

FISCAL NOTE
Requested by Legislative Council
12/19/2014

Bill/Resolution No.: HB 1027

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

| | 2013-2015 Biennium | | 2015-2017 Biennium | | 2017-2019 Biennium | |
|-----------------------|--------------------|-------------|--------------------|-------------|--------------------|-------------|
| | General Fund | Other Funds | General Fund | Other Funds | General Fund | Other Funds |
| Revenues | | | | \$39,106 | | \$78,212 |
| Expenditures | | | | \$39,106 | | \$78,212 |
| Appropriations | | | | \$39,106 | | \$78,212 |

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

| | 2013-2015 Biennium | 2015-2017 Biennium | 2017-2019 Biennium |
|-------------------------|--------------------|--------------------|--------------------|
| Counties | | | |
| Cities | | | |
| School Districts | | | |
| Townships | | | |

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

A bill for an Act to create and enact Chapter 4.1-26 of the North Dakota Century Code; and to repeal Chapter 4-18.1 of the North Dakota Century Code, relating to the Milk Marketing Board including amending the assessment rate.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

4.1-26-27. Assessments-Continuing Appropriation. 1.A. Each licensed processor shall pay to the Milk Marketing Board an amount determined by the Board but not exceeding eighteen cents per hundredweight, on all milk and milk equivalents used by the processor in manufacturing milk products and frozen dairy products. House Bill 1027 amends the maximum assessment rate from not exceeding fourteen to not exceeding eighteen cents per hundredweight.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

The assessment revenue will increase at the rate of \$19,553 per year or \$39,106 per biennium per one cent of assessment increase.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The Milk Marketing Fund will receive an additional \$19,553 per year or \$39,106 per biennium per one cent of assessment increase to pay the increasing cost of conducting business.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

4.1-26-27. Assessments - Continuing Appropriation. 3. All monies in the Milk Marketing Fund are appropriated on a continuing basis to the Board to carry out this chapter. Revenue, expenditures, and appropriations will increase at the rate of \$19,553 per year or \$39,106 per biennium per one cent of assessment increase.

Name: John E Weisgerber

Agency: Milk Marketing Board

Telephone: 7013289588

Date Prepared: 12/23/2014

2015 HOUSE AGRICULTURE

HB 1027

2015 HOUSE STANDING COMMITTEE MINUTES

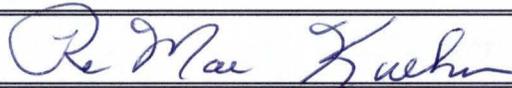
Agriculture Committee
Peace Garden Room, State Capitol

HB 1027

1/8/2015
21771

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the milk marketing board.

Minutes:

Attachments #1a, 1b, 2

L. Anita Thomas, Legislative Council: (00:45) Introduced the bill.
(See attached #1a and #1b)

Representative Diane Larson: (27:30) On page 12, the grounds for denial of a license-- does this limit competition?

L. Anita Thomas: That would be one perspective

John Weisgerber, Milk Marketing Board: We follow the administrative practices act and we hold hearings. In regard to limiting competition with the granting of licenses, there are several opinions. It is no different than in 1967. It was out-of-state firms who are in Minneapolis. They want to go down interstate and pick off the good accounts. Part of our licensing is you have to service everybody.

Representative Dwight Kiefert: This bill will expand the boundaries of the price control in western North Dakota. Is that correct?

John Weisgerber: No, we have always controlled that. The federal order comprises Minnesota, Iowa, Wisconsin, South Dakota, and the 16 eastern counties of North Dakota. To go back to 1967--two sessions before that the dairy farmers asked to create this law for some price control. Price control actually started back in the 30s. Fluid milk needs to move to the consumer in 21 days. The U.S. Supreme Court determined that the state can exercise the police power of the states. 90% of the milk is regulated by federal government and the rest is by states.

Representative Dwight Kiefert: We had a producer from the western part of the state that claimed this action would lower his price.

John Weisgerber: That dairy farmer was Andrew Holle. He and his father are here today.

If the Milk Marketing Board was done away with and all of North Dakota including their farm went under the federal order, he would lose \$2.31 per hundred weight. Last year he would have lost \$300,000 of gross income. This rewrite of the law will not do that.

Representative Craig Headland: How many producing dairies are in the state?

John Weisgerber: Today we have 92 dairy farms.

Representative Craig Headland: They are under the regulatory authority of the milk board. Would any of these dairies like to opt out of regulation?

John Weisgerber: We don't control that. Our involvement with the dairy farmer is setting a minimum price. We don't dictate where they can market the milk.

Stephen Kuhle, Three-star Dairy in Mayville: (38:35) We are a distributor of dairy products. To be a distributor in North Dakota you need two licenses. The first license is from the Department of Agriculture. Your products and brands to sell are listed along with the address of your building. You guarantee they can inspect your building at any time.

The second license is required for the Milk Stabilization Board. This license requires 3-star Dairy to deliver to anyone who wants a delivery in our trade area. Without this requirement a distributor could pick and choose (cherry pick) the customers they want to deliver to. We provide dairy products to 76 towns. Less than 30 percent of these towns have a grocery store. Many deliveries are made to cafes, post offices, small gas stations, and implement dealerships. These are low volume accounts.

Representative Craig Headland: Why would a producer suggest that it would be time to get rid of the Milk Marketing Board?

Stephen Kuhle: We support the milk board. I'm not a producer.

Representative Diane Larson: Could another distributor sell to your accounts? Because you are already delivering, does that mean they can't get a license?

Stephen Kuhle: I am not the only distributor in these areas. There is still Cass Clay, etc. The biggest problem with an outside source, many have requirements on the amount of cases you need to order. With a small order there is a \$25 delivery charge. Our delivery fee is \$3.

Representative Joshua Boschee: (46:00) In your trade area, are you restricted to that area with your licensure from the Marketing Board?

Stephen Kuhle: We do have tangents that go out.

Vice Chair Wayne Trottier: You mentioned Cass Clay can come into your territory.

Stephen Kuhle: We buy our products from Cass Clay and Dean Foods. Anyone that has a license can come into our area. If we don't do our job right, there is competition.

Vice Chair Wayne Trottier: Why would any retailer not like the milk board?

Stephen Kuhle: The retailers I call on are very supportive.

Tom Woodmansee, ND Grocers Association: (48:00) We have no problem with what has been addressed. I haven't dealt with any retailer that doesn't like the Milk Marketing Board. Those that don't are the big box stores. If the Milk Board is gone, they can do what they want. The reason for no gifts is what you do for one you should do for all.

Representative Joshua Boschee: This sounds like this is about keeping communities vital--a rural access issue.

Tom Woodmansee: Correct. We make sure wherever they are they will get serviced.

Representative Joshua Boschee: Is this a standard throughout other rural states?

Tom Woodmansee: John can answer this better.

Kenton Holle, Dairy farmer from south of Mandan: (52:00) I am in support of the rewrite and the Milk Board. The purpose is to maintain the dairy industry in North Dakota. We utilize Class I which is where fluid milk goes into. For most producers, 20% of their milk goes into Class I. The smallest percentage gets the highest price. When the Milk Board was created, it applies to all producers in the state. At the time this was created there were 1500 producers in the state. Now we are down to 91. Class I is more regulated. It won't end up in a plant that is Class 3. The Milk Board does benefit all producers. Class I milk is price protected.

The other benefit of the board is that it audits the milk plants. It checks if producers were overpaid or underpaid. This past year we were undercharged \$18,000. Last year the Milk Board audited back to the producers of North Dakota \$100,000. Over the life of the Milk Board, it has returned \$1.2 million to the producers.

Vice Chair Wayne Trottier: Are you allowed to buy wholesale from your processor?

Kenton Holle: I don't know

Representative Craig Headland: I am not clear why would a producer want to get rid of the Milk Board. Are you still milking?

Kenton Holle: If a producer isn't getting the highest Class I price. We milk 600 cows three times a day. Three people are in the parlor.

John Weisgerber: (1:03:45) I am aware of some producers wanting to do away with the board because they compare milk checks. That milk would probably go with Dairy Farmers

of America or Associated Milk Producers. That milk ends up in a bottle in Fargo. They do compare milk checks. We heard during the interim the Federal Market order people give the statistics. Utilization is where the secret is. The area of North Dakota that is not in the order, 89% of the milk last year went into the bottle. In the Federal Market order, 11% went into the bottle. So 89% is getting Class I vs. 11%.

They want the Milk Board to create a market-wide pool. The Federal Market order pools all the milk on paper until there is so much milk. Everybody shares in that utilization. The difference between the way we do it and the Federal order is that when the Milk Marketing Board was created, the dairy farmers did not want a market-wide pool created. They wanted individual-handler pools. Each plant utilizes the milk at their own plant. Being a proprietary plant they want high utilization. Whereas Cass Clay is a co-op. They want access to more farmers. Whereas a proprietary plant wants to limit it so they can keep the utilization. A co-op is owned and managed by the dairy farmers. Their board makes the decision. A proprietary has a manager that makes the decisions. So there is a difference in the take-home price.

In a federal order they share. Here each plant is on its own. Those producers would like to sell to a plant in Bismarck but the plant can only take so much.

Representative Joshua Boschee: other states?

John Weisgerber: There are a number of states. In this law we regulate the farm price, the wholesale price, and the retail price.

The dairy farmers in 1967 wanted a law like other states. It took two sessions to get this law passed. The dairy farmers wanted minimum price protection. In the meantime the creamery processors came in and wanted someone to set the price the stores were paying them. Then the retail grocers wanted someone to set the price to the consumer level. The original intent was to set the minimum farm price.

States with laws like ours that do all three levels: California, Nevada, Montana, North Dakota, Pennsylvania, Louisiana, New Jersey, Maine, and Virginia. There are 25 others that either set the minimum farm price or they set below cost statutes. Many states moved away from the way we do by setting the price to below cost statutes. Then when they started going to court, no one could determine "cost." Then they moved back to regulating the whole thing.

Chairman Dennis Johnson: Will this be a hindrance for attracting a new dairy?

John Weisgerber: (1:14:35) The hindrance in North Dakota is the climate.

Chairman Dennis Johnson: What stops others from bringing milk?

John Weisgerber: The ones wanting to get rid of the Milk Board wanted more money. Selling to a plant is the plant's decision.

Representative Alisa Mitskog: You mentioned 92 dairy farms. Give us some history on the number producers. Are you trending down or leveling off.

John Weisgerber: Ten years ago there were 306 dairy farms.

Representative Tom Kading: If there was no Milk Board, would dairy farmers have to market under Federal Order #30?

John Weisgerber: That is probably what would happen. The difference between the blend price (take-home price) was \$2.31 per hundred weight. The dollars would go into the Federal Order pool. Thousands of dollars would go to producers in Minnesota and Wisconsin where the milk doesn't go into the bottle. North Dakota would lose thousands of dollars. Our producers according to the Milk Producers Association don't want that.

Vice Chair Wayne Trottier: It was brought up that the climate is deterring dairies from coming to North Dakota. My experience is that cows do better in cold weather than hot.

John Weisgerber: I not a producer.

Opposition: none

Neutral:

Deb Egeland, Department of Public Instruction, Child Nutrition: (1:24:56)

I take care of the school lunch programs across the state.

Testimony from Jan Sliper, Food Service Director, West Fargo. (See attached #2)

I also talked to our Bismarck Public Food Service Director. He said he is fine with every school being licensed separately and every school having their volume discount figured out separately.

Back to the question about if the Milk Stabilization board should be here. I talked to the State of Colorado. This fall their milk went up 30%. I feel we are fortunate that in North Dakota the Milk Board looks out for our really small schools.

John Weisgerber: Many years ago school boards went to the Attorney General. His opinion was that the whole school district volume applies. That is in effect right now.

Chairman Dennis Johnson: Closed the hearing.

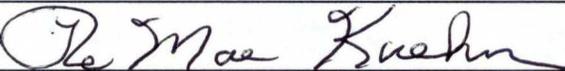
2015 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

HB 1027
1/16/2015
22057

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

(Committee Work)

Relating to the milk marketing board

Minutes:

John Weisgerber, Milk Marketing Board: The testimony that Jan Sliper presented during the hearing questioning the definition of a retailer and the wording in the statute. This was settled 40 some years ago. There was an Attorney General's opinion #6914, dated October 13, 1969. The Fargo Board of Education requested the opinion. It was similar to what Ms. Sliper asked. The opinion said it is the school district that needs to be licensed with one license. The purpose is to get a bigger discount to add all the purchases together.

Representative Joshua Boschee: Moved Do Pass.

Representative Diane Larson: Seconded the motion.

A Roll Call vote was taken: Yes 10, No 0, Absent 3.

Do Pass carries.

Representative Haak will carry the bill.

**2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1027**

House Agriculture Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation

- : Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Rep. Boschee Seconded By Rep. Larson

| Representatives | Yes | No | Representatives | Yes | No |
|------------------------------|-----|----|---------------------|-----|----|
| Chairman Dennis Johnson | X | | Rep. Joshua Boschee | X | |
| Vice Chairman Wayne Trottier | X | | Rep. Jessica Haak | X | |
| Rep. Bert Anderson | X | | Rep. Alisa Mitskog | AB | |
| Rep. Alan Fehr | X | | | | |
| Rep. Craig Headland | AB | | | | |
| Rep. Tom Kading | X | | | | |
| Rep. Dwight Kiefert | X | | | | |
| Rep. Diane Larson | X | | | | |
| Rep. Alex Looyen | AB | | | | |
| Rep. Cynthia Schreiber Beck | X | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Total (Yes) 10 No 0

Absent 3

Floor Assignment Rep. Haak

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1027: Agriculture Committee (Rep. D. Johnson, Chairman) recommends DO PASS
(10 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1027 was placed on the
Eleventh order on the calendar.

2015 SENATE AGRICULTURE

HB 1027

2015 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

HB 1027
3/5/2015
Job #24352 and #24379

- Subcommittee
 Conference Committee

Committee Clerk Signature

Emmery Grotter

Explanation or reason for introduction of bill/resolution:

Relating to the milk marketing board

Minutes:

Attachments: #1-2

Chairman Miller opened the hearing on HB 1027

Anita Thomas, Legislative Council introduced HB 1027 (see attachment #1)

Senator Warner (11:15) Do they take into account transportation differences, distance from large processing plants, that sort of thing?

Anita Thomas directed the question to Mr. Weisgerber.

Chairman Miller: (23:35) What do other states do in regards to milk marketing, do any of our neighbors have a similar law to this?

Anita Thomas directed the question to Mr. Weisgerber.

Vice Chairman Luick: On page 17 where you're talking about the giving away of milk products in the store. Why is it that we are stipulating that they cannot giveaway milk products?

Anita Thomas: I do not know why that is in there, the interim committee did not have any specific discussions about that but I'm sure there's some historical comments that will be made about that.

Senator Warner: Relative to board compensation levels, we seem to see a fairly standardized number across a lot of boards. Has there ever been a discussion about making on reference in code somewhere that statutory boards shall be compensated at such a level so they automatically adjust rather than having to come back and be readjusted from time to time?

Anita Thomas: That discussion has been had but it has not been followed through on.

Senator Warner made a comment about the low compensations amounts on state boards vs. corporate boards.

Mark Doll, ND Milk Producers: (27:00) Testified in support of HB 1027. The Milk Producers support this bill as it evens out the dairy industry as it provides even pay from the processor to the producer and it gives the equality that all the areas in the state will be able to get milk products at a price that is fair to everyone.

Chairman Miller: I hear from dairy farmers that the price they are getting is next to nothing. What is the milk board doing to retain dairies?

Mark Doll: The milk market is a global market so no one has control over that market and no one can guess where it's going. The milk board bases its prices off what the milk price is throughout the US. There is FMO30; part of ND is in a government milk marketing order so they milk their price off the national dairy products price.

Chairman Miller: So theoretically, the more milk production we have, we can set the price better?

Mark Doll: Yes and no, as milk production goes up it is still based off global market. It depends on what it is utilized for, milk is divided into four different classes. Class 1 is milk that goes into the bottle and that is the only price that milk marketing board controls. It does not control any of the other class prices.

Andrew Holle, dairy farmer from South of Mandan: (29:42) Testified in support of HB 1027. He testified about what the milk marketing board does for him and impacts the state. Currently the check-off is assessed to the processors that the processors asses to the dairy producers so they are paying for the milk marketing board out of the check-off. He stated that they are allowed to set the price and they check over the checks that the dairy producers receive from the processors. He said that back in through November, they received an increase of \$18,000 that the processor did not pay.

He stated that other states without the milk marketing board are in a federal 30 order. So the money in the Class 1 difference that are received, goes into the federal order and it is distributed among all the other farmers in that order. The milk marketing board in ND allows the set price at Class 1, and the producers get to keep the difference. He stated that in 2014, it was a \$68,000 difference that they would not have received that would have gone into the federal order that would have been divided up to all the other thousands of farmers.

He stated that the board reassures that small communities will remain in effective getting milk because the milk marketing board ensures that the milk carriers stop in the small areas that need milk. If the board wasn't there and there was a large company coming through, they would cherry pick and only stop at the big stops that make them money. He said that many of the distributors today stop at all the spots and they don't make money at every stop but they make money on the route.

Chairman Miller: The eighteen cents, how does that affect your bottom line?

Andrew Holle: I don't know what they will assess to me, I think we're at five or seven cents--Mr. Weisgerber would know more than I do.

Chairman Miller: I don't know what kind of margins you work with but is that an insignificant 5 cents?

Andrew Holle: It adds up, last year we spent \$1,200 towards the milk marketing board. IT's based off your hundredweights; so the more milk you produce, the more you pay in.

Tom Woodmansee, ND Grocer's Association: testified in support of HB 1027. We have some complaints from some of the retailers around the state on occasion but we have been able to get those resolved by working with the Milk Marketing Board. Collectively, we do support the rewrite as we were involved from the beginning and I don't think that any of our retailers have notified me that they would like to see it gone unless there were particular issues that they were violating and it got corrected.

Steve Kuhle, Three Star Dairy Inc., Mayville: In order to be a distributor in ND, you need to have two licenses. One is from the department of Agriculture that allows an inspector to come in and check your buildings, your trucks, coolers, freezers for cleanliness and temperatures.

The second license that is needed is from the milk stabilization board. When you sign this license, you promise that you will deliver it to anybody in your trade area. You cannot pick and choose or cherry pick. Anyone in our trade area that wants a delivery will get service.

Mr. Kuhle went through the towns he visits on his route. In this box circle, we go to 83 towns. Less than 65% of these town have a grocery store. Many of these deliveries are made to day cares, post offices, cafes, small gas stations, C-Stores and implement dealerships. These are low volume accounts but someone needs to provide service to these areas.

Chairman Miller: How many stops do you think you make that are a money loss?

Steve Kuhle: Each route is different. When we start on this route we don't make a profit, but in the summer we make a profit with the dairy queen. In the summer we don't make a profit on the schools.

John Weisgenberger, Milk Marketing Board Executive Director: I will try to answer your questions.

One of the questions is why does the milk marketing board not allow gifts from the grocery store, that has been in the law since 1967. In the interim we addressed that, the large stores could give things away but small stores cannot. We address those issues every year with the ND the retail grocers and the grocers asked that to be in place as it is.

Another issue is the assessment; we asked that the maximum go from fourteen to eighteen cents. We aren't going to go to eighteen cents right away, it will be slow transition. In 1995 when the legislature allowed the milk board to go to fourteen cents, it was a slow transition

and we didn't go to fourteen cents until 2011 when we needed the money. Fourteen and eighteen cents sounds like a lot but if we take our cost of doing business, \$270,000 a year and divide it by our population, it comes out to thirty-eight cents per person. Equated to a half gallon of milk that fourteen cents is .006 on a half-gallon of milk. The bottlers and the creameries they pay the assessment. When we set the whole-sale and retail price, we do not figure that in there. We do not raise or lower the price of milk or the wholesale retail based on this assessment. The farmers pay fifteen cents which is a federal law that goes to the promotion board.

The law states that the board members cannot hold elective or appointed office while serving on the milk board so that there would be no conflict of interest. We've lived with that law and this bill is not changing that.

Chairman Miller: Regarding interstate transport of milk, what are the laws regarding unprocessed milk?

John Weisgenberger: All bottled milk comes under the PMO (pasteurized milk ordinance) each state has a representative and they sit on the department of agriculture and they update the PMO. Every two years the Department of Agriculture comes here and updates that PMO. Fluid milk that is in trust state or interstate has to meet the requirements of the PMO.

Chairman Miller: In a nut shell, all these regulations are about fluid bottled milk.

John Weisgenberger: This milk law is only grade A fluid milk. In those days it was cheese milk, now it is grade B milk. There's less of that and now there's just a few left in ND, MN, and WI. Most of the whole country is grade A. Grade B or manufacturing grade milk basically goes to a cheese plant.

Senator Warner: It seems like there's a growing tendency to create specialty products, is there enough flexibility in this law to allow for those special varieties?

John Weisgenberger: That would be allowed, although we don't have much of that in ND. The reason why is probably that those special types cost more.

Kim Kessler, Chairman of ND Grocer's Association: (52:30) (see attachment #2)

Senator Warner: How do dollar stores buy their milk?

Kim Kessler: They have a license to sell it and they don't have a big cooler to store their milk, they have their small cooler in their store. They don't have the necessity of a grocery store to have a milk cooler. Milk is a loss liter for those store.

Vice Chairman Luick: How long is it from the day it is packaged until it is spoiled?

Kim Kessler stated that she didn't know and perhaps someone else could answer the question.

Senator Klein: At the processing plant, they run a rigorous bacteria count. Sometime the bacteria will grow and that will diminish the timing and the date the milk has on it. There is a determination of the bacteria level at the processing facility.

Mark Doll: Regarding whether the milk is viable, Land o Lakes milk is good for 21 days. We can ship raw milk out of state; as long as you under the federal milk OMO milk can be interstate shipped.

Chairman Miller closed the hearing on HB 1027.

The committee heard another bill and then came back to HB 1027 (see Job #24379)

Senator Klein: You served on that interim committee and it looks like a lot of work has been done so I'm confident that after all those eyes have spent time on the rewrite.

Chairman Miller I don't want to amend this bill, but I had some ideas relating to something else and I thought that this could be a vehicle. If the committee wishes and there are no issues, I would entertain a motion.

Senator Warner moved Do Pass on HB 1027.

Vice Chairman Luick seconded the motion.

A Roll Call vote was taken. Yea: 6; Nay: 0; Absent: 0.

Do Pass carries.

Senator Klein will to carry the bill.

REPORT OF STANDING COMMITTEE

HB 1027: Agriculture Committee (Sen. Miller, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1027 was placed on the Fourteenth order on the calendar.

2015 TESTIMONY

HB 1027

#1a

1/8/15

1

ND MILK MARKETING BOARD - HOUSE BILL NO. 1027

Presentation notes

L. Anita Thomas, J.D., LL.M.

Senior Counsel, ND Legislative Council

About every 4-6 years, it seems that a bill surfaces to repeal the Milk Marketing Board. The claims are that it is heavy handed, it promotes protectionism at the expense of free enterprise, that it is a rogue agency, etc. In the 2013 session, there was a legislator who owned a convenience store in western North Dakota and she could not understand why her franchisor could deliver virtually every product she sold except for fluid milk and secondly, why she had to purchase her fluid milk from a local distributor who allegedly charged her more per gallon than she was paying at retail in Fargo.

That is how this study came about. Specifically, the interim committee was directed to examine:

- The board's structure;
- Its statutory duties;
- The manner in which it prescribes and regulates producer, distributor, and retail prices throughout the state;
- The manner in which it investigates and resolves concerns regarding the price and availability of milk throughout the state; and
- Any policy or regulatory changes that the board has implemented, in order to address pricing issues and the availability of milk in the western portion of this state.

The study was also to address whether the continued regulation of the Grade A dairy industry is best accomplished by the board in its current form and operating under its current statutory directives, whether changes are needed to the board or its statutory directives, and whether there are other methods by which the desired results could be effectively and efficiently achieved.

Unlike other commodities, the marketing of milk has several complicating factors:

- Milk is produced daily;
- It is perishable;
- It is bulky and expensive to transport; and
- The production and retail cycles require reserves.

Statutes and regulations are the historical method by which consumers were ensured an adequate supply of fresh and wholesome fluid milk and dairy producers were guaranteed stable and reliable milk markets. It's a balancing act.

In North Dakota, the regulatory program governing the marketing of milk came into being in 1967, with the formation of the North Dakota Milk Board. Two years later, the Legislative Assembly provided for some amendments and the chapter has stayed relatively untouched since that time.

Overview of Current Law

By statute, the North Dakota Milk Marketing Board is required to designate milk marketing areas that cover the entire state and to establish uniform minimum prices that processors must pay to dairy producers for raw milk. The prices are to reflect:

- The available supply of raw milk;
- The adequacy of the reserve supply of raw milk;
- The balance between production and consumption;
- The cost of dairy feed;
- Farm wage rates; and
- Other factors, as appropriate.

Furthermore, the board must ensure that the minimum prices:

- Are beneficial to the public interest;
- Protect dairy producers; and
- Preserve an adequate supply of pure and wholesome milk to the inhabitants of this state.

The board must also establish, for each marketing area, the minimum prices for sales of milk products by processors or distributors to retailers and for sales of milk products by any person to consumers. In addition to the mandatory setting of prices, the board is authorized to establish minimum prices for:

- Sales of milk products by processors to distributors;
- Sales of frozen dairy products by a processor, distributor, or retailer to any person;
- Sales of milk products by a processor to another processor or by a distributor to another distributor; and
- Sales of milk products or frozen dairy products not otherwise previously addressed.

The board is also authorized to establish the maximum prices for which milk products may be sold by a processor, a distributor, or a retailer to any person.

The North Dakota Century Code requires the board to administer a process for licensing dairy producers, processors, distributors, and retailers and it establishes various criteria that must be met, prior to the issuance of a license. The Century Code also requires the board to prohibit or regulate disruptive trade practices and provides an illustrative, but not an exclusive, list of what those practices could entail.

The North Dakota Milk Marketing Board is supported through an assessment paid by licensed processors. The amount of the current assessment is 14 cents per cwt on milk or milk equivalents used in the manufacturing of milk products and frozen dairy products.

As the interim committee reviewed the existing statutes and reviewed concerns articulated about the North Dakota Milk Marketing Board, it could find no indication that the board operated outside of its statutory authority. Whatever the board was doing, it was because the Legislative Assembly had at one point in time required that such be done.

The next point of inquiry for the interim committee was whether the statutory authority was still appropriate, nearly one-half century after it was first enacted. In order to do that, the committee had to overcome the hurdle of interminable sentences in interminable paragraphs that precluded readily discernible content.

In other words, the committee asked for a rewrite of the chapter so that it and others interested in the chapter could more readily determine whether changes were needed, and if so, what those changes could, would, or should be.

For those of you who are new, a rewrite is an effort that involves looking at every word and sentence in the chapter.

- We modernize the language.
- We clarify the language.
- We remove duplicative and unnecessary language.

Although the goal is not to change the intent of that which the Legislative Assembly enacted, we do recognize that sometimes, what worked 40 or 60 years ago is perhaps not as pertinent or relevant today. Those sorts of changes are proposed as well.

We try to use more sections and certainly more subsections and subdivisions, so one doesn't feel like one was reading prose in those interminable paragraphs when all one really want to find out was:

- What are the criteria for licensure?

In order to make this happen, we have to craft a new chapter - which is the bill before you.

The chapter, as it appears in current law, begins with 13 declarations including the fact that:

Milk is a necessary article of food for human consumption; and that
Its production, transportation, processing, storage, distribution, and sale is an industry affecting
the public health and interest.

It also provides that "unfair, unjust, destructive, and demoralizing trade practices have been and are now being carried on in the production, transportation, processing, storage, distribution, and sale of milk, milk products, and frozen dairy products, which trade practices constitute a constant menace to the health and welfare of the inhabitants of this state and tend to undermine the sanitary regulations and standards of content and purity of milk."

The current law also articulates a purpose for the chapter -- i.e. to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the milk industry.

Those sections are gone - Not because they are not important, but because they are not statutory.

They are testimony.

They do not tell people or entities what they must do or may not do.

They merely articulate philosophy and as one of the interim committee members was fond of saying: "We do not need to make the Century Code any longer than it already is."

The proposed bill begins with definitions.

We removed several that were unnecessary.

We do not need to define person. That's already covered in the general definitions of the Century Code.

We really do not need to define obvious designations -- such as "licensee. "

Also missing from the list are products of yore such as:

- Mellorine;
- Olarine;
- Sherine; and
- Sherbines.

On page 4, in the section regarding the membership of the Milk Marketing Board, we updated the names of the nominating groups.

Whereas current law literally drew a line between certain counties and required that three members come from one side of that line and two members come from the other, the rewrite requires the governor to ensure a "geographic balance."

On the bottom of page 4, you will see the compensation section.

Milk Marketing Board members are entitled to receive compensation in the amount established by the board, but not exceeding \$135 per day.

Current law had capped their annual per diems at \$1500.

This was removed by the interim committee.

So, if per chance board members have to work for more than 11 days a year, they can actually get paid for that service

At the top of page 5, current law requires that the board meet at least every 60 days. The board requested that this requirement be removed, so that they are not statutorily required to meet if there is no good reason to do so.

The safeguard provision is that if 3 of the 5 members petition the chairman for a special meeting, the chairman must call one within 7 days.

On page 5, beginning on line 5, you will see a list of the Board's powers.

Here the interim committee pulled together some pretty standard language about enforcing the chapter, compensating personnel, contracting, etc.

The interim committee did remove language that authorized the board to "supervise, investigate, and regulate every segment of the state's dairy industry." The committee was not comfortable with such limitless authority being placed in the hands of a board.

At the bottom of page 5, the bill addresses milk marketing areas. Like current law, it does not indicate how many there ought to be and it does not indicate their boundaries. However, if the board sees the

need to change those boundaries, or to increase or decrease the number of milk marketing areas, that must be done under 28-32 so that there is notice, a hearing, public testimony, etc.

On page 6, we get into the requirements that the board establish a milk stabilization plan for each milk marketing area.

The plans must include the minimum price that processors located within that marketing area have to pay to dairy farmers for raw milk and they have to include the minimum price that:

- A processor must charge a retailer;
- A distributor must charge a retailer; and
- Any person must charge a consumer.

Milk stabilization plans can also address other areas, as reflected beginning on page 7.

Those can include broader range minimum prices, certain maximum prices, quantity discounts, and wholesale price filings, and they may take into account packaging cost differences. Home-delivered goods may also be a different price than those sold in stores.

On page 10, line 10, you will see what the interim committee called the domino effect.

This section provides that whenever the minimum prices that processors must pay to farmers change, the board must also ensure that simultaneous changes occur in all other minimum and maximum prices established in accordance with the chapter.

Also on page 10, we get into who must be licensed. Licensure extends to:

- Dairy Farmers;
- Processors;
- Distributors; and
- Retailers.

Current law states: that "[s]chools, hospitals, state institutions, and charitable institutions may obtain "retailer" licenses from the board regardless of whether they fall within the definition of "retailer."

This was somewhat puzzling to the committee. But, Mr. Weisgerber explained that the purpose of the verbiage was to ensure that such entities could purchase milk products and frozen dairy products at wholesale prices.

So, on P11 L14, we literally said that "in order to effectuate the purchase of milk products and frozen dairy products at wholesale prices, the following entities may be licensed as retailers:

- School districts;
- Nonpublic schools;
- Hospitals;
- State institutions; and
- (5) Not-for-profit entities.

At the top of page 12, the law requires that before processors can be licensed by the board, they must be licensed by the Agriculture Commissioner.

Similarly, before distributors can be licensed by the board, they must be licensed by the Agriculture Commissioner.

These provisions are financially focused. Processors and distributors must demonstrate the ability to pay those from whom they purchase milk.

Dairy farmers have to be "inspected" by the Agriculture Commissioner or the state department of health, before they can be licensed.

Once an application is filed, the board has 30 days within which it must:

- Issue the license; or
- Notify the applicant of the date on which a hearing will be held to receive evidence relative to the application.

The board has 30 days after the hearing within which to notify the applicant of its decision. If the board cannot do this within the 30 days, it must do so "as soon thereafter as practicable."

Whereas the current law mixes together grounds for licensure denial with grounds for suspension and revocation of a license, the bill separates those concepts.

Beginning on the bottom of page 12, you will see that the board can deny a processor's license or a distributor's license if:

- Persons currently licensed by the board in that capacity are supplying an adequate variety and quantity of high quality milk products and frozen dairy products to retailers and consumers in this state;
- Deliveries are being made with sufficient regularity and frequency; and
- The issuance of additional licenses of the type sought will:
 - a. Result in an excess of processing plant capacity;
 - b. Tend to increase to unsatisfactory levels the average unit processing or average unit distribution costs for persons already licensed by the board; or
 - c. Otherwise tend to prevent achievement of the objectives of this chapter.

This section uses a lot of adjectives such as "adequate" variety and "high" quality, and "sufficient" regularity. It uses phrases such as "tend to increase" or "tend to prevent." These are words that attorneys like to use because they are non-committal. When a regulatory function is in place, however, they are also nebulous.

The interim committee, however, did not have sufficient time to pursue alternate criteria.

In addition to having stated grounds for denying a license, the board can also impose certain conditions on the issuance of a license.

In the case of a distributor, for instance, and I am now in the middle of page 13, the board can require declarations that the person:

- Will not sell milk products or frozen dairy products to any person who is not appropriately licensed;
- Will not purchase milk products or frozen dairy products from any person who is not appropriately licensed;
- Will sell such milk products or frozen dairy products as are customarily handled by a distributor to any retailer who:
 - Wishes to purchase the products from the distributor; and
 - Has a place of business in any community in which the distributor distributes or sells milk products or frozen dairy products.

Finally, the distributor must promise to offer to any retailer the same frequency of delivery and the same in-store services as are customary in the community.

Even though everybody knows what is meant by "in the community," we defined a "community" to mean a city, together with any commonly recognized residential or business area adjacent to the city.

This is the point at which the interim committee had some discussions about "cherry picking." Most distributors would gladly service what were referred to as the more lucrative accounts along the interstate.

The unresolved question is who would service the smaller accounts in the more remote areas of the state?

On page 14, you will see that licenses, once issued, are effective until:

- There is a change of ownership or of location;
- The license is suspended or revoked; or
- The business that is licensed has been discontinued or has been inactive for more than 30 days.

There are no license fees.

The board supports itself through assessments on licensed processors.

When the current law was written, a fee structure was phased in. It was capped at 12 cents per cwt beginning July 1, 1995. It was capped at 13 cents beginning July 1, 1997. It was capped at 14 cents beginning July 1, 1999. There it has stayed for the past 15 years.

The board indicated to the interim committee that, in light of rising expenses, it asks that the Legislative Assembly consider raising this cap to 18 cents per cwt. Processors indicated that they were supportive of this increase and so it was included on page 14, line 16.

Disruptive Trade Practices are found on Page 16. This is a list of "Though shalt nots." The problem with the current law is that it begins by stating: "[T]he board shall by regulation prohibit or regulate each of the following practices. . . .

The first question is:

Are the activities "prohibited" or are they "regulated?"

Is one completely precluded from engaging in the activity or can one engage in the activity under certain circumstances determined by the board?

The interim committee believed that making such determinations should be within the bailiwick of the Legislative Assembly.

Current law goes on to say that the list of practices is "solely for the purpose of illustrating the broad scope of the board's authority under the said subsection. Such listing is not intended to be an exclusive enumeration of those practices, methods, devices, schemes, arrangements, and activities which the board is authorized to prohibit or regulate."

In other words, the section currently provides that the board can determine whether it ought to regulate or prohibit certain activities and then it goes on to say, "Oh by the way," there may be more things that the board may want to regulate or prohibit.

Again, this is not the board's doing. This is language that was enacted many years ago.

Rather than delegating to the board the authority to determine whether an activity is to be prohibited or regulated, the proposed language clarifies which activities are prohibited and which are to be regulated, using current North Dakota Administrative Code provisions as a guide.

Let me, however, point out a couple of changes.

Current law states that the board may prohibit or regulate the "giving of a free milk product or a free frozen dairy product to a customer." The interim committee was concerned that this language could preclude the giving of tasting samples at an ice cream counter or having the local grocer provide ice cream cups to boy scouts.

So, on Page 17, line 4, the bill provides that:

A person may not give a free milk product or a free frozen dairy product to a customer. It goes on to state that this language does not prohibit a person from:

- Providing tasting samples to an individual; or
- Donating products for charitable purposes.

Continuing on Page 17, line 16, the committee was also concerned about the directive that the Milk Marketing Board could prohibit or regulate the giving of gifts by dealers to retailers."

The committee wondered whether there should be a dollar limit or a reference to frequency.

Here is the committee's thought process:

- When you look at dollar amounts, what's the point at which someone can be bought off?
- A \$20 box of chocolates says "Merry Christmas."
- Does a trip to Paris carry some different implication? What if it's only a weekend in Medora? Where do you draw the line?
- If A gives B a box of chocolates, is it because they have a dealer/retailer relationship, or is it because they are friends and neighbors, and that's what friends and neighbors do?

Ultimately, Mr. Weisgerber reminded the committee that these are all restrictions that the industry has imposed on itself and that many of the unanswerable questions I just posed were probably the reason that the verbiage has remained unchanged through all of these years.

Current law also contains several sections that reference or parallel 28-32 with respect to various administrative and regulatory functions. 28-32 is a reference you will hear with some frequency. It's the state's Administrative Practices Act. It governs what agencies, boards, and commissions must do as they make their rules and it governs the court-like procedures that must take place when an agency, a board, or a commission charges a person with violating those rules.

Now if you have the main chapter -- i.e. 28-32, and you have outliers i.e. chapters such as this that have their own references to how administrative actions should take place, what often happens is that the main chapter (28-32) is changed, but not all the outliers. Then, one isn't sure which version ought to be followed.

The interim committee opted for simplicity and clarity. It removed all of the outlying sections and said on Page 19, lines 3 through 5:

- All administrative and regulatory functions follow chapter 28-32.

On page 19, in the middle of the page -- line 13, you will see one set of numbers crossed out and another set underlined. This is called a cross reference reconciliation.

This is a section of the law that makes a reference to many boards, including the Milk Marketing Board. It has to do with a new Governor's right to appoint his or her own people to an administrative board. It references the section that refers to the Milk Marketing Board under current law.

If this bill were to pass, we would in effect be repealing current law and the provisions of the new bill would then govern the Milk Marketing Board. These new provisions don't have the same section numbers as the old law, and so we are merely reconciling the section references.

The very last line of the bill again directs that the old law be removed from the books and that this bill, in whatever form it is ultimately passed, will govern the workings of the Milk Marketing Board.

Let me bring you full circle in terms of the interim committee effort. This bill cleans up the chapter of law that relates to the Milk Marketing Board. With very few exceptions, it does not significantly change current law. The interim committee was very aware that some people would have liked to see a bill that did away with the board or that changed the licensing process. The interim committee was also very aware that this could potentially have beneficial results for some and detrimental effects for others.

Without sufficient evidence to conclusively determine the nature and scope of such effects, the committee concluded that the most appropriate approach would be to offer a more streamlined and comprehensible chapter so that those who wished to pursue changes could more readily do so and that those who needed to understand the actions of the North Dakota Milk Marketing Board, as they related to any potential changes, would likewise be better prepared to evaluate any and all future proposals.

North Dakota Milk Marketing Board Study

Background

The domestication of milk-producing animals has an anthropological history that covers thousands of years. Such animals were part of the subsistence farming efforts engaged in by nomadic tribes and the animals' protection and feeding nurtured the symbiotic relationship between the animals and the herders. In more recent societies, dairy animals not only produced milk for the use of individuals and collectives or villages, but also served in multifaceted roles that included functioning as draught animals and toward the end of their lives, as meat.

The actual commercialization of milk production came with industrialization and urbanization. So too did governmental intervention in the milk markets. The Capper-Volstead Act of 1922 provided a limited antitrust exemption for United States dairy cooperatives and in the ensuing decade, states began to adopt price controls. It was at that same time that federal milk marketing orders came into being.

Today, milk and dairy product pricing is either market-determined or administratively determined through a variety of public sector programs and policies. In addition to the federal milk marketing orders and price supports, there are import restrictions, export subsidies, domestic and international food aid programs, state-level milk marketing programs and since 1996, a multistate milk pricing organization. The list of interventions would not be complete without mention of the Chicago Mercantile Exchange, where wholesale dairy product prices are determined and futures and options contracts for milk and dairy products are traded.

Federal Milk Marketing Orders

The marketing of milk has several complicating factors. Milk is produced daily. It is perishable. It is bulky and expensive to transport and the production and retail cycles require reserves. Federal milk marketing orders were and continue to be one method by which consumers can be ensured of having an adequate supply of fresh and wholesome fluid milk and dairy producers can be guaranteed stable and reliable milk markets. These ends are achieved through the promotion and maintenance of orderly milk marketing conditions.

Federal milk marketing orders are put into place at the request of local dairy producers and their cooperatives and funded by the milk handlers. No tax dollars are directed toward their support.

Federal milk marketing orders classify milk according to its use, establish minimum prices that regulated milk buyers pay for milk, pool milk receipts and determine a blend or uniform price to be paid to dairy producers, establish regulations or pooling requirements to determine what milk is eligible to receive the blend price, ensure that milk is accurately tested, weighed, and classified, and provide useful market information. Federal milk marketing orders do not establish minimum retail prices, guarantee a dairy farmer a milk market or a profitable milk price, control milk production, or establish quality requirements.

Milk is a classified product. Class I milk is used for bottling. Class II milk is used for creams and soft manufactured products. Class III milk is used for cheese, and Class IV milk is used for butter and powder. Under a classified marketing system, handlers would pay for milk based on how it was used. Milk sold for bottling has a much higher value than milk sold for use in cheese and butter production. Under a pooling system, the total classified value of milk within a marketing area is "pooled" and producer price differentials are used to ensure that all producers within the pool share equally in the market utilization.

Portions of North Dakota have participated in federal milk marketing orders since 1967. The original Minnesota-North Dakota Federal Order included Fargo, Moorhead, Grand Forks, Thief River Falls, and the surrounding milk sheds. In June 1976, that order merged with orders covering Minneapolis-St. Paul, Duluth-Superior, and Southeastern Minnesota-Northern Iowa to form the Upper Midwest Federal Order. In 2000 the Upper Midwest Federal Order merged with the Chicago Regional Order and was renamed the Upper Midwest Order or Federal Order No. 30. Today, the eastern counties of Barnes, Cass, Cavalier, Dickey, Grand Forks, Griggs, LaMoure, Nelson, Pembina, Ramsey, Ransom, Richland, Sargent, Steel, Traill, and Walsh participate in that order.

In 2004, 169 million pounds of North Dakota milk were pooled under Federal Order No. 30. That amounted to 36 percent of North Dakota's milk production and 1 percent of the order's total production. In 2013, 226 million pounds of North Dakota milk were pooled under Federal Order No. 30. That amounted to 66 percent of North Dakota's production and 0.7 percent of the order's total production.

The committee was told that if a dairy farmer in the western two-thirds of North Dakota marketed approximately 1 million pounds of milk per month under the jurisdiction of Federal Order No. 30, rather than under the individual handler pool pricing system, the bottling plant that accepted the producer's milk would still be paying the same amount, but that money would be taken and shared among producers throughout the entire federal order. A dairy farmer who resides south of Mandan indicated that he milks 600 cows three times per day. He said, if he had to market his milk

under Federal Order No. 30, his personal economic loss would have been \$330,000 last year. He estimated that the total annual loss to western North Dakota producers would be \$1.6 million.

Given the size of the economic impact, the committee questioned why dairy producers in the eastern portion of the state did not simply extricate themselves from the federal order. Thirty years ago, North Dakota dairy producers came to the Legislative Assembly for a resolution asking that the Governor and the Congressional delegation assist them in so doing. Unfortunately, federal law requires a vote of all those affected before an order can be changed. Of the 13,000 producers in Federal Order No. 30, North Dakota producers number approximately 100.

North Dakota Milk Marketing Board

The regulatory program governing the marketing of milk in the western two-thirds of North Dakota came into being in 1967, with the formation of the North Dakota Milk Marketing Board. Two years later, the Legislative Assembly provided for some amendments and the chapter has stayed relatively untouched since that time.

The first section of the chapter begins with 13 declarations, including the fact that milk is a necessary article of food for human consumption and that its production, transportation, processing, storage, distribution, and sale is an industry affecting the public health and interest. It also provides that "unfair, unjust, destructive, and demoralizing trade practices have been and are now being carried on in the production, transportation, processing, storage, distribution, and sale of milk, milk products, and frozen dairy products, which trade practices constitute a constant menace to the health and welfare of the inhabitants of this state and tend to undermine the sanitary regulations and standards of content and purity of milk." In order to prevent the occurrence and reoccurrence of such conditions and practices, the section declares that it is necessary to invoke the police powers of the state to provide constant supervision and regulation of the milk industry. The stated purpose of the chapter is to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the milk industry. In order to accomplish this, a five-member board is created and given the authority to supervise, investigate, and regulate every segment of the state's dairy industry. The only exceptions are matters of health and sanitation, which are under the purview of other governmental agencies, and the sale of raw milk that is not Grade A. The board consists of a dairy producer, a processor, a retailer, and two consumers, all appointed by the Governor.

By statute, the North Dakota Milk Marketing Board is required to designate milk marketing areas that cover the entire state and to establish uniform minimum prices that processors must pay to dairy producers for raw milk. The prices are to reflect the available supply of raw milk, the adequacy of the reserve supply of raw milk, the balance between production and consumption, the cost of dairy feed, farm wage rates, and other factors, as appropriate. Furthermore, the board must ensure that the minimum prices are beneficial to the public interest, protect dairy producers, and preserve an adequate supply of pure and wholesome milk to the inhabitants of this state. The board must also establish, for each marketing area, the minimum prices for sales of milk products by processors or distributors to retailers and for sales of milk products by any person to consumers.

In addition to the mandatory setting of prices, the board is authorized to establish minimum prices for sales of milk products by processors to distributors; sales of frozen dairy products by a processor, distributor, or retailer to any person; sales of milk products by a processor to another processor or by a distributor to another distributor; and sales of milk products or frozen dairy products not otherwise previously addressed. The board is also authorized to establish the maximum prices for which milk products may be sold by a processor, a distributor, or a retailer to any person.

The Century Code requires the board to administer a process for licensing dairy producers, processors, distributors, and retailers and it establishes various criteria that must be met, prior to the issuance of a license. The Century Code also requires the board to prohibit or regulate disruptive trade practices and provides an illustrative, but not an exclusive, list of what those practices could entail.

The North Dakota Milk Marketing Board is supported through an assessment paid by licensed processors. The amount of the assessment is 14 cents per hundredweight on milk or milk equivalents used in the manufacturing of milk products and frozen dairy products.

Consideration

As the committee reviewed the existing statutes and listened to concerns articulated about the North Dakota Milk Marketing Board, it could find no indication that the board operated outside of its statutory authority. Having concluded that, the next point of inquiry was whether the statutory authority was still appropriate, nearly one-half century after it was first enacted. In order to do that, the committee had to overcome the hurdle of interminable sentences in interminable paragraphs that precluded readily discernible content. The committee asked for a rewrite of the chapter so that it and others interested in the chapter could more readily determine whether changes were needed, and if so, what those changes could, would, or should be.

The clarification provided by the rewrite then allowed the committee to focus on what it believed was the undercurrent of discontent regarding the marketing of milk in North Dakota--i.e., the existing licensure process and specifically, the licensing of distributors. Licensure is accomplished by means of an application process. Within 30 days of receiving an application, the North Dakota Milk Marketing Board must either issue the requested license or notify the applicant of the date and time at which a hearing will be held to receive evidence relative to the application.

With respect to distributor licenses, the North Dakota Milk Marketing Board has the statutory authority to deny licensure if it determines that:

- Persons currently licensed by the board are supplying an adequate variety and quantity of high-quality milk products and frozen dairy products to retailers and consumers in this state;
- Deliveries are being made with sufficient regularity and frequency; and
- The issuance of additional distributor licenses will result in an excess of processing plant capacity, tend to increase to unsatisfactory levels the average unit processing or average unit distribution costs for persons already licensed by the board, or otherwise tend to prevent achievement of the chapter's objectives.

In addition to requiring that the North Dakota Milk Marketing Board make determinations regarding the matter addressed in the preceding paragraph, the Century Code also requires that, as a condition of receiving a distributor's license, an applicant declare that he or she:

- Will not sell milk products or frozen dairy products to any person who is not licensed in accordance with the chapter;
- Will not purchase milk products or frozen dairy products from any person who is not licensed in accordance with the chapter;
- Will sell such milk products or frozen dairy products as are customarily handled by a distributor to any retailer who desires to purchase such products from the distributor and has a place of business in any community in which the distributor distributes or sells milk products or frozen dairy products; and
- Will offer to any retailer the same frequency of delivery and the same in-store services as are customary in the community.

The committee was made aware of one applicant for a distributor's license who refused to make the required declarations on the application. The applicant indicated that, without having his sales staff canvass the area for potential clients, a declaration of the sort currently required would be purely speculative. He indicated that his company is permitted to distribute milk to its clients in 22 of the 23 states it serves. North Dakota is the exception. The company in question offers 14,000 to 15,000 products to its customers, including cigarettes and tobacco products, beverages, candy, groceries, health and beauty products, food service components, automotive products, and store supplies, including can liners, toilet tissue, paper towels, floor cleaners, etc. He indicated that while the company requires a minimum order, the array of products that it carries does not make the requirement burdensome.

The committee was told that there are 78 distributors in the state and while adding one additional distributor might not have a significant impact, relaxing the qualifications for a distributor's license would enable a host of other equally qualified companies to request licensure as well.

The committee determined that the North Dakota Milk Marketing Board had its genesis because of the need to ensure the availability of fluid milk at a price that balanced the interests of producers, consumers, and all entities in between. The committee was cognizant of stated concerns about large distributors wanting to provide goods and services to more lucrative accounts along well-traveled routes, but perhaps being less committed to lower-volume accounts in the more remote regions of this state. The committee ultimately determined that while changes to the licensure of distributors could provide benefits and opportunities, there was also an outside possibility that there might be certain detrimental effects. Without sufficient evidence to conclusively determine the nature and scope of such effects, the committee concluded that the most appropriate approach would be to offer a more streamlined and comprehensible chapter so that those who wished to pursue changes could more readily do so and that those who needed to understand the actions of the North Dakota Milk Marketing Board, as they related to any potential changes, would likewise be better prepared to evaluate any and all future proposals.

Recommendation

The committee recommends House Bill No. 1027 to rewrite those portions of the Century Code that pertain to the North Dakota Milk Marketing Board.

Testimony on HB 1027
Presented to the House Agriculture Committee
By Jan Sliper, Food Service Director, West Fargo Schools

#2
1/8/15

1 Mr. Chairman and members of the House Agriculture Committee, my name is Jan
2 Sliper. I am the Food Service Director for the West Fargo School District and my testimony
3 is to request consideration to amend a portion of HB 1027.

4 Section 4.1-26-17, # 5, states that in order to purchase milk products at wholesale
5 prices, school districts are listed (among others) as entities that may be licensed as retailers.
6 Then in #6 under this section, it states that a separate licensure for each place of business is
7 required. We recommend a statement be included in #6 saying that school districts be
8 licensed as a district rather than by individual schools within the district.

9 Section 4.1-26-13, #3, states that the quantity discount must be based upon the
10 quantity of product the retailer purchased for resale at each place of business. We
11 recommend a statement be included saying that the quantity discount for school districts is
12 based upon total purchases for the district and not by individual schools within the district.

13 I apologize for not being available to answer questions in person. However, if there
14 are questions from the committee, I can be reached by e-mail at sliper@west-
15 fargo.k12.nd.us or by telephone at 701-499-1837.

ND MILK MARKETING BOARD - HOUSE BILL NO. 1027

Presentation notes

L. Anita Thomas, J.D., LL.M.

Senior Counsel, ND Legislative Council

About every 4-6 years, it seems that a bill surfaces to repeal the Milk Marketing Board. The claims are that it is heavy handed, it promotes protectionism at the expense of free enterprise, that it is a rogue agency, etc. In the 2013 session, there was a legislator who owned a convenience store in western North Dakota and she could not understand why her franchisor could deliver virtually every product she sold except for fluid milk and secondly, why she had to purchase her fluid milk from a local distributor who allegedly charged her more per gallon than she was paying at retail in Fargo.

That is how this study came about. Specifically, the interim committee was directed to examine:

- The milk board's structure;
- Its statutory duties;
- The manner in which it prescribes and regulates producer, distributor, and retail prices throughout the state;
- The manner in which it investigates and resolves concerns regarding the price and availability of milk throughout the state; and
- Any policy or regulatory changes that the board has implemented, in order to address pricing issues and the availability of milk in the western portion of this state.

The study was also to address whether the continued regulation of the Grade A dairy industry is best accomplished by the board in its current form and operating under its current statutory directives, whether changes are needed to the board or its statutory directives, and whether there are other methods by which the desired results could be effectively and efficiently achieved.

Unlike other commodities, the marketing of milk has several complicating factors:

- Milk is produced daily;
- It is perishable;
- It is bulky and expensive to transport; and
- The production and retail cycles require reserves.

Statutes and regulations are the historical method by which consumers were guaranteed an adequate supply of fresh and wholesome fluid milk and dairy producers were guaranteed stable and reliable milk markets. It's a balancing act.

In North Dakota, the regulatory program governing the marketing of milk came into being in 1967, with the formation of the North Dakota Milk Board. Two years later, the Legislative Assembly provided for some amendments and the chapter has stayed relatively untouched since that time.

Overview of Current Law

By statute, the North Dakota Milk Marketing Board is required to designate milk marketing areas that cover the entire state and to establish uniform minimum prices that processors must pay to dairy producers for raw milk. The prices are to reflect:

- The available supply of raw milk;
- The adequacy of the reserve supply of raw milk;
- The balance between production and consumption;
- The cost of dairy feed;
- Farm wage rates; and
- Other factors, as appropriate.

Furthermore, the board must ensure that the minimum prices:

- Are beneficial to the public interest;
- Protect dairy producers; and
- Preserve an adequate supply of pure and wholesome milk to the inhabitants of this state.

The board must also establish, for each marketing area, the minimum prices for sales of milk products by processors or distributors to retailers and for sales of milk products by any person to consumers. In addition to the mandatory setting of prices, the board is authorized to establish minimum prices for:

- Sales of milk products by processors to distributors;
- Sales of frozen dairy products by a processor, distributor, or retailer to any person;
- Sales of milk products by a processor to another processor or by a distributor to another distributor; and
- Sales of milk products or frozen dairy products not otherwise previously addressed.

The board is also authorized to establish the maximum prices for which milk products may be sold by a processor, a distributor, or a retailer to any person.

The North Dakota Century Code requires the board to administer a process for licensing dairy producers, processors, distributors, and retailers and it establishes various criteria that must be met, prior to the issuance of a license. The Century Code also requires the board to prohibit or regulate disruptive trade practices and provides an illustrative, but not an exclusive, list of what those practices could entail.

The North Dakota Milk Marketing Board is supported through an assessment paid by licensed processors. The amount of the current assessment is 14 cents per cwt on milk or milk equivalents used in the manufacturing of milk products and frozen dairy products.

As the interim committee reviewed the existing statutes and reviewed concerns articulated about the North Dakota Milk Marketing Board, it could find no indication that the board operated outside of its statutory authority. Whatever the board was doing, it was because the Legislative Assembly had at one point in time required that such be done.

The next point of inquiry for the interim committee was whether the statutory authority was still appropriate, nearly one-half century after it was first enacted. In order to do that, the committee had to overcome the hurdle of interminable sentences in interminable paragraphs that precluded readily discernible content.

In other words, the committee asked for a rewrite of the chapter so that it and others interested in the chapter could more readily determine whether changes were needed, and if so, what those changes could, would, or should be.

For the record, a rewrite is an effort that involves looking at every word and sentence in the chapter.

- We modernize the language.
- We clarify the language.
- We remove duplicative and unnecessary language.

Although the goal is not to change the intent of that which the Legislative Assembly enacted, we do recognize that sometimes, what worked 40 or 60 years ago is perhaps not as pertinent or relevant today. Those sorts of changes are proposed as well.

We try to use more sections and certainly more subsections and subdivisions, so one doesn't feel like one was reading prose in those interminable paragraphs when all one really want to find out was:

- What are the criteria for licensure?

In order to make this happen, we have to craft a new chapter - which is the bill before you.

The chapter, as it appears in current law, begins with 13 declarations including the fact that:

Milk is a necessary article of food for human consumption; and that
Its production, transportation, processing, storage, distribution, and sale is an industry affecting the public health and interest.

It also provides that "unfair, unjust, destructive, and demoralizing trade practices have been and are now being carried on in the production, transportation, processing, storage, distribution, and sale of milk, milk products, and frozen dairy products, which trade practices constitute a constant menace to the health and welfare of the inhabitants of this state and tend to undermine the sanitary regulations and standards of content and purity of milk."

The current law also articulates a purpose for the chapter -- i.e. to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the milk industry.

Those sections are gone - Not because they are not important, but because they are not statutory.

They are testimony.

They do not tell people or entities what they must do or may not do.

They merely articulate philosophy and as one of the interim committee members was fond of saying:

"We do not need to make the Century Code any longer than it already is."

The proposed bill begins with definitions.

We removed several that were unnecessary.

We do not need to define person. That's already covered in the general definitions of the Century Code.

We really do not need to define obvious designations -- such as "licensee. "

Also missing from the list are products of yore such as:

- Mellorine;
- Olarine;
- Sherine; and
- Sherbines.

On page 4, in the section regarding the membership of the Milk Marketing Board, we updated the names of the nominating groups.

Whereas current law literally drew a line between certain counties and required that three members come from one side of that line and two members come from the other, the rewrite requires the governor to ensure a "geographic balance."

On the bottom of page 4, you will see the compensation section.

Milk Marketing Board members are entitled to receive compensation in the amount established by the board, but not exceeding \$135 per day.

Current law had capped their annual per diems at \$1500.

This was removed by the interim committee.

So, if per chance board members have to work for more than 11 days a year, they can actually get paid for that service.

At the top of page 5, current law requires that the board meet at least every 60 days. The board requested that this requirement be removed, so that they are not statutorily required to meet if there is no good reason to do so.

The safeguard provision is that if 3 of the 5 members petition the chairman for a special meeting, the chairman must call one within 7 days.

On page 5, beginning on line 5, you will see a list of the Board's powers.

Here the interim committee pulled together some pretty standard language about enforcing the chapter, compensating personnel, contracting, etc.

The interim committee did remove language that authorized the board to "supervise, investigate, and regulate every segment of the state's dairy industry." The committee was not comfortable with such limitless authority being placed in the hands of a board.

At the bottom of page 5, the bill addresses milk marketing areas. Like current law, it does not indicate how many there ought to be and it does not indicate their boundaries. However, if the board sees the need to change those boundaries, or to increase or decrease the number of milk marketing areas, that must be done under 28-32 so that there is notice, a hearing, public testimony, etc.

On page 6, we get into the requirements that the board establish a milk stabilization plan for each milk marketing area.

The plans must include the minimum price that processors located within that marketing area have to pay to dairy farmers for raw milk and they have to include the minimum price that:

- A processor must charge a retailer;
- A distributor must charge a retailer; and
- Any person must charge a consumer.

Milk stabilization plans can also address other areas, as reflected beginning on page 7.

Those can include broader range minimum prices, certain maximum prices, quantity discounts, and wholesale price filings, and they may take into account packaging cost differences. Home-delivered goods may also be a different price than those sold in stores.

On page 10, line 10, you will see what the interim committee called the domino effect.

This section provides that whenever the minimum prices that processors must pay to farmers change, the board must also ensure that simultaneous changes occur in all other minimum and maximum prices established in accordance with the chapter.

Also on page 10, we get into who must be licensed. Licensure extends to:

- Dairy Farmers;
- Processors;
- Distributors; and
- Retailers.

Current law states: that "[s]chools, hospitals, state institutions, and charitable institutions may obtain "retailer" licenses from the board regardless of whether they fall within the definition of "retailer."

This was somewhat puzzling to the committee. But, Mr. Weisgerber explained that the purpose of the verbiage was to ensure that such entities could purchase milk products and frozen dairy products at wholesale prices.

So, on P11 L14, we literally said that "in order to effectuate the purchase of milk products and frozen dairy products at wholesale prices, the following entities may be licensed as retailers:

- School districts;
- Nonpublic schools;
- Hospitals;
- State institutions; and
- Not-for-profit entities.

At the top of page 12, the law requires that before processors can be licensed by the board, they must be licensed by the Agriculture Commissioner.

Similarly, before distributors can be licensed by the board, they must be licensed by the Agriculture Commissioner.

These provisions are financially focused. Processors and distributors must demonstrate the ability to pay those from whom they purchase milk.

Dairy farmers have to be "inspected" by the Agriculture Commissioner or the state department of health, before they can be licensed.

Once an application is filed, the board has 30 days within which it must:

- Issue the license; or
- Notify the applicant of the date on which a hearing will be held to receive evidence relative to the application.

The board has 30 days after the hearing within which to notify the applicant of its decision. If the board cannot do this within the 30 days, it must do so "as soon thereafter as practicable."

Whereas the current law mixes together grounds for licensure denial with grounds for suspension and revocation of a license, the bill separates those concepts.

Beginning on the bottom of page 12, you will see that the board can deny a processor's license or a distributor's license if:

- Persons currently licensed by the board in that capacity are supplying an adequate variety and quantity of high quality milk products and frozen dairy products to retailers and consumers in this state;
- Deliveries are being made with sufficient regularity and frequency; and
- The issuance of additional licenses of the type sought will:
 - a. Result in an excess of processing plant capacity;
 - b. Tend to increase to unsatisfactory levels the average unit processing or average unit distribution costs for persons already licensed by the board; or
 - c. Otherwise tend to prevent achievement of the objectives of this chapter.

In addition to having stated grounds for denying a license, the board can also impose certain conditions on the issuance of a license.

In the case of a distributor, for instance, and I am now in the middle of page 13, the board can require declarations that the person:

- Will not sell milk products or frozen dairy products to any person who is not appropriately licensed;
- Will not purchase milk products or frozen dairy products from any person who is not appropriately licensed;
- Will sell such milk products or frozen dairy products as are customarily handled by a distributor to any retailer who:
 - Wishes to purchase the products from the distributor; and
 - Has a place of business in any community in which the distributor distributes or sells milk products or frozen dairy products.

Finally, the distributor must promise to offer to any retailer the same frequency of delivery and the same in-store services as are customary in the community.

Even though everybody knows what is meant by "in the community," we defined a "community" to mean a city, together with any commonly recognized residential or business area adjacent to the city.

This is the point at which the interim committee had some discussions about "cherry picking." Most distributors would gladly service what were referred to as the more lucrative accounts along the interstate.

The unresolved question is who would service the smaller accounts in the more remote areas of the state?

On page 14, you will see that licenses, once issued, are effective until:

- There is a change of ownership or of location;
- The license is suspended or revoked; or
- The business that is licensed has been discontinued or has been inactive for more than 30 days.

There are no license fees.

The board supports itself through assessments on licensed processors.

When the current law was written, a fee structure was phased in. It was capped at 12 cents per cwt beginning July 1, 1995. It was capped at 13 cents beginning July 1, 1997. It was capped at 14 cents beginning July 1, 1999. There it has stayed for the past 15 years.

The board indicated to the interim committee that, in light of rising expenses, it would like the Legislative Assembly to consider raising this cap to 18 cents per cwt. Processors indicated that they were supportive of this increase and so it was included on page 14, line 16.

Disruptive Trade Practices are found on Page 16. This is a list of "Though shalt nots." The problem with the current law is that it begins by stating: "[T]he board shall by regulation prohibit or regulate each of the following practices. . . .

The first question is:

Are the activities "prohibited" or are they "regulated?"

Is one completely precluded from engaging in the activity or can one engage in the activity under certain circumstances determined by the board?

The interim committee believed that making such determinations should be within the bailiwick of the Legislative Assembly.

Current law goes on to say that the list of practices is "solely for the purpose of illustrating the broad scope of the board's authority under the said subsection. Such listing is not intended to be an exclusive enumeration of those practices, methods, devices, schemes, arrangements, and activities which the board is authorized to prohibit or regulate."

In other words, the section currently provides that the board can determine whether it ought to regulate or prohibit certain activities and then it goes on to say, "Oh by the way," there may be more things that the board may want to regulate or prohibit.

Again, this is not the board's doing. This is language that was enacted many years ago.

Rather than delegating to the board the authority to determine whether an activity is to be prohibited or regulated, the proposed language clarifies which activities are prohibited and which are to be regulated, using current North Dakota Administrative Code provisions as a guide.

Let me, however, point out a couple of changes.

Current law states that the board may prohibit or regulate the "giving of a free milk product or a free frozen dairy product to a customer." The interim committee was concerned that this language could preclude the giving of tasting samples at an ice cream counter or having the local grocer provide ice cream cups to boy scouts.

So, on Page 17, line 4, the bill provides that:

A person may not give a free milk product or a free frozen dairy product to a customer. It goes on to state that this language does not prohibit a person from:

- Providing tasting samples to an individual; or
- Donating products for charitable purposes.

Continuing on Page 17, line 16, the committee was also concerned about the directive that the Milk Marketing Board could prohibit or regulate the giving of gifts by dealers to retailers."

The committee wondered whether there should be a dollar limit or a reference to frequency.

Here is the committee's thought process:

- When you look at dollar amounts, what's the point at which someone can be bought off?
- A \$20 box of chocolates says "Merry Christmas."

- Does a trip to Paris carry some different implication? What if it's only a weekend in Medora? Where do you draw the line?
- If A gives B a box of chocolates, is it because they have a dealer/retailer relationship, or is it because they are friends and neighbors, and that's what friends and neighbors do?

Ultimately, Mr. Weisgerber reminded the committee that these are all restrictions that the industry has imposed on itself and that many of the unanswerable questions I just posed were probably the reason that the verbiage has remained unchanged through all of these years.

Current law also contains several sections that reference or parallel 28-32 with respect to various administrative and regulatory functions. NDCC chapter 28-32 is the state's Administrative Practices Act. It governs what agencies, boards, and commissions must do as they make their rules and it governs the court-like procedures that must take place when an agency, a board, or a commission charges a person with violating those rules.

Now if you have the main chapter -- i.e. 28-32, and you have outliers i.e. chapters such as this that have their own references to how administrative actions should take place, what often happens is that the main chapter (28-32) is changed, but not all the outliers. Then, one isn't sure which version ought to be followed. Is it the later passed or is it the one specific to milk.

The interim committee opted for simplicity and clarity. It removed all of the outlying sections and said on Page 19, lines 3 through 5:

- All administrative and regulatory functions follow chapter 28-32.

On page 19, in the middle of the page -- line 13, you will see one set of numbers crossed out and another set underlined. This is a cross reference reconciliation.

This is a section of the law that makes a reference to many boards, including the Milk Marketing Board. It has to do with a new Governor's right to appoint his or her own people to an administrative board. It references the section that refers to the Milk Marketing Board under current law.

If this bill were to pass, we would in effect be repealing current law and the provisions of the new bill would then govern the Milk Marketing Board. These new provisions don't have the same section numbers as the old law, and so we are merely reconciling the section references.

The very last line of the bill again directs that the old law be removed from the books and that this bill, in whatever form it is ultimately passed, will govern the workings of the Milk Marketing Board.

Let me bring you full circle in terms of the interim committee effort. This bill cleans up the chapter of law that relates to the Milk Marketing Board. With very few exceptions, it does not significantly change current law. The interim committee was very aware that some people would have liked to see a bill that did away with the board or that changed the licensing process. The interim committee was also very aware that this could potentially have beneficial results for some and detrimental effects for others.

Without sufficient evidence to conclusively determine the nature and scope of such effects, the interim committee concluded that the most appropriate approach would be to offer a more streamlined and

comprehensible chapter so that those who wished to pursue changes could more readily do so and that those who needed to understand the actions of the North Dakota Milk Marketing Board, as they related to any potential changes, would likewise be better prepared to evaluate any and all future proposals.

This bill was not amended in the House.

Good morning Mr. Chairman and members of the Senate Agriculture Committee.

My name is Kim Kessler, I own and operate a grocery store in Beulah and am Chairman of the ND Grocers Association.

I represent both small and large Grocers, and we support this bill. Milk is such a perishable product and can be a real hardship for stores. With the Shelf life of milk being very short, we cannot have too much on hand or it will be a loss. We do not want to run out of milk, because our customers count on us to have this necessity on hand at all times. We cannot be like the drug stores and dollar stores that might sell a couple of cooler doors of milk at a loss, and then be out of milk until the next week when they get another delivery.

We would appreciate your support of House Bill 1027, it is very important for small and large grocers alike.

This concludes my direct testimony. Thank You. I will try to answer your questions if you have any.