STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

STATEMENT OF NEED AND REASONABLENESS

In the Matter of the Proposed Adoption of the Rules of the Minnesota Department of Commence Relating to Electronic Funds Transfer Terminals

M.R. 2675.8100, Definitions
M.R. 2675.8120, Application for Authorization
M.R. 2675.8130, Notice to Commissioner
M.R. 2675.8140, Technical Standards
M.R. 2675.8150, Alternative Technical Standards
M.R. 2675.8160, Customer Disclosure Requirements
M.R. 2675.8180, Advertising, Exceptions
M.R. 2675.8190, Other Permissible Activities, Electronic Benefits Transfer, Consumer Convenience Services

I. INTRODUCTION AND BACKGROUND

The nature of the proposed rules of the Department of Commerce (Department) contained in Minnesota Rules, parts 2675.8100 to 2675.8160, 2675.8180, and 2675.8190 is to bring the existing rules parts 2675.8100 to 2675.8170 relating to Electronic Funds Transfer Facilities up to date with changes in technology, amendments to the Act, Minnesota Statutes, sections 47.61 to 47.74, and address issues involving the development of uses of electronic financial terminals and related federal law and rule, Federal Reserve Regulation E.

Notice for Comment regarding proposed electronic funds transfer terminals and transmission facilities was published in the State Register July 22, 1996. In addition, the notice was provided by mail to those interested parties filing with the Department

requesting notice of proposed rule making as well as notice included in the text of the information telephone line and banking computer network maintained by the Department as alternative methods of publishing the notice. Comments were requested by September 30, 1996.

Legislation passed in 1995 and 1996 modified the application and approval process, creating a notice procedure for financial institution providers, changed definition of electronic financial terminal and removed the limitation to retail locations for establishing terminals. The requirement for the Commissioner's approval of reasonable technical standards relating to mandatory sharing by other financial institutions was also removed. This eliminated the need for specific minimum and alternative technical standards adopted in the original rule making. These aspects of the environment and law relating to existing rules which were adopted in 1978 have been incorporated in the proposed rule amendments.

This Statement of Need and Reasonableness justifies the need for and reasonableness of the proposed rules action required by Minn. Stat. §§ 14.131 and 14.23.

Interested parties should refer to the entire proposed rule amendment for the proposed language on specific rule amendments. The rules are published in the State Register on _____, 1996 and are also being mailed to all persons on the Department's mailing list who have expressed an interest in the rule making activities of the Department.

Discretionary notice and a copy of the rule amendments are also being mailed to the currently approved list of terminals in operation in Minnesota, persons included in the working group of consumers, financial institutions and retailers called for in Chapter 202, 1995 Laws of Minnesota, to make recommendations regarding point-of-sale terminals, and trade associations representing providers of financial services in Minnesota.

These proposed amendments are necessary in order to effectively administer the approval and notice process for establishment of electronic financial terminals, protect the consumer as technology develops, and remove confusion between and among state and federal law and rule, and these rules.

II. STATEMENT OF THE DEPARTMENT'S STATUTORY AUTHORITY

The Department's statutory authority to adopt these rules is set out in Minnesota Statutes, section 45.023, as it generally applies to the Commissioner of Commerce's responsibility to administer through rules the various laws under his control. Specifically, section 47.71 provides authority for the Commissioner of Commerce to promulgate such rules as are reasonably necessary to carry out and make effective the provisions and purposes of Minnesota Statutes, sections 47.61 to 47.74, relating to Electronic Funds Transfer Facilities.

III. ADVISORY COMMITTEES

The Department has not appointed any additional advisory committee on the planned rule.

IV. DEPARTMENTAL CHANGES IMPOSED BY THE RULE

Minnesota Statutes, Section 16A.1285, is inapplicable because the proposed rule does not impose any departmental charges or fees.

V. FISCAL IMPACT

A fiscal note is not required as the rule will not force any local agency or school district to incur costs.

VI. WITNESS

If these rules go to a public hearing, the witnesses below may testify on behalf of the Department of Commerce in support of the need for and reasonableness of the proposed rule. The witnesses will be available to answer questions about the development and the content of the rules.

JOAN PETERSON, ASSISTANT ATTORNEY GENERAL

JAMES G. MILLER, MINNESOTA DEPARTMENT OF COMMERCE

VII. STATEMENT OF NEED AND REASONABLENESS ITEMS REQUIRED UNDER MINNESOTA STATUTES, SECTION 14.131

i. **A DESCRIPTION OF THE CLASSES OF PERSONS WHO WILL PROBABLY BE AFFECTED BY THE PROPOSED RULE, INCLUDING CLASSES THAT WILL BEAR THE COSTS OF THE PROPOSED RULE AND CLASSES THAT WILL BENEFIT FROM THE PROPOSED RULE**

The classes of persons who will be affected by this rule are those financial institutions issuing cards as access devices and their customers who are card holders using the devices to activate electronic financial terminals. Also, there is developing a class of merchants and retail business establishments that are buying and leasing terminals to offer the terminals on the same basis and through electronic information processing networks used by financial institutions historically. The cost in connection with these rules was established by law in terms of application fees (Minn. Stat. § 47.62, subd. 4). These rules actually reduce the indirect costs of compliance by removing certain requirements and information in response to technical advances and law changes in 1995 and 1996 directly related to the application process.

ii. **THE PROBABLE COSTS TO THE AGENCY AND TO ANY OTHER AGENCY OF THE IMPLEMENTATION AND ENFORCEMENT OF THE PROPOSED RULE AND ANY ANTICIPATED EFFECT ON STATE REVENUES**

The proposed rule changes will not result in any additional costs and will streamline the process more consistent with the historical fees that are unchanged and reducing unnecessary filings, notices and approvals previously required of the Department.

iii. **A DETERMINATION OF WHETHER THERE ARE LESS COSTLY OR LESS INTRUSIVE METHODS FOR ACHIEVING THE PURPOSE OF THE PROPOSED RULE**

This rule amends existing rules and will provide a less intrusive application process than the original provisions. The amendments take advantage of the legislated changes to eliminate and pursue this rule making as a less costly or less intrusive method of enforcing the application and operations of electronic financial terminals mandated by law.

iv. **A DESCRIPTION OF ANY ALTERNATIVE METHODS FOR ACHIEVING THE PURPOSE OF THE PROPOSED RULE THAT WERE SERIOUSLY CONSIDERED BY THE AGENCY AND THE REASONS WHY THEY WERE REJECTED IN FAVOR OF THE PROPOSED RULE**

The law at Section 47.62, subdivision 3, requires that applications for authorization be in a manner prescribed by rule including enumerating the factual considerations. Electronic submissions were considered as an alternative but only the latitude was provided for in removing the word "written" in Part 2675.8120. The Department's 1997 legislative proposal includes authority for an electronic alternative format in its amended version of Section 46.04 and "facsimile or electronic media."

v. **THE PROBABLE COSTS OF COMPLYING WITH THE PROPOSED RULE**

The rule creates no additional cost of compliance beyond that contemplated when the process was mandated in 1978 and a $100 fee applied. Completion of the form and attachments is a modest expense of time in the ordinary course of business. The form by reason of these amendments will be less than one hour plus the copying costs of reproducing the agreements, insurance and bond forms to be included. Most technical and operating characteristics are supplied by the vendors selling the machines. Should the financial strength demonstration exceed that available in professionally prepared financial statements, a standard form financial guaranty bond has become available in $5,000 denomination for $100 to $125 per year.

vi. **AN ASSESSMENT OF ANY DIFFERENCES BETWEEN THE PROPOSED RULE AND EXISTING FEDERAL REGULATIONS AND A SPECIFIC ANALYSIS OF THE NEED FOR REASONABLENESS OF EACH DIFFERENCE**

The amendments proposed already comport with federal regulations such as in 2675.8100, subparts 3 and 11, relating to access device terminology and exclusions for home information systems are similarly addressed in the federal law relating to electronic fund transfers. Also, see 2675.8120 L for comparability.

The proposed additional language in Part 2675.8160 I.2 is language taken directly from the Act and is inconsistent with Federal Regulation E and customers' limitations of liability for unauthorized transfers. This provision has in law since 1978 provided for a greater benefit and protection under Minnesota law and is to be adopted as part of the disclosure provisions for completeness and consistency with law and this rule.

VIII. DETAIL OF THE PROPOSED RULE AND STATEMENT OF NEED AND REASONABLENESS

M.R. 2675.8100 - DEFINITIONS

2675.8100, subp. 3. The definition of "card" is amended to incorporate the terminology of current developments in the description of devices termed "access devices" for purposes of Federal Regulation E, 12 CFR Part 205, Electronic Funds Transfers for flexibility and comparability as new devices such as "stored value cards" and cards issued by government agencies become more commonplace.

Stored value cards take various configurations but would only be applied to the rule where they perform one or more of the transactions authorized at an electronic financial terminal. There is no intention to exclude such multi-purpose devices except for off-line transactions whether they add or subtract value from the device.

So-called EBT transactions for the convenient distribution of government benefits and entitlements may or may not use a device issued by a depository institution. This

exception does not intend to disqualify a device capable of being used at a terminal but to not apply the card issuer or other regulatory aspects of the rule on government entities.

This is a delicate balance between issues related to consumer protection in the private sector for which the Act and rule apply and the inherent responsibilities of government to promote consumer protection and safeguard individuals' personal data.

2675.8100, subp. 5. Recent experience with private ownership, nonfinancial institution providers of terminals is that vendors set up arrangements which include their servicing the terminals as they relate to the information aspects of the terminal as well as agreements with third parties which accommodate the network linkup. None of the agreements transfers the liability created under the Act equivalent to ownership or leasehold interest. This amendment makes it clear that control remains with the owner or lessee until and unless an agency agreement is comprehensive enough to incorporate a full substitution of liability under this rule and the Act.

2675.8100, subp. 6. The definition of "customer" includes the statutory term "function" which is replaced by the term "transaction" solely for the purpose of consistency throughout the rule. This is technical and makes no substantive change.

2675.8100, subp. 7. The definition of "operator" contains a typographical error confusing the fact that a customer is not to be considered an operator and included in the list of

exceptions. The conjunction "or" is substituted for the incorrect word "of." This is technical and makes no substantive change.

2675.8100, subp. 8. The definition of "person" specifically includes a "financial institution." In general use, "person" as it relates to Minnesota Statutes, section 645.44 needs no explanation, but in this case its original purpose has changed. Chapter 414, 1996 Laws of Minnesota, created a distinction for terminal application and approval purposes carving out financial institutions from "any person." Financial institutions file a notice, while other persons continue to file an application under part 2675.8120. "Financial institution" is deleted from the definition of "person" to make this distinction effective throughout the rule.

2675.8100, subp. 11. The definition of "terminal" in the Act excludes a telephone; however, as the technology develops, the telephone becomes the nexus for other equipment which could be confused with a terminal because of the capability to effect transactions under the rule, much like a terminal. The new language in this subpart does two things to recognize these developments and is needed to remove potential confusion and doubt. Digital screen incorporated with telephones, personal computers or interactive cable televisions where possessed by the customer are excluded from application of the law and rule. This is reasonable as such proprietary equipment is not subject to general use and to regulate its conduct is as unnecessary and inappropriate as regulating the telephone itself would be. Second, the terms and conditions notices in part 2675.8160

required to be disclosed to a customer are capable of being disclosed electronically in a situation such as the home banking computer screen application. It is reasonable to assume that an information capability at the request of a customer can add convenience and improve the time and cost attendant to issuance of a card and its personal identification code. Clearly under the customer's control, the information transmitted to a personal computer can be stored, read and/or printed. Subsequent amendments to parts 2675.8140 and 2675.8160 carry through on these recent and needed enhancements to customer convenience without diminishing the intent of the law and rule.

M.R. 2675.8120 - APPLICATION FOR AUTHORIZATION

Various changes to this procedural rule are needed due to amendments to the Act in Minnesota laws since its original enactment in 1978.

C. Chapter 102, 1983 Laws of Minnesota, removed the requirement that a terminal must be located at a retail location. Consistent with that amendment, the word "retail" where modifying the location of a terminal is deleted.

Chapter 202, Article 2, Sections 8 and 9, 1995 Laws of Minnesota, exempted financial institutions as defined in the Act from the need to file an application and receive approval prior to establishing a terminal. A separate notice requirement now applies to financial institutions, and it is necessary to make that distinction in part 2675.8120.

A, B, and O. With the deletion of the financial institutions, the remainder of the rule describing the means to supply the Department with application information has been modified to better suit the needs of small business. We have learned the retail merchants are the bulk of the remainder of potential applicants for terminal approval and, for example, seldom are financial statements prepared or available in a manner like regulated financial institutions. It is reasonable to delete the requirement of a financial statement and rely on the rule's bonding or other financial responsibility provisions. To reinforce the flexibility needed to gather suitable information on a case-by-case basis, language is added to clarify that information may reasonably be requested in connection with an application at the discretion of the Commissioner.

Paragraph A also includes the addition of "controlling" to modify the person that has standing to file an application. We have learned that there are very active sales organizations marketing terminals for lease or purchase by retail merchants. Also, there have been other third parties such as financial institution subsidiaries, including transmission facilities, that have indicated their intent to file on behalf of one or a group of new or prospective class of terminal owners. Seldom, however, do these related parties contract to assume the liabilities and responsibilities of the merchant owner or lessee. Granted, these owners may be unfamiliar with regulatory relationships and have some difficulty with the application process. With the simplification we have introduced in this process in these rules and the need to have certification by a party with standing, only

"controlling" persons shall apply. Those parties are by definition in part 2675.8100, subp. 5.

C and G. The nomenclature of the terminal provides information relating to the existence of technical standards under which a financial institution requesting use of an electronic financial terminal is permitted only if the financial institution conforms to such reasonable technical operating standards. The Act in Section 47.64, subdivision 1, requires such standard be in evidence although Chapter 171, 1995 Laws of Minnesota, in Section 26 removed the requirement that such standards be approved by the Commissioner. To reduce regulatory burden on applicants, we have reserved the discretion to omit the requirement for a complete physical and technical operations standard once a model of terminal has been certified. Subsequent applications need only include identification of the terminal by manufacturer and model number.

H. Requiring a complete record of the card issuers and financial institutions sharing each and every terminal is unnecessary and unreasonable. The Act at section 47.64 requires mandatory sharing and 2675.8160, subp. 3, requires a listing of financial institutions using the terminal as a directory at the terminal site. It is reasonable to delete the requirement the application include names and addresses of sharing financial institutions and especially where the applicant is asked to identify those prospectively "seeking" permission to share the terminal. There is no useful regulatory purpose to be served by such an ongoing registration requirement within the Department of Commerce of those card issuers.

I and N. Copies of agreements between the card issuer and customer are required in an application. This is reasonable where the applicant is a card issuer, but now that the application procedure is reserved only for non-financial institution persons, small business and retail merchants, they have no access to those card issuer agreements. The enforcement of 2675.8160 for customer disclosure is entirely the responsibility of a card issuer and not the terminal provider. The bifurcation of the responsibility under the rule between the terminal provider and a card issuer is also addressed in N, inserting clarifying language needed to limit the application to the terminal provider in certification of compliance by the applicant. It is reasonable to speculate that without these clarifications, an applicant may be viewed as agreeing to effect compliance with card issuer responsibilities.

L. With the removal of the approval requirement regarding technical operating standards, an element in those standards previously adopted as 2675.8140 E is more pertinent to terminal security and consumer privacy in the Act's Sections 47.68 and 47.69. In the case of private, nonfinancial ownership of these terminals, responsibility for these statutory concerns is not so easily understood or controlled by these private parties. The amendment to L transfers the language in 2675.8140 E and also includes safeguards involving card issuers.

This safeguarding and issuance of the personal identification code, referred to generally as a PIN or personal identification number is key to consumer protection against unauthorized withdrawals. Federal Reserve Regulation E recognizes more than one method of implementing and validating the account agreement between the card issuing financial institution and the customer. In addition to mailing the card after the signed agreement is received, alternative procedure for issuance of access devices, PIN numbers, and validation is adopted. A card issued on an unsolicited basis may be validated and transactions authorized after telephone procedure is followed. This procedure is well established, and it is reasonable to allow its use in connection with card issuers in Minnesota. The referenced procedure is contained in 12 CFR Part 205.5, Electronic Fund Transfers and parallels these alternative procedures.

E, J, K, L and M. These paragraphs include technical changes relating to the word "transaction" substituted for function for consistency and use of direct citations for reference to Minnesota Statutes rather than the 1978 session law.

Finally, in the opening paragraph of this part, the word "written" is deleted to allow for flexibility in the media form applications and notices which may be made available in the future. The Department has implemented application forms capable of being transmitted electronically in certain cases. It is reasonable to afford this flexibility for purposes of this rule and for the convenience and needs of the public who may be comfortable with these developing technologies.

M.R. 2675.8130 - NOTICE TO COMMISSIONER

A. This rule in paragraph A relates to the amendment to 2675.8120, paragraph H, and the information required about sharing financial institutions. Paragraph A is an ongoing requirement by notice to register additional sharing financial institutions within 30 days of their access to the terminal. There is no reasonable need to marshal this information in the interests of consumer protection or financial institution safety and soundness. It is reasonable to delete this unnecessary regulatory notice filing requirement. This elimination is consistent with the changes proposed in Part 2675.8120 H.

C. This paragraph becomes a new rule needed because of a 1995 amendment to the Act at section 47.62 adding a new subdivision 6 relating to the notice or approval procedure for relocation of an existing terminal. Relocations over three miles constitute a new application or notice requirement under the law. This rule clarifies the relocation under three miles only requires a notice 15 days before the intended date of relocation. It is reasonable and necessary to remove the potential belief that because only full, new applications or notices are required for relocations over three miles, that nothing need be done to record the under three-mile relocations.

M.R. 2675.8140 - TECHNICAL STANDARDS
M.R. 2675.8150 - ALTERNATIVE TECHNICAL STANDARDS

These parts are no longer necessary because 1995 Laws, Chapter 171, effective August 1, 1995, removed the requirement that the Commissioner approve the technical standards

governing the mandatory sharing of terminals by other financial institutions than the controlling party. These standards were to create minimum standards which, if met, were deemed reasonable and become part of the determination that sharing was available on a fair, equitable and nondiscriminatory basis. These standards are now to be determined by the provider of the terminal subject not to these minimum and alternative standards tests but to the general applicability under the Act. This may provide for more flexibility in a dynamically developing industry's technology and removes the need for this rule.

M.R. 2675.8160 - CUSTOMER DISCLOSURE REQUIREMENTS

Subpart 1, Disclosure Information, contains a reference change to the law which is technical and adds a new provision recognizing that where a customer agrees, the disclosure required by this part may be given electronically. This is a reasonable extension of the changes to 2675.8100 and the proliferation of the personal computer as a method of communication under mutual agreement between the card issuing financial institution and customer.

Paragraph I (1.) relating to disclosure to customer of required action to limit liability for unauthorized withdrawals deletes the exception for negligent conduct or intentional misconduct of the terminal operator. This change is necessary because the law at section 47.59, subd. 3, was amended by Chapter 414, 1996 Laws, removing the exception where the loss was due to the negligence or intentional misconduct of an operator or person establishing or maintaining a terminal. Also, the changes to subparagraphs (2) (new 2)

add to the customer disclosure pertinent language from the law peculiar to Minnesota to be incorporated in the notice. These changes are consistent with and needed due to statutory amendments and to clarify the total language to be disclosed under the "Minnesota Disclosure" in a single rule.

Subpart 2, Type Sizes, includes a change necessary to be consistent with making computer displayed disclosures available. See amendments to 2675.8100, subp. 11, 2675.8140E, and subp. 1 of this section.

Subpart 3, Listing. This change removes the word "retail" to be consistent with statutory changes discussed at 2675.8120.

2675.8180 - ADVERTISING, EXCEPTIONS

This new rule is necessary to address questions raised about what a terminal provider may display at the terminal site. More specifically, it has been asked if surcharges imposed by the terminal provider can be displayed given the advertising limitations. Clearly, it is reasonable to conclude that such information, as well as information about the terminal's operation and party providing service in the event of problems, is needed and would not constitute advertising so as to be prohibited by law at section 47.67.

2675.8190 - OTHER PERMISSIBLE ACTIVITIES, ELECTRONIC BENEFITS TRANSFER, CONSUMER CONVENIENCE SERVICES

This new rule is necessary to clarify alternative uses for terminals to promote their efficiency and consumer convenience. The law at section 47.63 limits the financial transactions which may be performed by an electronic financial terminal except for "any internal business activity of the retailer." Clarification is provided by this rule that any terminal provider may adapt the terminal to follow the demand for delivery of consumer services by other than traditional ways. New services such as dispensing of stamps, phone cards and statements have the potential to drive down the cost of delivering the financial transactions. Cash dispensers can cost less than $10,000; full service terminals can cost more than three times that much and are more expensive to service. Computer software and add-on packages are available to provide these other consumer benefits.

A. This rule relates to the exception in 2675.8100, subpart 3, for EBT card usage as a nonfinancial transaction where no customer deposit account is signaled to effect the distribution of benefits. This accommodation is vitally important to both government efficiency and the role to be played by terminals provided by both financial institutions and nonfinancial institution persons.

B. This rule clarifies the availability of consumer services through terminals as not limited to the financial transactions under section 47.63 and 2675.8100, subpart 12. These services are not controlled by the rule nor would they constitute advertising or promotion of a financial nature to which the advertising limitation in 47.67 pertains. It is reasonable to caution the terminal provider which is a financial institution that

the inclusion of such services does not constitute a grant of authority where the activity is not otherwise available to a financial institution.

IX. CONCLUSION

Based on the foregoing analysis and summary of the evidence and argument in this statement of need and reasonableness, it is clear that there is justification that the action taken is rational and both necessary and reasonable to support the proposed amendments to Minnesota Rules, Parts 2675.8100 to 2675.8160, and new parts 2675.8180 and 2675.8190.

Dated: December 26, 1996

James G. Miller, Deputy Commissioner
Minnesota Department of Commerce
133 East Seventh Street
St. Paul, Minnesota 55101