# Sample Findings to Explain Changes Between Proposed and Adopted Rules

**In general.** This form contains several sample findings to justify changing proposed rules. These sample findings are to serve as examples only. They are not meant to imply that there is a formula for writing findings. There is no doubt an infinite number of ways to write adequate findings. Your findings must explain why you are making a change to the proposed rules, show that the change is reasonable, and show that the change does not make the adopted rules substantially different than the proposed rules. For issues that are particularly controversial or that involve a great deal of discussion and compromise, a finding may be several paragraphs or even several pages long.

**Notes on Substantial Difference.** The limitations on changing proposed rules are contained in Minnesota Statutes, section 14.05, subdivision 2, which prohibits an agency from modifying proposed rules so that they are substantially different from the proposed rules. Section 14.05, subdivision 2, states:

**“14.05 GENERAL AUTHORITY.**

Subd. 2. **Authority to modify proposed rule.** (a) An agency may modify a proposed rule in accordance with the procedures of the administrative procedure act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.

(b) A modification does not make a proposed rule substantially different if:

(1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;

(2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and

(3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

(c) In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question the following factors must be considered:

(1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;

(2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and

(3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing.”

**Sample findings.** The sample findings listed here run the gamut from very straightforward to relatively controversial. The sample findings have been taken from actual rulemakings but have been edited for use as samples. The sample findings include:

* The first two sample findings (A1 and A2) are very straightforward. They are from Department of Public Safety rules relating to disposition of a driver’s license following non‑alcohol‑related offenses, adopted in 1991.
* The next sample finding (B1) is somewhat more involved and is from Department of Health rules governing the collection of aggregate data from hospitals, adopted in 1994.
* The next sample finding (C1) is more controversial and addresses contested issues. This sample finding is from Department of Health rules governing health maintenance organizations, adopted in 1998.

## Sample Finding A1.

Part 7409.3600 of the proposed rules is amended to add a reference to Minnesota Statutes, section 65B.67.

This amendment to the proposed rules conforms with a statutory change which occurred during this rulemaking. Minnesota Laws 1991, chapter 333, section 31, amends Minnesota Statutes, section 171.30, as follows:

“In any case where a person’s license has been suspended under section 171.18 or revoked under section 65B.67, 169.121, 169.123, 169,792 or 171.17, the commissioner may issue a limited license to the driver including under the following conditions: . . . .”

This change does not make the rule substantially different because it is clearly within the scope of “disposition of a driver’s license following noon-alcohol-related offenses” as announced in the notice of intent to adopt rules. Further, conforming rules to statutory changes made during the rulemaking process is a logical outgrowth of a notice of intent to adopt rules. Finally, this rule change does not diminish the fair warning to persons who will be affected by the rule, it just applies the rule to persons consistent with a statutory change.

## Sample Finding A2.

Part 7409.4000, item C, of the proposed rules has been amended to read:

“C. if the driver is not the owner of the vehicle involved in the incident and the driver does not own a vehicle, proof of insurance for a non-owner operator policy or proof of insurance verifying that the person is a named insured.”

The language inserted above makes paragraph C consistent with the language in the proposed rules, part 7409.3800, item C, which also deals with reinstatement of a driver’s license after an insurance related incident. The additional language does not change the meaning of item C, but provides for consistent language within the rules. Since the additional language does not change the rule’s meaning, it clearly does not make the rule substantially different.

## Sample Finding B1.

(Note: the names of the three persons who commented on this rulemaking have been replaced with AB, CD, and EF.)

AB, an administrator of a small, rural hospital, commented on part 4650.0112, subpart 3, item C, and the requirement for detailed reporting of support services expenses. AB requested that hospitals with fewer than 50 licensed beds be exempted from detailed reporting of these expenses because these hospitals “use a standard chart of accounts and no one else requests the expense data in this format.” AB asserted that individual staff members at small hospitals each perform a variety of functions and that “it will be almost impossible to accurately separate out detailed expenses by these functions.” AB pointed to the fact that these small hospitals make up about 60% of the hospitals in the state, but their combined total budgets represent only about 6% of the total of all hospital budgets in the state. AB asserted that any potential benefits from this data would be negligible. AB requested a hearing on the proposed rules because of this issue.

CD, a manager at the Minnesota Hospital Association, and 17 of CD’s co‑workers requested a public hearing on the issue identified by AB. EF, a vice president at Metropolitan Healthcare Council, and six of EF’s co‑workers also requested a public hearing on this issue. The Minnesota Hospital Association is an organization that works with all of the hospitals in the state who are governed by these rules. Metropolitan Healthcare Council is an organization of metropolitan area hospitals.

The Department entered into discussions with CD and EF, the results of which are contained in the Department’s September 27, 1994, and September 29, 1994, letters to CD and EF and their letters to the Department dated September 27, 1994, September 28, 1994, and September 29, 1994. AB was informed of these discussions by telephone and facsimile machine.

The Department proposes to amend part 4650.0112, subpart 3, items B and C, as follows:

“B. a statement of management information systems expenses and plant, equipment, and occupancy expenses. A hospital licensed for 50 or more beds shall make percentage allocations of management information systems expenses and plant, equipment, and occupancy expenses must be made to each of the support services functions listed in item C. A hospital licensed for fewer than 50 beds shall estimate percentage allocations of management information systems expenses and plant, equipment, and occupancy expenses to total support services;

C. a statement of total support services expenses for the facility, and. A hospital licensed for 50 or more beds shall make a statement of expenses for each of the following support services functions: admitting; patient billing and collection; accounting and financial reporting; quality assurance; community and wellness education; promotion and marketing; research; education; taxes, fees, and assessments; malpractice; and other support services. The statements required by this item may be estimated from existing accounting methods with allocation to specific categories based on a written methodology that is available for review by the commissioner and that is consistent with the methodology described in this part;”

The Department believes support services expenses in hospitals with 50 or more beds are reasonably representative of these expenses in hospitals with fewer than 50 beds. This exemption for small hospitals will not significantly affect the data received by the Department. At the same time, this exemption will reduce the burden of the rules on small hospitals.

This change does not make the rules substantially different. Clearly, this change is within the scope of the matter announced in the notice of intent to adopt rules; namely, the collection of aggregate data from hospitals. Further, it is a logical outgrowth of the notice and the comments submitted in response by AB, CD, and EF, as summarized above. Finally, the notice provided fair warning that this rule change could result because: the commenters clearly understood (and in fact urged) that this rule would result; the rule is not greatly different than originally proposed; and the rule reduces the burden on small hospitals while not significantly affecting the data received by the Department.

## Sample Finding C1.

(Note: at the hearing on these rules, the Department had proposed several preliminary modifications to the proposed rules. Several of the preliminary modifications were challenged as making the rules substantially different than the proposed rules. This sample finding does not set out the proposed preliminary modification again, but instead dives right into the substantial difference argument. Also note: the name of the person who commented on this rulemaking has been replaced with GH.)

**Allegation of substantial change**

At the public hearing on August 3, 1998, the Department introduced, as Exhibit M of Hearing Exhibit 1, several preliminary modifications to the proposed rules which the Department is considering based upon the comments received. Three of the preliminary modifications, relating to durable medical equipment, home health services, and coordination with participating providers, were questioned by the Minnesota Council for Health Plans (hereinafter “Council”). Specifically, GH, on behalf of the Council, commented at the hearing that the preliminary modifications proposed by the Department would result in substantially different rules than the proposed rules in the notice of intent to adopt rules. The Department believes that the preliminary modifications will not result in substantially different rules than the proposed rules, but has revised certain of the preliminary modifications, attached hereto as Exhibit K1, as additional preliminary modifications of the proposed rules pursuant to Minnesota Statutes, section 14.24.

Minnesota Statutes, section 14.24, provides that “the proposed rule may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantially different rule as determined under section 14.05, subdivision 2, from the rules originally proposed.” The attached modifications were based on numerous comments received by the Department suggesting that the proposed rule, listing durable medical equipment as a permissible exclusion, was an unreasonable and unnecessary rule. Review of the current practice of HMOs indicates that most, if not all, HMOs include durable medical equipment as a benefit, albeit with certain limitations. Further, numerous comments received from individuals and entities argue that durable medical equipment is a medically necessary service. Based upon these comments and the Department’s understanding that HMOs currently provide some level of these services as a benefit, the Department tentatively decided to move durable medical equipment to Minnesota Rules, part 4685.0700, subpart 3, item B, as a permissible limitation.

Minnesota Statutes, section 14.05, subdivision 2, sets forth the standard for determining whether a modification of proposed rules makes the rules substantially different. That law provides three criteria for determining whether a modification makes rules substantially different from the proposed rules. Those criteria are discussed below.

**1) The differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice. (Minnesota Statutes, section 14.05, subdivision 2, paragraph (b), clause (1)).**

The Department published several different notices relating to these rules. The first notice, a Request for Comments for Planned Amendment to Rules Governing Health Maintenance Organizations, Minnesota Rules, Chapter 4685, (Exhibit A of Hearing Exhibit 1) was published in the State Register on August 5, 1996, and stated that as well as amending or appealing outdated rule provisions:

“(T)he Department is considering amendments to rule provisions that may be unclear, outdated, or no longer necessary. For example, the rule provisions that govern permissible limitations and exclusions on the provision of comprehensive health maintenance services, Minnesota Rules, part 4685.0700, are being considered for amendment. The comprehensive health maintenance services affected may include **durable medical equipment**, medical supplies, cosmetic surgery, dental services, vision care services, eye glasses, ambulance transportation, experimental and investigative services, custodial care, domiciliary care, **home health care**, maternity services, outpatient treatment of mental illness and chemical dependency, prescription drug services, in-patient hospital services, and underwriting restrictions. The Department is considering defining several terms as amendments to the rule provisions that govern quality assurance, Minnesota Rules, parts 4685.1100 to 4685.1130. These rule amendments may address definition of terms, HMO quality assurance programs, activities, quality evaluation steps, focus study steps, filed written plans, and work plans.” (Emphasis added.)

Subsequently, on June 22, 1998, the Department published in the State Register a Dual Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing If 25 or More Requests For A Hearing Are Received (hereinafter “Dual Notice”). That notice, submitted as Exhibit F of Hearing Exhibit 1, advised interested parties that the proposed rules were about health maintenance organizations and community integrated service networks. Finally, on July 23, 1998, the Department of Health issued a notice of hearing to those who requested a hearing about proposed amendments to rules governing health maintenance organizations, Minnesota Rules, chapter 4685. The preliminary modifications announced by the Department prior to and at the August 3, 1998, hearing all relate to state regulation of HMOs and CISNs. (Exhibit K of Hearing Exhibit 1) Accordingly, the modification is within the scope of the matter announced by the various rulemaking notices.

**2) The differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice. (Minnesota Statutes, section 14.05, subdivision 2, paragraph (b), clause (2)).**

The rules as published in the Dual Notice specifically listed durable medical equipment and home health services as possible exclusions to the list of comprehensive services required to be provided by HMOs. The Department received many comments strongly suggesting that placement of durable medical equipment as a “permissible exclusion” was unreasonable because enrollees in HMOs need durable medical equipment as a matter of medical necessity. It was also pointed out that most HMOs provide some level of durable medical equipment, and that the proposed rule, rather than being a technical change as intended by the Department was a significant change, which reduced the benefits available to enrollees. Further, the Department became aware that most, if not all, HMOs include durable medical equipment in the benefits they provide, and consequently, the technical change proposed by the Department in the Dual Notice was a significant change with an unintended effect which would be unreasonable. As a result of this determination, and in response to the comments received, the Department submitted a preliminary modification at the hearing indicating that it would consider moving durable medical equipment to the permissible limitation category.

Upon further review it became apparent that home health services were handled much the same as durable medical equipment by HMOs and their enrollees, and thus the same modification was suggested for that health benefit. These modifications are logical outgrowths of the Dual Notice and are based upon the comments received in response to that notice. As stated in the Statement of Need and Reasonableness, the Department does not wish to change the benefit set currently offered and these modifications maintain the status quo.

The modification requiring HMOs to coordinate with participating providers in developing and implementing written guidelines regarding network capacity is not a substantial change because the development of such written guidelines is within the regulation of HMOs and CISNs. It is a logical outgrowth of the proposed rule that required the development of such guidelines and clearly the Council understood that the rule may affect the interests of its members. Indeed, for an HMO to develop and implement standards without coordinating with participating providers may well lead to the development of network standards which cannot be met by individual providers. The proposed modification specifies one element of the development process, but allows substantial latitude on how HMOs “coordinate” with participating providers and thus is a reasonable, as well as a necessary modification.

**3) The notice of intent to adopt or notice of hearing provided fair warning that the outcome of the rule making proceeding could be the rule in question. (Minnesota Statutes, section 14.05, subdivision 2, paragraph (b), clause (3)).**

GH suggests the proposed modifications run afoul of the “fair warning” portion of the substantive change law. For purposes of determining whether or not fair warning was provided Minnesota Statutes, section 14.05, subdivision 2, paragraph (c), provides that the following factors must be considered:

(1) The extent to which persons who will be affected by the rule should have understood that the rulemaking proceedings on which it could be based could affect their interests;

(2) The extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing;

(3) The extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing.

It is clear that persons affected by the rule not only should have understood that the rulemaking proceeding could affect their interest but did understand that effect and commented on the rule and its impact on them. Durable medical equipment and home health services were listed in the original Request for Comments; further, durable medical equipment, home health services, and coordination with participating providers are within the subject matter contained in the Dual Notice. In addition, the Department met with interested parties prior to the rule hearing, including representatives of the Council, and advised them that it was considering the preliminary modifications in question.

At the rules hearing, GH, on behalf of the Council, appeared to agree that the difference in the proposed modifications were within the scope of the matter announced, that the differences are a logical outgrowth of the Dual Notice, and only challenged whether the industry had received fair warning that the outcome of the rulemaking proceeding could be the rule in question. GH suggested that the effects of the preliminary rule modifications differ from the effects of the proposed rule contained in the Dual Notice because the Dual Notice allowed HMOs to totally exclude durable medical equipment. GH, in response to questions asked at the hearing, indicated, however, that most of the industry currently provides durable medical equipment, and GH’s concern, as explained at the hearing, is that by moving these terms from permissible exclusions to permissible limitations the plans may not be able to exclude total classes of durable medical equipment. When asked for an example of the class of durable medical equipment which a health plan might want to exclude, GH gave the example of general use items such as air conditioners and computers. The Department believes that general use items, such as air conditioners or computers, are not medical devices, so are excludable according to existing or modified law. It was not the intent of the Department, by placing durable medical equipment in the “permissible limitation” category, to expand benefits beyond those which are medical in nature. The effect of the proposed modification by the Department is that HMOs may continue to limit the type of durable medical equipment that they provide to their enrollees, but they may not totally exclude durable medical equipment.

GH further suggested that “without the benefit of the SONAR, we do not know how the Department intends to interpret ‘permissible limitation.’” (Hearing Exhibit 7, p. 9). In fact, interpretation of “permissible limitation” is addressed at length in the SONAR on pp. 23-24, and durable medical equipment is discussed on pp. 24-25 of the SONAR.

In Exhibit I-25 of Hearing Exhibit 1, the Council suggests that “the proposed language be amended back to track language in the existing rule and reflect current practice.” The Department believes that in making the modification suggested, moving durable medical equipment and home health services to the permissible limitation section, it has done what is suggested by the Council. The proposed modification reflects existing practice and tracks the existing format of the rule.

Although home health services were also included in GH’s comments as a potentially substantially different rule, no testimony was submitted to indicate that the effect of the rule modification differs from the effect of the proposed rule contained in the Dual Notice.

In comments at the hearing, admitted as Hearing Exhibit 7, GH suggests that requiring HMOs to develop guidelines in coordination with participating providers makes the rules substantially different “because it reduces an HMO’s ultimate responsibility for this managed care policy. We prefer the language to read: ‘The health maintenance organization shall seek input from participating providers’ . . . “ It is unclear whether the Council believes “seeking input” from providers is not a substantial change while “coordination” is a substantial change, because the terms are similar. Indeed, “coordination” with participating providers would appear to offer more flexibility than “seeking input.”

As mentioned previously, the proposed modification can be implemented in a variety of ways, and the Department does not believe that requiring an HMO to coordinate with participating providers in developing access guidelines reduces the HMO’s responsibility for development of those guidelines. It would be unreasonable, however, to allow an HMO to develop such guidelines in a vacuum, because the HMO must implement such standards through its participating providers.

It is clear that interested parties, including the health plans, were given fair warning that this rulemaking proceeding could result in the modification in question, since the Department provided all interested parties with the preliminary modifications that it was considering prior to the rule hearing, and those preliminary modifications were the subject of substantial written comment as well as testimony at the hearing itself.

GH suggested that the Department should withdraw the proposed rules because the proposed modifications make the rule substantially different that the proposed rules. It appears GH was suggesting that only the proposed rules on durable medical equipment (part 4685.0700, subpart 3, item B), home health services (part 4685.0700, subpart 3, item C), and coordination with providers (part 4685.1010, subpart 2) be withdrawn. As is clear from the above discussion, the Department believes that the proposed rules are needed and reasonable and the modifications to these proposed rules do not result in substantially different rules than proposed. Accordingly, the Department does not withdraw the rules.