Department has complied with the requirements of Minn. Stat. § 14.115 with regard to proposed Minn. Rule 2872.0100.

27. With regard to proposed Minn. Rule 2872.0200 establishing the posted notice requirements, the Department has failed to document that it considered any of the statutory methods for reducing the impact on small businesses. In this case, the Department is proposing a requirement for signage that is incredibly specific and would require small businesses to expend very large sums to have signs painted that comply with the rule. The Department could have considered a less stringent compliance requirement as required by Minn. Stat. § 14.115, subd. 2(a). It could also have considered a performance standard as required by Clause (d) in lieu of the design standard that would have achieved the desired result of informing the public while reducing the cost impact on the small businesses affected by the rule. Given the extreme requirements of this rule, for which the Department provided no rationalization, and given the many alternative, less onerous rules it is possible to imagine, it is clear that the Department did not consider any methods for reducing the impact on small businesses. Since the Department failed to do so, the ALJ finds that the Department failed to comply with Minn. Stat. § 14.115, subd. 2, with regard to proposed Minn. Rule 2872.0200.

Proposed Minn.-Rule 2872.0100 - Currency Exchange Fees

28. Subpart 1 of this proposed rule establishes presumed reasonable fees for two classes of instruments: (1) "Checks, drafts, money orders, or travelers' checks," and (2) "Checks issued by a government entity in an amount up to \$500.00." Even though the former class includes the latter, no one objected to the possible confusion created by the overlapping definitions. Everyone seemed to understand that there was a rate established for checks issued by government entities in an amount up to \$500.00 and a rate for all other checks. Nonetheless, the rule could be clarified and improved by eliminating the overlap. That could be done by adding a proviso such as "Except as provided below," to subp. 1A, the general class, or by listing the general class last and changing it to read "For cashing all other checks, drafts, money orders or travelers' checks,

29. A fee of one and one-half percent of the face amount of the instrument, or 50 cents, whichever is greater, is set for cashing all types of

instruments. A fee of one percent of the face amount of the instrument, or 50 cents, whichever is greater, is set for cashing checks issued by a government entity in an amount up to \$500.00.

30. According to the SONAR, the proposed rules are intended to provide uniformity in the fees charged by currency exchanges in Minnesota and to allow currency exchanges to charge a fee that results in a reasonable profit, without being excessive. In its post-hearing comments, the Department states that the purpose of using presumed reasonable fees is to facilitate fee approval. Ex. Q at 1. No objection was raised to using a presumed fair and reasonable rate methodology. As discussed below, the objection is to the level at which these rates are proposed to be set. As noted above, the Department has used a similar methodology in approving credit life insurance policy rates. But Minn. Stat. § 53A.07 requires the commissioner to "set a separate rate" for government checks, which would at first blush seem to require the setting of a specific, universally-applied rate applicable to all currency exchanges for such checks. In the other states that regulate currency exchanges, or check cashers as they are sometimes called, maximum

rates are set that apparently do not allow for exceptions or waivers from those rates. Nonetheless, using a presumed fair and reasonable rate methodology is, on its face, a reasonable method of approving rates because it makes things administratively convenient while providing exceptions for unusual cases and providing guidance to the regulated persons in establishing their rates. An administrative agency may declare that certain things constitute prima facie evidence or create rebuttable presumptions. *Juster Bros. v. Christgau*, 214 Minn. 108, 7 N.W.2d 501 (1943). Such a methodology, if properly implemented, also meets the requirements of Minn. Stat. § 53A.07, subd. 3, that the commissioner determine whether rates are fair and reasonable by considering certain factors. The final advantage of a presumptively fair and reasonable rate is that it quite likely saves the rule from any constitutional infirmity. Any currency exchange dissatisfied with the presumptive rates has an opportunity to demonstrate that, in its particular situation, higher rates would be fair and reasonable. However, in order to fulfill its purposes, a presumptively fair and reasonable fee must be set at a level that would not require every currency exchange to apply for an exception. That would not only defeat the very purpose of the rule but would unfairly prejudice the currency exchanges. The public and the press would quite likely feel that any currency exchange applying for an exception, even if it were granted, is charging an unfair and unreasonable rate. That would be all the more so if every currency exchange had to apply for an exception.

31. In the context of the credit life insurance rates, the prima facie rates became the rate most insurers charged for credit life insurance. *Lunde Report*, Finding 10. Similarly, in this situation, because of the adverse publicity of seeking rate exceptions and the extra administrative burden and legal expense of doing so, few currency exchange operators will be willing to seek exceptions. Therefore, the presumptively fair and reasonable fees must be set at a reasonable level, consistent with the relevant statutory standards, that is only somewhat less than the level at which maximum rates would be set.

32. In proposing the presumptively reasonable fees, the Department at the hearing briefly addressed the statutory criteria set out at Minn. Stat. § 53A.07, subd. 3. However, the Department then took the position that it was not obliged to apply those standards in establishing the presumptively fair and reasonable rates. Clearly the Department is wrong. Minn. Stat. § 53A.07 specifically states that the rate for government entity checks shall be set consistent with the standard set forth in this statute. For other checks, since the very purpose of the rule is to provide a convenient mechanism for determining whether rates are fair and reasonable under the standards of the statute, it is incorrect to suggest that the standards don't apply. Certainly, individual circumstances of individual currency exchanges needn't be applied, but typical circumstances of typical well-run currency exchanges as they relate to the factors must be considered in determining a presumptively fair and reasonable rate that applies to all the currency exchanges. A similar argument by the Department in the credit life insurance rate hearing was dismissed by Judge Lunde as follows:

The Department also suggests that Section 62B.07, subd. 2 applies only to the approval of policy forms filed by individual insurers. Chapter 62B does not mention prima facie rates or specifically authorize the Commissioner to

adopt them. Moreover, the plain language in Section 62B.07, subd. 2 states that each insurer's rates are to be determined after an examination of its claims costs and administrative expenses. However, it does not follow, as the Department implies, that when prima facie rates are set the statute is inapplicable. Since the Commissioner must consider the factors in Section 62B.07, subd. 2 in determining whether rates are excessive in relation to benefits, and since a prima facie rate is presumptively not excessive in relation to benefits, it follows that the Commissioner must give some consideration to the statutory expenses in establishing prima facie rates. It makes no sense to suggest that a bench mark that totally ignores the statutory expenses can be used. Prima facie rates are designed to be a surrogate for the individual examination and approval of insurer rate filings under the statute. An insurer's rates are still approved on an individual basis: if they are at or below the prima facie levels they are usually approved under the rules, and if they are above prima facie levels they are approved after a detailed examination of their expenses pursuant to the statute. The Commissioner's decision to adopt rules to streamline the approval process alters, but does not negate the statutory mandate. Hence, when individual approval is based on a rule, the rule must consider the statutory expenses.

Lunde Report, Finding 31.

33. In July, 1989, the Department conducted a survey of the thirty known currency exchanges in Minnesota for the purpose of determining the fees charged for check cashing services and whether fees were posted. (Ex. B). From its 15 responses, the Department concluded that it was necessary to adopt a uniform fee schedule because of the wide range of fees charged. The survey revealed the following range of fees charged:

Government checks: 1.5% to 15%, average 4.2%, most frequent 3%.
Payroll checks - handwritten: 2.5% to 15%, average 6.1%, most frequent 8%.
Payroll checks - typed: 2.5% to 15%, average 5.4%, most frequent 3%.
Second-party checks (3 respondents don't cash): 10% to 16%, average 13.83%, most frequent 15%.
Computer checks: 2.5% to 15%, average 4.9%, most frequent 3%.
Money orders: 3% to 15%, average 7.67%, most frequent 8%.

34. The survey did not request that fees charged for cashing public assistance checks issued by government entities be distinguished from fees

charged for non-public assistance checks issued by a government entity. Neither do the proposed rules make that distinction. There is some basis for making such a distinction; as discussed below.

35. With regard to government checks, the apparent basis for the Department's finding in the survey that the highest rate charged was 15% is

based upon one currency exchange, Broadway Sales, which stated that all of its charges vary from 3% to 15%, If that rather vague response is eliminated from the survey, then the highest rates are at two currency exchanges that charge 6% for new customers and 3.2% and 3% for established customers. One other currency exchange, UnBank, which operates eleven stores, charges 3% plus 75 cents on government checks over \$900 and on a sliding scale for government checks below that amount with a \$2.75 minimum. Two currency exchanges charge 2.5% on government checks. All the others charge 3%, except for Ramsey Financial which, according to the survey, charged 3% on government payroll checks, but 1-112% on social security checks.

36. David Taklo, who operates Ramsey Financial, testified at the hearing that they had been charging 1-1/2% fee for government checks. He stated that they evaluated the rate over a recent 11-month period and determined that they had lost \$7,400 against the fees collected on those checks. Therefore, they were going to be filing for new rates at the level of a maximum of 3% for government checks. The reason for the loss, according to Mr. Taklo, was that they cash many Ramsey County welfare checks and many of those checks are returned to them because they have been reported stolen and stop-payment orders have been issued by the County. Mr. Taklo stated:

One thing about government checks and welfare checks, a lot of them have a way of disappearing. They will get new ones issued and the old ones always seem to be cashed. And we always take the loss on that.

Ex. T, Att. I at 93-94. Mr. Taklo submitted Exhibit F, the June 14, 1990, Ramsey County Human Services stop-payment list, which lists some 500 checks the County had stopped payment on at that point in time.

37. In post-hearing comments, one currency exchange, My Bank, which operates in a neighborhood in St. Louis Park, reported that 90% of its business is cashing payroll checks with very few welfare checks or personal checks. They charge senior citizens 1-112% on all their checks, including government issued checks and payroll. They charge other persons 2.5% on

payroll and government checks and 5% on all personal checks. Their data was not included in the Department's survey because they were unknown to the Department at the time.

38. As to payroll checks, again the highest rate according to the survey was Broadway Sales with its general response that it charged from 3% to 15% on all checks. Again, if this rather vague response is eliminated, there is a much narrower range of fees. For typed payroll checks, two stores charge 8%, one charges 6%, eight charge 3% and two charge 2-112%. Two of those who charge 3% charge more if it is not for an established customer and one charges a 75 cent surcharge. Four of the currency exchanges charge a slightly higher percentage if the payroll check is handwritten rather than typed.

39. As to second-party checks, the charges are uniformly high because of the risks associated with them. Even the currency exchanges with the lowest rates on other types of checks charged 10% for second-party checks and the most frequent charge was 15%.

40. Minn. Stat. § 53A.01, subd. 1, which defines currency exchange, excludes from the definition persons who provide check cashing services incidental to their primary business if the charge for check cashing does not exceed \$1.00 or 1% of the value of the instrument. This exception is intended to exclude those grocery stores, bars and other businesses that cash checks incidentally to their main line of business, so long as they charge only a minimal fee. It can be assumed that the Legislature intended to allow currency exchanges somewhat higher rates because Minn. Stat. § 53A.07 specifically states that items such as reasonable profit, costs of doing business as a currency exchange and risks associated with check cashing operations are to be considered in determining whether currency exchange fees are fair and reasonable. The Department's proposed presumptively reasonable fee for government entity checks is equal to the 1% fee allowed to incidental check cashers and its minimum fee of 50 cents on both government entity and non-government entity checks is one-half of the \$1.00 minimum fee allowed to the incidental check cashers.

41. At the hearing, Ms. Mautner stated that after proposing the rates, she received a lot of feedback and information regarding the significant differences between the Minnesota market and the markets in Illinois and New York. She then confirmed for herself that in Illinois, government benefit checks were delivered directly to the currency exchanges to be distributed, thereby reducing the problems of theft and forgery and creating a market incentive to have the recipient cash the check at that location. She also learned of similar arrangements in New York and that in both states the currency exchanges handle additional matters that create other sources of income for them. She stated that the Department also took particular note of Connecticut, which it felt to be more comparable to Minnesota because it did not have any government tie-ins or bank tie-ins like New York and Illinois.

42. There was considerable testimony at the hearing on the rates allowed in other states. It is the principal factor the Department relied upon in

establishing the presumptively fair and reasonable fees. In the SONAR, the Department stated that it was reasonable to assume that all Minnesota currency exchanges could, if properly and efficiently operated, charge fees approximately the same as those charged in other regulated states and still obtain a reasonable profit. In the SONAR, the Department stated that only Connecticut, Illinois and New York regulated the rates charged by check cashers and that the Illinois rate for all checks was 1.2% of the face amount plus 90 cents and that New York's rate for all checks was 9/10 of 1% or 50 cents, whichever was greater. In Connecticut, the maximum rate for cashing government checks was 1%.

43. Having decided that rules were needed because of the wide fluctuations it thought the survey revealed, the Department next considered what the rates should be. Ms. Mautner attended a meeting of state regulators in November of 1989 on the subject of regulation of check cashers and money order sellers, She came away from the meeting with the knowledge that only Illinois and New York were regulating the rates as to all types of checks and that Connecticut was only regulating the rate on government checks. She was aware of what those maximum rates were in those states, as set forth in the previous finding. In describing the Department's decision-making process at the hearing, Ms. Mautner stated:

So the Department discussed this and determined that we would set the rates slightly higher for Minnesota to allow for possible differences in the market. So that was the rate that we came up with and - the 1.2% for government checks and the 1.5% for every other type of check. And we gave it a slightly higher boost than what New York and Illinois were doing. And that's the rate that was in the proposed rules and that's the rate that's discussed in the Statement of Need and Reasonableness.

Exhibit T, Att. I at 9-10.

Several things need to be noted about this testimony. First, the only basis for the rates established by the Department were the rates then existing in Connecticut, Illinois and New York, with the rate for other-than-government-entity checks being given "a slightly higher boost" than what New York and Illinois were doing. The rates being charged by currency exchanges in Minnesota were not considered; the only conclusion drawn by the Department from its survey was that there was a wide variation in rates and, therefore, rates needed to be set. Obviously, it did not use the survey data in setting the fees because they were set far lower than anyone was charging. None of the other statutory criteria was considered at all. Second, rates allowed in other states is not a statutory factor. Clause 2 of Minn. Stat. § 53A.07 requires the Commissioner to take into consideration "the income, cost, and experience of the operations of currency exchanges existing prior to this enactment or in other states under similar conditions and regulations. This clause does not direct the Commissioner to consider the rates in those other states, it directs consideration of the financial operation of currency exchanges in an unregulated environment. The best that can be said about this factor is that it is "any other matter the Commissioner deems appropriate", which may be considered under Clause 6 of the statute. Third, it was not a slip of the tongue when Ms. Mautner stated that the rate for government checks was 1.2%. Later in the hearing the following exchange took place:

MR. VAN CLEVE: . . . Now the rates that are being proposed, 1-112% for non-government checks and 1% for government checks, those are asserted by the Department to

be a fair and reasonable rate, correct? A presumptively fair and reasonable rate?

MS. MAUTNER: 1.2% for government and 1.5% for anything else. Yes, presumptively reasonable.

MR. VAN CLEVE: 1.2% or 1%?

MS. MAUTNER: It's 1.2% for government.

THE JUDGE: It says 1 and 1-112%.

MS. MAUTNER: Doesn't it say 1.2% for government? (She is handed a document by Ms. Ham.) I'm sorry, you're right. It says 1%.

MR. VAN CLEVE: 1-112% or 50 cents, the greater of, for non-government, and 1% or 50 cents for government checks?

MS. MAUTNER: Yes, you're right.

Thus, at one percent for government checks, the Department did not give "the slightly higher boost" it had apparently intended. Finally in this regard, it appears that the Department may have been considering its proposed rates to be maximum fees, subject to few exceptions. For example, in its SONAR the Department stated, after noting the right of currency exchanges to present evidence in order to rebutt the presumption, that "the rule sets a higher maximum fee than the other states which regulate currency exchange fees." SONAR at 5.

44. New Jersey has set a maximum fee of 1% for in-state checks and 1.2% for out-of-state checks. Georgia's maximum fees, effective July 1, 1990, are 3% for government checks, 5% for payroll checks, and 10% for all other checks. Ms. Mautner testified at the hearing that the trade-off in Georgia was that they charged a very high application fee of \$2,000, from which she concluded that Georgia had decided to use their check cashing statute as a money-making device for the state as opposed to protecting the check cashing consumer. Ex. T., Att. I at 13-14. No doubt the state of Georgia would strongly dispute such a conclusion and would state that their application fee relates to the cost of their background investigation. Moreover, the Georgia application fee has now been reduced to \$250. Ex. W, Att. F at page 11.

45. At the time the Department first proposed its fees, the Connecticut rate of 1% on government checks had been preliminary enjoined from being enforced by the United States District Court in Connecticut. A new law was passed by the Connecticut legislature effective July 1, 1989, amending the law so that the maximum fee of 1% applied only if the check were drawn by the State of Connecticut and payable to a recipient of public assistance. The rate on all other checks has been set by regulation in Connecticut at a maximum of 2%. Upon amendment of the statute in Connecticut setting the 1% rate on Connecticut welfare checks, the District Court dismissed the pending action challenging the statute without prejudice to allow the plaintiffs to

amend their complaint to address the new statute. On July 12, 1990, the plaintiffs did so, filing a second amended complaint alleging that both the statute and the fee limitations contained in the regulation are unconstitutional. Ex. J and Ex. W, Atts. A, C and D.

46. Harold Turner, a Legal Aid attorney who was involved with the adoption of Chapter 53A, testified at hearing that the 1% fee for government checks is reasonable. His concern is particularly for those persons who are receiving public assistance benefits, who have difficulty establishing banking relationships, paying the fees, and negotiating instruments. Mr. Turner presented a situation involving one of his clients who had received an insurance settlement specifically chose to have the check cashed by a currency exchange for a fee of 8% to 10% over cashing it at a bank which would have held the check for three to five days. He felt the fee charged by the currency exchange was unreasonable.

47. Currency exchange owners and representatives testified to the service aspect of their businesses. They offer convenience, courteous service, bill paying services, money orders and stamps. Therese Balach, a broker of closely-held businesses in the Metropolitan area, testified at hearing that

currency exchanges are a convenience service, one that is used by employed persons with no over-representation by persons who are disadvantaged. For the UnBank, 67% of the checks it cashes are payroll checks, 15% are government assistance checks, 13% are personal checks and second-party checks, 3% are money orders and 2% are something else.

48. A significant percentage of the population do not have bank accounts because they are unable to establish a banking relationship and the only banking alternative available to them is a currency exchange. Ms. Balach cited a two year old statistic from Entrepreneur magazine indicating that 30% to 35% of the population doesn't have a banking relationship. Thomas Dietz, owner of Kwik Cash, Inc., in a post-hearing comment, included information from Western Union Financial Service citing a 50% figure (Ex. P). Other testimony indicated, however, that in some currency exchanges, many of the clients do have banking relationships, but still prefer to use the currency exchanges' services.

49. Gerald Harding, owner of Best Cash Co. in Minneapolis, stated that the current fees don't seem to bother anyone who cashes checks. However, several currency exchange operators did agree that some rate regulation was necessary to eliminate the few abusive cases and to assist the industry in creating a better image for itself. Jeffrey Voss, owner of a national franchise operation known as Check-X-Change, suggested that Minnesota should follow the Georgia statute in establishing rates here. He testified that establishing extremely low rates would restrict the business to the less desirable currency exchanges. The Minnesota Currency Exchange Association stated that the Association agreed that the highest fee being charged in each check category shown in to the Department's survey was excessive.

50. Vince Aprea and Ron Peterson, who recently purchased a currency exchange in North Minneapolis, stated in a post-hearing comment that the increase in business in the store they purchased indicated that their customers felt its 3% payroll check rate was fair and reasonable. From August, 1989, to March, 1990, its gross monthly income increased from \$283.21 to \$4,207.64. (Ex. S).

51. There was vehement objection to the proposed maximum fees. Ms. Balach stated that the ceilings "would effectively diminish" the profits of currency exchange owners and "take away their livelihood." All the currency exchanges felt they would not be able to operate at the rates proposed by the Department and would be forced out of business if the rates were adopted.

52. Ms. Mautner testified that between the time the rule was first proposed and the hearing, the Department had an opportunity to "delve somewhat deeply" into at least one check cashing operation and found the expenses incurred to be "very troubling." She went on to state:

There were large amounts in the cost factor for expansion, large amounts for consulting, six-figure salaries, large amounts for non-compete contracts. And what one of the costs set out was, was cars, was transportation and the personal use of vehicles had not been separated out. So if anything, when we looked at these costs, we found the industry playing fast and loose

with the numbers. And it further encouraged us that they could make some significant changes and work with our rules and still make a profit.

Ex. T, Attachment I at 16. The currency exchange to which Ms. Mautner was referring is the UnBank which operates eleven currency exchange operations in Minnesota and is totally unlike any other currency exchange operation in the state, all of which are one or two store operations. The reference to the six-figure salary apparently grew out of a conversation between UnBank's accountant, Mark Ziessman, and Mr. Terry, who had been retained by the Department to assist it in reviewing the financial statements of the currency exchanges. During that conversation, Mr. Terry noted that \$120,000 had been budgeted for the owner's salary and Mr. Zeissman responded that that amount would not be unreasonable for the owner of eleven stores. Mr. Ziessman testified at the hearing that the full budgeted amount had never been paid to the owner.

53. The UnBank had provided its financial data to the Department and the Department agreed to keep the materials confidential and to return them following their review. In a letter to UnBank's attorneys, the Department did reserve the right to question any UnBank witnesses at a rule hearing from notes made from the materials submitted. At the hearing, the Department provided no particulars regarding its claims of excessive expenditures being made by UnBank. Mr. Terry, in fact, did not testify that he had seen the excesses that Ms. Mautner had described, but that they were the type of things that small businesses tended to do, that ought to be looked for, but that he was not able to identify. Ex. T, Attachment I at 203-210. He did say that the financial statements he reviewed, along with comments from the accountants, did indicate that there had been expenditures for covenants not to compete, money spent for expansion and personal use of autos. Ex. T, Attachment I at 214-215.

54. In its post-hearing comments, Ex. Q, the Department argued that the currency exchanges in Minnesota had failed to produce evidence that the proposed rates would prevent them from earning a reasonable profit. It should first be noted that the burden is upon the Department in this proceeding to

demonstrate that its proposed rules are reasonable and necessary, not upon the regulated parties to prove that they are unreasonable. In support of its argument, the Department specified the amount of management fees that had been paid to related parties and shareholders of UnBank as a questionable expense. It also specified the amount listed in UnBank's statements for a non-compete contract and the amount of expenditures for trips to other states to investigate possible expansion. The comment states that Mr. Terry stated that these items were excessive and questionable, that a covenant not to compete is not a true business expense and that expenses for expansion purposes are not typical operating expenses. The Administrative Law Judge can find no such statements in his review of Mr. Terry's testimony. In fact, these may all be legitimate business expenses, except for personal use of automobiles and other personal benefits that may be derived by corporate owners and officers. As for non-compete agreements, the only question raised by Mr. Terry was the length of time over which they are amortized.

55. The Minnesota Currency Exchange Association has moved the Administrative Law Judge for an order striking the specific amounts referred

to in the Department's comments from the record on the basis that they were provided subject to a confidentiality agreement. The Department objected to the request on the grounds that the Association had no standing to raise the issue of confidentiality and on the grounds that it had not presented the information at the public hearing but chose to present it only in its written comments after the hearing. The letter from the Department stated, "Unbelievably, this courtesy has prompted an outburst on behalf of the Minnesota Currency Exchange Association." Ex. X. The Motion to Strike should be granted. The Department breached its agreement to maintain the confidentiality of UnBank's specific financial figures by putting them in a comment that is part of a public record. The UnBank's attorneys are the same attorneys that represented the Association at the hearing and the objection was properly raised. Whether or not the data submitted to the Department by the currency exchanges should be data that is not public is a broader question that could be addressed in future rulemaking proceedings or legislation. Since the currency exchanges now have their rates subject to review by the Department and the currency exchanges' costs and profits are specifically factors to be considered, it would appear that that information should be part of the public record. The Department may decide otherwise. Nonetheless, in this particular case, the Department promised confidentiality and must be held to its promise.

56. Mr. Harding, owner of Best Cash Company, submitted his uniform financial reporting forms into the record. Ex. E. His income and expense statement for the year ending December 31, 1989, showed the following:

INCOME

Total check cashing fees	\$	93,115.00
All other income		0.00
Total income	\$	93,115.00

EXPENSES

Salaries/officers	\$	4,500.00
Other payroll expenses		338.00
Money delivery fees		798.00

Bank service charges	11,804.00
Insurance	451.00
Rent	4,420.00
Depreciation of fixed assets	7,840.00
Legal and professional fees	1,352.00
Advertising, dues, etc.	4,588.00
Telephone	3,980.00
Losses	30,924.00
Amortization of non-competes	16,105.00
TOTAL EXPENSES	\$ 87,100.09
NET INCOME	\$ 6,015.00

Mr. Harding works seventy-two hours a week at his store and charges 2.5 percent for cashing government and payroll checks. On money orders he charges 8 percent and he does not take personal checks or second-party checks. He entered the business two years ago, investing money that he obtained by placing a second mortgage on his home and borrowing against his life insurance

policies. Approximately 15 to 20 percent of the checks he cashes are government checks. He believes that limiting his fees to the rates proposed by the Department would put him out of business. The non-compete agreement for which he pays approximately \$16,000.00 per year goes to the individual from whom he bought the business and runs for five years.

57. Reducing Mr. Harding's rates to the levels proposed by the Department, assuming 20 percent of the checks he cashes are government checks, would reduce his overall rate to approximately 1.4 percent. Assuming that all of his 1989 check cashing fees were generated at the 2.5 percent level, he cashed approximately \$3,724,600.00 worth of checks in 1989. At the rates proposed by the Department, assuming the same volume, his total income would be \$52,144.00 and he would have a net loss of about \$35,000.00. Adding back in his own salary of \$4,500.00 would yield a net loss of \$30,500.00. Mr. Harding is making very little money at the rates he currently charges; he is correct when he says he would be out of business very quickly at the Department's rates.

58. Jerome Gagerman, Chairman of the National Check Cashers Association, questioned the use of the words "government entity" in the proposed rules as this would include both public assistance checks and government payroll checks. He suggested a distinction be made, or that term defined, because there is greater business risk associated with the former.

59. At hearing, the Department referred to the risk factor as one that could easily be "manipulated". They suggest, for example, that a currency exchange that chooses to operate 24 hours a day for the entire year is not engaging in a prudent business practice. This is a comment that could be made against other business operations, from large grocery stores to small convenience stores, that have expanded their hours and operate around-the-clock in response to consumer demand. It may very well be a sound business judgment to operate a check cashing store around the clock.

60. Others testified to the risk of cashing certain types of checks. Mr. Voss testified at hearing that not only is it more difficult to collect on

personal checks that are returned for insufficient funds, but that the return rate on personal checks is four times greater than on government checks. Gerald Harding testified that he does not cash personal checks because of the high risk involved; he does, however, cash money orders which are "very high risk", but comprise only a small percent of his business. He estimated that 15% to 20% of his business is cashing government checks, which are not always secure because of theft or forgery. He also stated that he is able to collect on "quite a few" NSF checks, but does recover his initial cost. Mr. Gagerman stated that federal regulations require the immediate replacement of public benefit checks reported as lost, stolen or forged, and that this was one of the reasons why Illinois began its direct delivery program of public checks to currency exchanges.

61. Deanna Fredericks, Vice President of UnBank and President of the Minnesota Currency Exchange Association, presented copies of fifteen government checks that UnBank had cashed, but had been returned unpaid. She reported that for calendar year 1989, UnBank had been unable to receive payment on \$7,000.00 of the government checks they had cashed. UnBank cashed \$32,000,000 worth of checks in 1989. The Department, in its post-hearing

comment, gave its analysis of the extent of this loss (Ex. Q). Based on the percentage of government assistance checks cashed by UnBank of 15%, \$4,800,000.00 of such checks were cashed. Since \$7,000.00 went uncollected, the Department argues that that is only a 0.14% loss in that category and thus a small risk. The Department then goes on to state that currency exchanges shouldn't be permitted to charge a higher fee for cashing government checks than the risk warrants. The Department's analysis is faulty. Since the UnBank charges approximately 3% on government checks, its gross return on those \$4,800,000 worth of checks is approximately \$144,000. \$7,000.00 is 4.86% of that amount, and that is clearly a significant cost and not an insignificant risk.

62. It appears from all the testimony and evidence submitted that government benefit checks mailed to the recipients carry a risk different from payroll checks. They are subject to claims of loss and theft which cause the government entities to stop payment, even though such claims may be false. It would also appear from the record that this risk renders government benefit checks mailed to the recipients at least as risky as payroll checks. Nonetheless, it is apparent that the main focus of the Legislature and the main concern with check cashing rates is with government benefit checks. The feeling is that those receiving government benefits are already living at a minimum level of income and that that income should not be further reduced by large check cashing charges. Therefore, greater scrutiny must be given to the rates charged on government benefit checks than other checks. The Department has suggested that the check cashers should take steps to decrease the risks on benefit checks by working with the government to develop programs such as those in New York and Illinois of direct delivery of the checks. They also state in their post-hearing comment, Ex. Q at 4, that Hennepin County has an agreement with certain banks that it will pay any instrument that has been cashed as long as proper identification has been produced, even if it is later claimed that an instrument bears a forged signature or has been stolen. Apparently, the Department thinks that the currency exchanges should seek such

an agreement with County welfare agencies. At any rate, they claim that such considerations were weighed by the Commisisoner in setting the presumptively fair and reasonable rates. There is no evidence in this record that such considerations were weighed by the Commissioner in setting the rates. Moreover, if they were, it was inappropriate because the rates are to be set on existing facts, not on what might be.

63. There was no testimony offered regarding the relationship between the risk involved in different locations of currency exchanges. Traditionally, most currency exchanges have been located in poorer neighborhoods, but some, such as Check-X-Change, attempt to locate in suburban areas and operate more up-scale stores. See Ex. C. My Bank is apparently a similar operation.

64. The Minnesota Currency Exchange Association prepared a pro forma combined statement of operations for the year ended December 31, 1989, based on data from the sixteen locations operated by its members. The original pro forma statement offered at the hearing, Ex. M, included owners' and officers' salaries, depreciation and amortization of non-compete contracts in its listing of total expenses. Based upon comments by the Department at the hearing that such expenses may be inappropriate or may distort the net income figure, the Association revised the pro forma to delete those expenses. Ex.

T, Attachment 2. The revised pro forma statement shows the following:

Forma	Historical	Pro
Dollar value of checks cashed \$42,320,678	\$42,320,678	
Check cashing fees 634,810	1,420,977	
Other income 500,758	500,758	
TOTAL REVENUE 1,135,568	1,921,735	
Total expenses: (these expenses do not include officers/owner's salaries, depreciation and amortization of non-competes) 1,894,451	1,894,451	
Operating income (loss) before income taxes (758,883)	27,284	

The revised historical operating income before taxes of \$27,284 for all the members is very close to Mr. Harding's alone; the total of his 1989 salary of \$4500, non-compete payment of \$16,105 and net income of \$6015 was \$26,620. Also, the majority of the Association's pro forma is made up of figures from the UnBank's operations. Despite the doubts about the pro forma these issues raise, it is clear that the Department's proposed presumptively fair and reasonable fees would essentially cut the typical Minnesota currency exchange's gross revenues in half and place it in a loss situation.

65. Heated statements were both made by and aimed at the Department regarding reasonable profit. Therese Balach stated that an annual income of \$40,000 to \$45,000 is not excessive for an operator who has been in business between three and five years. She admitted that she had no basis for this figure and that she had literally "pulled it out of the air." From the evidence presented at the hearing, no profit anywhere near that is being made at any currency exchange location.

66. Mr. Dietz and Ms. Balach, in their post-hearing comments, argued that the competitive market will give customers the lowest cost and that eventually fees will stabilize. In response, the Department asserted that the Legislature has mandated that the industry be regulated and that a free market system is not an option since the passage of Chapter 53A. While the Legislature has required that a separate rate be set for cashing checks issued by a government entity, and while currency exchanges are subject to licensure and licensing requirements, and prohibited from engaging in activities associated with the banking industry, it is erroneous to state that a free market system ceases to exist under this statute. The purpose of the Chapter 53A is to prevent abusive practices and charges, not to eliminate market competition. The Department's own information as submitted at the hearing, together with the evidence submitted by the currency exchange operators, shows only a few examples of abusive charges. Nothing in the record indicates any need to clamp down on the rates charged by the majority of the currency exchanges to the extent the Department proposes.

67. Regulations must be reasonable in order to be valid. In the absence of a "reasoned determination" of how the proposed maximum fees were selected, they are arbitrary and capricious. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984). The Department has demonstrated that there is a need for a presumptively fair and reasonable rate to be set for government entity checks, because that is mandated by statute and because there are a few examples of rates that would appear to be unfair and unreasonable being charged. Similarly, the need for some regulation of charges on other checks has been shown. Some members of the industry want some reasonable regulation and the evidence tends to show that some persons are charging unreasonably high rates for the relatively low risk cashing of payroll checks. Government and payroll checks constitute the vast majority of the checks cashed. There has been no need established in the record to regulate the rates charged for other types of checks and money orders. The higher risk personal checks, second-party checks and money orders may be a legitimate market, and there is no suggestion in the record that rates of 10% to 16% on such instruments are abusive. If there is a market for such checks, the record indicates that it should be allowed to operate, rather than simply being dismissed as too risky and foreclosed entirely, as the Department is attempting to do by setting a very low rate applying to all other checks.

68. The Department has failed to demonstrate the reasonableness of its 1% or 50cents presumptively fair and reasonable rate on government entity checks within the meaning of Manufactured Housing Supra. The rate is far lower than anything charged by currency exchanges in Minnesota today. Only two exchanges charge as low as 1.5%, and one of those does it only for senior citizens and the other one is raising its rate. The other states on which the rate is supposedly based are not really comparable. Illinois, New York and New Jersey have procedures to enhance the safety of cashing government benefit checks and

check cashers there do a very limited amount of business in other types of checks. Connecticut applies the 1% rate only to checks issued by the state itself for public assistance. Georgia has a cap of 3%. The rate is no greater than that allowed to incidental check cashers by statute in this state and the minimum charge is even lower. The record in this case would support a presumptively fair and reasonable fee for government checks of \$500 or less of 2.5% or \$1.00, whichever is greater, if it is limited to checks issued by government entities to provide government benefits and if the currency exchanges are allowed to charge twice that rate for new customers.

69. The Department has failed to establish the reasonableness of a presumptively fair and reasonable rate of 1.5% or 50cents for all other checks, As found above, no need has been established to regulate checks other than payroll checks at all. As to payroll checks, 1.5% is about half of the 2.5% or 3% that most Minnesota currency exchanges now charge and there is no basis in the record to support the Department's "assumption" that currency exchanges could survive on such a rate "if they improved their business practices." In Illinois, New York and New Jersey, these types of checks are not cashed in any significant amount. In Georgia, the cap is 5%. In Connecticut, it is 2%. The record in this case would support a presumptively fair and reasonable charge for government checks not included above and payroll checks of 3% or \$1.00, whichever is greater, and 6% or \$1.00, whichever is greater, for new customers. The several currency exchanges that charge such rates now make no more than a reasonable profit and the rate is less than one-half of the 8% to 10% that one witness described as abusive.

Proposed Minn. Rule 2872.0200 Posting Qf Fee Schedule

70. The proposed rule states as follows:

The fees charged by a currency exchange for rendering any service authorized by Minnesota Statutes, chapter 53A, at all times shall be prominently posted on the premises. The notice shall be made of plastic or metal, be no less than 30 inches wide and 36 inches high, with letters between one-half inch and three-quarters inch in size.

For checks, other than those which are issued by a government entity in an amount up to \$500, the notice must indicate, in one cent increments, between 50 cents and \$7.50, the fee that applies to the full amount of the check to be cashed.

For checks which are issued by a government entity in an amount up to \$500, the notice shall indicate, in one cent increments, between 50 cents and \$5, the fee that applies to the full amount of the check to be cashed.

If a minimum fee of 50 cents is imposed, the notice must indicate that fact. The notice must be posted on two separate walls in the customers' area.

71. This proposed rule sets out the manner in which fees are to be posted for both government and non-government checks, but limits that posting to checks in an amount up to \$500. This rule provides no guidelines for the posting of fees for checks in an amount greater than \$500 and therefore conflicts with the fee notice provision of the statute, Minn. Stat. § 53A.13, subd. 1, which requires that all fees be prominently displayed.

72. If the posting of fees for a government check must be in one cent increments from \$0.50 up to \$5.00, it would require 451 entries. If the posting of fees for other types of checks must also be in one cent increments from \$0.50 up to \$7.50, it would require 701 entries. This is a total of 1156 entries. If each "letter" must be at least one-half inch, and allowing one-half inch space between each entry, then 1156 entries lined one under the other would reach 96 feet, 4 inches. Of course, if they were put in side-by-side columns, the length could be reduced, perhaps to eight feet. It would still be incomprehensible, and very expensive to have painted.

73. The only justification provided for this rule was that it was needed because the Department's survey showed that some currency exchanges weren't posting their rules "as required by the statute." That does not establish the need for this rule, it only establishes a need to enforce the statute or to remind the currency exchanges to post their rates.

74. The Department offered no evidence or argument to demonstrate that this rule was reasonable. There is no explanation of why the posting shall be

made of plastic or metal. The Department has not provided a "reasoned determination" as to issues such as: What's wrong with a sign painted on wood, masonite, glass, paper, poster board, chalk board or on the wall itself? Why does it have to be no less than 30 inches by 36 inches? Why do the letters have to be between 1/2 inch and 3/4 inch in size, and does that mean high or wide? Why does it have to be a posted sign at all? Can't small printed rate sheets be placed on the tables and counters where the customers are endorsing their checks? Why does it have to be posted on two separate walls? And why does the rule require a sign that would have over 1,000 detailed entries on it? If customers cannot comprehend a sign that says "We charge 3%", they will never comprehend a sign with 1,000 entries. In some cases, a rule or a provision of a rule appears reasonable on its face and the agency will not be required to provide a detailed rationalization for it. Here, the rule appears unreasonable on its face and the Department has provided no rationale at all. The Administrative Law Judge finds, therefore, that the Department has failed to demonstrate the need for and reasonableness of this rule. Since the Administrative Law Judge has also found that the Department failed to comply with the small business considerations requirements of Minn. Stat. § 14.115, this rule cannot be adopted in any form at this time.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 27.

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 68, 69, 73 and 74.

5. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4 as noted at Findings 68 and 69.

7. That due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such .

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that proposed Minn. Rule 2872.0100 be adopted with the changes recommended herein and that proposed Minn. Rule 2872.0200 not be adopted.

ORDER

IT IS HEREBY ORDERED that the dollar amounts related to certain expenses of UnBank Company set forth in Part VI of the Department's post-hearing comments, Ex. Q, are stricken from the record.

Dated this 21st day of August, 1990.

STEVE M. MIHALCHICK
Administrative Law Judge