

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

AGRICULTURE COMMITTEE

Thursday, May 8, 2014
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Jim Schmidt, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Bill Amerman, Chuck Damschen, Bob Hunsakor, Dennis Johnson, Dwight Kiefert, Diane Larson, David S. Rust, Wayne Trottier, John Wall; Senators Jim Dotzenrod, Robert Erbele, Larry Luick

Members absent: Representative Tracy Boe; Senators Bill L. Bowman, Joe Miller

Others present: See attached [appendix](#)

It was moved by Senator Erbele, seconded by Representative Rust, and carried on a voice vote that the minutes of the April 15, 2014, meeting be approved as distributed.

NORTH DAKOTA MILK MARKETING BOARD - STUDY

At the request of Chairman Schmidt, Committee Counsel presented a bill draft [[15.0082.01000](#)] to rewrite North Dakota Century Code sections pertaining to the North Dakota Milk Marketing Board.

Section 1. Declaration of Policy Relating to Milk

Committee Counsel said this section contains 13 declarations of policy relating to milk. She said some of the declarations are quite benign, e.g., that milk is a perishable commodity and easily contaminated with harmful bacteria. She said others are much more graphic, e.g., unfair, unjust, and demoralizing trade practices; chaotic conditions; etc. She said one feature that all 13 declarations share is that not one of them imposes a duty or a prohibition on anyone. She said they are all background information. She said they belong in the legislative history, not in the North Dakota Century Code. She said removal is being recommended.

Section 2. Purpose

Committee Counsel said this section sets forth the chapter's statement of purpose. She said this too is legislative history--not law. She said the section states that the purpose of the chapter is to "protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the milk industry." She said that statement might have reflected the reason that the bill was introduced in 1967. She said it might even have been the reason that the bill was passed. She said whether or not that statement is accurate or relevant today could certainly be a point of discussion.

Committee Counsel said Legislative Council drafting guidelines direct that such sections not be used. She said there is a very practical reason for this directive. She said, often, the purpose of a bill as introduced, is not the purpose of the bill as enacted, or as amended in later years. She said that raises a question with respect to the appropriateness of amending the original purpose to reflect the current purpose. She said if that is not done, the end result could be a bill that contains declarations which conflict with statutory requirements. She said removal of this section is being recommended, as well.

Section 3. Definitions

Committee Counsel said there are basic rules that are generally applied to the drafting of definitions. She said Rule No. 1 is that it is not necessary to define the obvious. She said, the term "licensee," for instance, is broadly understood. She said there is no point in providing that the term means a person who holds a license.

Committee Counsel said Rule No. 2 is that it is not necessary to define words that are already defined in Title I of the Century Code and thereby applicable to the entire code. She said "person" is one such word.

Committee Counsel said Rule No. 3 is that if a word or phrase is not used in the chapter, it is not necessary to define it. She said an example of this is the phrase "adjudicatory matter."

Committee Counsel said Rule No. 4 is that a definition section should contain only definitions. She said if there are substantive matters that apply to the definition, those need to be in a separate section. She said an example of this is found in the definition of a "distributor."

Committee Counsel said the definition of a "frozen dairy product" contains references to products that could not be found in a dictionary or via an Internet search. She said "sherine" and "sherbine" are among those. She said "mellorine" was found, and "olarine" seems to exist only in the laws of North Dakota and Louisiana. She said one should determine whether these products still exist and whether they are produced or sold in this state. She said those determinations will indicate whether the references need to remain in the Century Code.

Committee Counsel said a "frozen dairy product" is described as any frozen dairy product, other than baked goods, that contains milk solids not fat, butterfat, or a milk derivative, and which is found by the North Dakota Milk Board to require regulation in order to effectuate the purposes of the chapter. She said if the committee determines that Section 2, the statement of the chapter's purpose, should be removed, it will necessitate a further reworking of this definition.

Committee Counsel said there is also a concern that the board is given the power to determine whether something falls within its regulatory authority. She said the committee may wish to discuss whether this is an impermissible delegation of legislative authority.

Committee Counsel said the section contains a definition of milk and a definition of a "milk product." She said the latter appears to include multiple versions of fluid milk. She said it would be appropriate to determine if all of the various listed products are still appropriately included within the definition of a "milk product."

Committee Counsel said, in addition to the 22 listed products, a "milk product" can also mean any other product that contains milk solids not fat, butterfat, or a milk derivative, and which is manufactured in the semblance of one of the products listed in the subsection and found by the board to require regulation. Again, she said, the committee may wish to discuss whether this board determination is an impermissible delegation of legislative authority.

Committee Counsel said this section also includes a list of products that do not fall within the definition of a milk product. She said baked goods are among the products that are not considered to be milk products. She said if there is some legitimate reason for such a declaration, it would be helpful to know about it. Otherwise, she said, there is the opportunity to eliminate unnecessary verbiage.

Section 4. North Dakota Milk Marketing Board

Committee Counsel said the North Dakota Milk Marketing Board has five members. She said all are appointed by the Governor from a list of names submitted by various interest groups. She said the rewrite attempts to modernize the references to those groups. She said the five members include a dairy farmer, a processor, a retailer, and two consumer representatives, neither of whom may be engaged in the milk business. She said the reference to engagement in the "milk business" is rather nebulous. She said a preferred alternative might be to provide that neither consumer representative may have a financial interest in a dairy farm nor in an entity that processes, distributes, or sells milk products or frozen dairy products.

Committee Counsel said the terms of office are five years in length and they are staggered. She said current law does not limit the number of terms that a member may serve.

Committee Counsel said board members are paid the amount established by the board and that is capped at \$135 per day plus the standard expense reimbursement.

Committee Counsel said the committee may wish to look at the mandatory bonding of board members. She said other rewrite efforts have simply provided the authority for boards to employ, bond, and compensate necessary personnel.

Committee Counsel said the board is authorized to employ a director and a legal counsel.

Committee Counsel said the board is required to meet at least every 60 days at the call of the chairman or at the call of a majority of the board. She said, in other cases, the law provides that the chairman shall call all board meetings and shall call a special meeting within seven days when petitioned to do so by two of the five board members.

Section 5. General Powers of the Board

Committee Counsel said the bill draft uses modernized and standardized language to provide that the North Dakota Milk Marketing Board may do all things necessary and proper to enforce the chapter. She said the current law provides the board with the power to supervise, investigate, and regulate every segment of the state's dairy industry. She said the only exceptions appear to be those areas pertaining to health and sanitation. She said those are governed by other state or local entities. She said the sale of raw milk that is not Grade A is also exempt from the board's authority. She said for purposes of this study, that breadth of statutory authority afforded the board is something that the committee may wish to examine.

Committee Counsel said this section authorizes the board to act as a mediator or arbitrator in any controversy or issue among or between dairy farmers, processors, distributors, retailers, or consumers, if the controversy or issue pertains to the production, transportation, processing, storage, distribution, or sale of milk products or frozen dairy products. She said the statute does not indicate if this is a free or a paid service. She said it does not indicate whether this needs to be requested by the feuding parties or agreed to by the feuding parties. She said the committee may also wish to discuss how a board can function in an impartial regulatory capacity and yet serve as a mediator or arbitrator in what is essentially a private dispute. She said if, however, the board is not providing these services, then it would be appropriate to remove this authority.

Section 6. Marketing Areas

Committee Counsel said this section requires the North Dakota Milk Marketing Board to divide the entire state into milk marketing areas. She said the board can decide how many milk marketing areas there will be, and it can increase the number, decrease the number, and adjust the boundaries of each area. She said the statute does not mention anything about a public hearing or comment period in connection with the establishment or alteration of marketing areas.

Committee Counsel said the statute does, however, provide that the board must take certain things into consideration when establishing or altering the boundaries of marketing areas. She said one of the things is the various conditions affecting the production, distribution, and sale of milk products and frozen dairy products in each marketing area. She said the statute provides that the board shall take into consideration the "need for establishing area boundaries in a manner that will facilitate cooperation between the board and federal authorities engaged in regulating prices paid by processors for raw milk." She said this is an exceedingly odd sentence in that the board may consider the need for facilitating cooperation, but once it has considered the issue, it appears to have no further obligation. She said the committee may also wish to discuss the relationship between milk marketing area boundaries and cooperation with federal authorities.

Section 7. Stabilization Plans

Committee Counsel said this section begins by directing the North Dakota Milk Marketing Board to establish, for each marketing area, the minimum price that a processor must pay a dairy farmer for raw milk. She said each stabilization plan must provide the means for determining which such plan is applicable to the raw milk purchases of a processor engaged in selling milk products in two or more marketing areas. She said it appears that the price paid to the dairy farmer is contingent upon the sphere in which the processor operates.

Committee Counsel said this section provides that the applicability of any such stabilization plan to raw milk purchased by a processor from a particular dairy farmer is not dependent upon the location of the seller's dairy farm nor upon the location at which title passes.

Committee Counsel said this section provides that in establishing or changing minimum prices to be paid by processors to dairy farmers for raw milk in each marketing area, the board shall consider various factors.

Committee Counsel said the board is directed to consider various factors in establishing the minimum prices to be paid by processors to dairy farmers in each marketing area. She said these include the available supply of raw milk in the marketing area and the adequacy of the reserve supply of raw milk available to processors. She said it is not clear whether the statute is referencing the amount of reserve raw milk that is in a marketing area or the amount of reserve raw milk that is available to processors who may be located in a marketing area that is different than that of the dairy farmers.

Committee Counsel said the board is also directed to consider the balance between production and consumption in the marketing area. She said she wonders if the appropriate reference would be to "retail sales" in a given marketing area. She said she does not believe that consumption is actually tracked. She said the area in which milk is consumed is not necessarily the area in which it is purchased.

Committee Counsel said the board is required to consider the cost of dairy feed in the marketing area, the cost of farm wage rates in the marketing area, and any other factors that will effectuate the purposes and policies of this chapter. She said, as stated earlier, if the purposes and policies sections are removed, this section will require different parameters.

Committee Counsel said the minimum prices established by the board must be those that "will be beneficial to the public interest, protect the dairy farmers, and ensure an adequate supply of pure and wholesome milk to the inhabitants of the state." She said reasonable minds can arguably differ with respect to what those statutory thresholds actually require.

Committee Counsel said a stabilization plan may be based on either a marketwide pooling arrangement or a handler-pooling arrangement.

Committee Counsel said if part of a marketing area is within a federal order, the board may require processors, who are subject to both a North Dakota stabilization plan and a federal order, to pay farmers the higher state prices.

Committee Counsel said the board is authorized to put a formula into a stabilization plan so that the minimum prices can be automatically adjusted based on changes in production costs, supply conditions, etc.

Committee Counsel said, in addition to determining the minimum prices that a processor must pay to a dairy farmer for raw milk, the board must also establish the minimum prices to be paid by processors selling milk products to retailers, by distributors selling milk products to retailers, and by any person selling milk products to consumers. She said the establishment of the minimum prices for the various interactions is mandatory. She said the board "may" but is not required to establish the minimum prices for the sales of milk products by processors to distributors. She said the board "may" but is not required to establish the minimum prices for the sales of milk products by one processor to another processor and by one distributor to another distributor. She said the board "may" but is not required to establish the minimum prices for the sales of frozen dairy products by processors, distributors, and retailers.

Committee Counsel said the the Century Code could be shortened a bit by maintaining the requirement that the board establish certain minimum prices and providing that it may establish minimum prices to govern the sale of milk products and frozen dairy products in all other instances not covered in the mandate.

Committee Counsel said this section authorizes the board to establish maximum prices for the sales of milk products by a processor, a distributor, and a retailer. Again, she said, the board is to take into consideration the same economic factors that it had to look at in establishing the minimum prices.

Committee Counsel said the board may, in a stabilization plan, authorize processors and retailers to give quantity discounts to retailers. She said if the board authorizes these quantity discounts, the board is to establish, for each retailer, the quantity discount rate for purchases of milk products and the quantity discount rate for the purchase of frozen dairy products.

Committee Counsel said the bill draft removes several lines providing that the minimum and maximum prices established by the board, other than those that are applicable to the prices received by dairy farmers, must be those that will tend to maintain reasonably efficient processors, distributors, and retailers, as necessary to ensure consumers an adequate and continuous supply of milk and frozen dairy products, at fair and reasonable prices, foster and encourage stability in the dairy industry and orderly and efficient marketing, prevent unfair trade practices, prevent unfair methods of competition, prevent monopolies or restraint of trade, and encourage quality. She said some of this phraseology is similar to that which is in the declarations of policy and statement of purpose. She said arguably, reasonable minds can differ with respect to what precisely those phrases mean and whether the prices that were established by the board have met the stated goals. She said philosophy is not law and policy is not law. As such, she said, the removal of this verbiage is recommended.

Committee Counsel said, earlier in the bill draft, there was a list of various factors that the board must consider in establishing or changing the minimum prices that processors must pay dairy farmers. She said this bill draft, like current law, also contains factors that the board must consider in establishing minimum prices, other than those that a processor must pay to a dairy farmer. She said the first is the prevailing price of raw milk in the marketing area. She said the second is the costs of processing and distribution that are incurred by representative processors, distributors, and retailers. She said there is no mention of how the retailers are to account for any costs of processing and distribution that they might incur.

Committee Counsel said the board is also to consider a reasonable return upon necessary investment. She said there is no indication as to how the board should determine what constitutes a reasonable return.

Committee Counsel said other required factors include the quantities of milk products and frozen dairy products consumed in the marketing area and economic factors that "substantially and directly affect market supply and demand for milk products and frozen dairy products in the marketing area." She said some might view that description as exceedingly broad or quite nebulous.

Committee Counsel said the statute provides the board with the authority to establish minimum wholesale prices for frozen dairy products. She said doing so is optional. She said the statute also provides that instead of establishing minimum wholesale prices for frozen dairy products, the board may require that processors and distributors file with the board the uniform wholesale price at which each frozen dairy product will be sold in each marketing area. She said if the board goes that route, the board must prescribe the time and manner in which the price filings must be submitted to the board, the amendment procedures, and an effective date. She said the board is also authorized to prescribe any other requirements pertaining to price filings.

Committee Counsel said this section provides that the minimum and maximum prices established by the board for products other than raw milk may reflect packaging cost differences. She said the minimum and maximum prices established by the board for home-delivered products may vary from the prices established by the board for products sold to consumers by retailers. She said while a distributor must provide home delivery services to any consumer upon request, the distributor is allowed to charge more for a product that is delivered to one's home than a store owner selling the same product at retail.

Committee Counsel said the board is required to take appropriate steps to ensure that changes in minimum dairy farmer prices are accompanied by simultaneous changes in the other minimum and maximum prices established by the board.

Section 8. Licenses

Committee Counsel said a person must be licensed as a dairy farmer if that person sells Grade A raw milk to a processor who processes the milk at a plant in this state. She said current law indicates that this requirement applies equally to dairy farmers whose farms are located in this state or outside of this state. She said the committee may wish to further explore this provision to determine if the law is in fact requiring out-of-state farmers to be licensed because they sell milk to an instate processor.

Committee Counsel said a person must be licensed as a processor:

1. If the person operates a plant in this state;
2. If the person sells milk products or frozen dairy products to a retailer in this state, even if the processor is located outside of this state or if the retailer takes title to the products outside of this state; and
3. If the person sells milk products or frozen dairy products to a distributor for resale to North Dakota consumers on home delivery or to a retailer.

Committee Counsel said a person must be licensed as a distributor if the person sells milk products or frozen dairy products to North Dakota consumers on home delivery or to a retailer. She said retailers selling milk products or frozen dairy products must also be licensed. Finally, she said, if a person dispenses milk products via vending machines, that person must be licensed in accordance with requirements prescribed by the North Dakota Milk Marketing Board. She said the Century Code does not indicate what those requirements are.

Committee Counsel said licenses are site-specific. She said there is no charge for a license and licenses remain in effect until there is a change in ownership or location, until the license is suspended or revoked, or until the business is discontinued or goes inactive for at least 30 days.

Committee Counsel said, if a person applies for a processor's license or a distributor's license, the board may decline to issue the license if persons already licensed in that capacity are supplying an adequate variety and quantity of high-quality milk products and frozen dairy products to the state's retailers and consumers. She said entry into the marketplace is controlled by the board. Furthermore, she said, reasonable minds could arguably differ with respect to what constitutes an "adequate" variety, an "adequate" quantity, or "high-quality" products.

Committee Counsel said a second reason that the board may decline to issue a processor's license or a distributor's license is if deliveries are already being made with sufficient regularity and sufficient frequency. Again, she said, the meaning of those adjectives is not defined in statute, but rather left to the determination of the board.

Committee Counsel said a license may also be denied if the board determines that it would result in an excess of processing plant capacity; if it would "tend to" increase to unsatisfactory levels the average unit processing or average unit distribution costs for persons already licensed by the board, or if it would otherwise "tend to" prevent achievement of the objectives of this chapter.

Committee Counsel said the final subsection 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 a retailer set forth hereinabove." She said a retailer is defined as "any person who is engaged in transferring title to milk products or frozen dairy products to consumers at one or more fixed places of business (retail establishments) located in this state." She said perhaps there is a historical explanation as to why an entity that is not a retailer per se may be, but does not have to be, licensed as a retailer.

Section 9. Licenses

Committee Counsel said this section goes through the steps necessary to obtain a license. Essentially, she said, one must obtain a form, complete it, and submit it to the North Dakota Milk Marketing Board.

Committee Counsel said this section requires applicants for processor and distributor licenses to state that they will not sell milk products or frozen dairy products to persons who are not properly licensed under this chapter. She said applicants for distributor and retailer licenses are required to state that they will not purchase milk products or frozen dairy products from persons who are not properly licensed under this chapter.

Committee Counsel said applicants for processor and distributor licenses must declare that they will sell such milk products and frozen dairy products as are customarily handled by one in that role to any retailer who wishes to purchase such products and who has a place of business in any community in which the respective processor or distributor processes, distributes, or sells the products. She said the committee may wish to look at the phrase "customarily handled."

Committee Counsel said the committee may also wish to look at the reference to any retailer who has a place of business in any "community." She said the Century Code refers to incorporated municipalities as cities. She said she would like to know if there is a need to apply this to convenience stores that are not in any communities. She said it would appear that if a retailer is located in a community that the processor or distributor does not service, there is no requirement that the service begin. However, she said, if the community is serviced, the retailer cannot be denied service.

Committee Counsel said applicants for processor and distributor licenses must also declare that they will offer to any retailer the same frequency of delivery and the same in-store services as are customary in such community and that they will provide home delivery services to any consumer residing in such community. Presumably, she said, if the processor or distributor elected to offer more frequent delivery or even better services than had been offered in the past, this statute, which requires the "same" services, would not be a hindrance. She said perhaps use of the phrase "at least the same services" would be preferable.

Section 10. Prohibited Acts

Committee Counsel said a licensee cannot buy or sell a milk product or a frozen dairy product at a price that is less than the minimum nor more than the maximum established by the North Dakota Milk Marketing Board. She said a dealer, which is a processor or a distributor, cannot sell a frozen dairy product at a price that varies from the filed price, and a retailer cannot buy a frozen dairy product at a price that varies from the filed price. She said a licensee cannot take any action that is contrary to that which was promised in the application.

Committee Counsel said a licensee cannot use or attempt to use any method, device, or transaction that is intended to accomplish or has the effect of accomplishing the sale or attempted sale of milk products or frozen dairy products at less than the minimum prices established by the board. She said a licensee cannot use or attempt to use any method, device, or transaction that is intended to accomplish or has the effect of accomplishing the purchase or attempted purchase of milk products or frozen dairy products at less than the minimum prices established by the board. She said a licensee cannot use or attempt to use any method, device, or transaction that is designed to circumvent the price requirements of the board or which substantially undermines such price requirements. She said these prohibitions apply regardless of whether the method, device, or transaction is applied directly to the product or is used in connection with the sale or handling of any other product, commodity, article, or service.

Committee Counsel said a distributor may not purchase milk products or frozen dairy products at prices that are less than minimum wholesale prices, i.e., at prices less than that for which a retailer could purchase the product, if the products are resold to consumers at a fixed place of business owned by the distributor. However, she said, the

subsection goes on to provide that a distributor can do exactly that, provided the distributor purchases, at distributor prices all of the other milk products and frozen dairy products that are to be resold by the distributor. She said a "distributor price" is the price at which any milk product or frozen dairy product that is not intended for resale at a fixed location owned by the distributor is purchased by the distributor.

Committee Counsel said, finally, a retailer may not sell or offer to sell any milk products or frozen dairy products of a particular brand at a price that is different from that charged by the retailer for the same quantity, type, quality, or grade, of a different brand, unless the price differential equals the difference in the price paid by the retailer for the referenced products. She said this appears to mean that if a store is selling half-gallon boxes of brand A vanilla ice cream and half-gallon boxes of brand B vanilla ice cream, assuming the brands are of the same quality, they must be priced identically, unless of course the wholesale price was different and if it was, the retail price has to reflect that.

Section 11. Authority of the Board to Regulate Disruptive Trade Practices

Committee Counsel said Section 11 is tied back to subsection 4 of Section 10. She said a licensee cannot use or attempt to use any method, device, or transaction that is intended to accomplish or has the effect of accomplishing either the sale or attempted sale or the purchase or attempted purchase of milk products or frozen dairy products at less than the minimum prices established by the North Dakota Milk Marketing Board. Likewise, she said, a licensee cannot use or attempt to use any method, device, or transaction that is designed to circumvent the price requirements of the board or that substantially undermines such price requirements. She said therefore, in order to ensure that a licensee does not engage in or attempt to engage in any of those activities, the board is directed to prohibit or regulate each of 12 listed activities.

Committee Counsel said the first question that the committee might wish to address is whether the board should have the authority to determine whether an activity should be prohibited or regulated or whether that determination should be within the Legislative Assembly's purview.

Committee Counsel said another issue in this section has to do with the statement that the prohibited and regulated practices that are listed are set forth "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." Literally, she said, the board is given the authority to regulate or prohibit any activity that it believes results in, could result in, or is designed to result in purchases or sales of milk products or frozen dairy products at less than the minimum prices established by the board. She said the committee might also want to address whether this provides the public with due notice of the prohibited activities.

Committee Counsel said the illustrative list of prohibited or regulated activities includes:

1. The giving of discounts, rebates, or allowances, unless authorized by the board;
2. The furnishing by a dealer of free equipment or services to a retailer, except that the dealer may stock the product and stamp a price on the product;
3. The giving of advertising or display allowances;
4. The giving of a free milk product or a free frozen dairy product to a customer;
5. The making or renewal of loans, or the provision of financial assistance in any other form, by a dealer to a retailer;
6. The furnishing of signs by a dealer to a retailer;
7. Selling, offering to sell, or advertising any milk product or frozen dairy product in combination with any other product or service;
8. Selling, offering to sell, or advertising any product or service at a price that is available only to purchasers of a milk product or a frozen dairy product;
9. The giving of gifts by dealers to retailers;
10. The selling, leasing, renting, or lending of equipment by a dealer to a retailer, except that if the matter at issue is the sale of equipment by a dealer to a retailer, the board may prescribe the minimum markup based upon the seller's invoice cost or depreciated value in the case of used equipment;
11. The requiring of deposits if milk products or frozen dairy products are purchased in returnable containers and the giving of allowances or credits in connection with the return of such containers; and

12. Payments by dealers to franchisors, wholesale grocers, or any other person closely connected with a retailer for central billing, customer solicitation, or other services, if the purpose or effect of such payment is to induce the recipient of the payment to influence or attempt to influence the decision of one or more retailers relative to the brands of milk products or frozen dairy products to be purchased and resold by the retailer or relative to the amount of space to be allocated to any brand of milk products or frozen dairy products.

Section 12. Assessments by the Board - Continuing Appropriation

Committee Counsel said each licensed processor is required to pay an amount determined by the North Dakota Milk Marketing Board, but not exceeding 14 cents per cwt, on all milk or milk equivalents used by the processor in manufacturing milk products and frozen dairy products. She said the phrase "milk equivalents" is not defined in the Century Code. She said there appears to be some inconsistency in the section. She said the assessment is imposed on milk or milk equivalents used in the manufacturing process. However, she said, the section goes on to state that the assessment is not imposed on milk products or frozen dairy products sold outside of this state. She said it is not clear whether the reference to milk products or frozen dairy products sold outside of this state is simply not needed or whether the board actually subtracts out milk or milk equivalents used in the manufacturing of products that are sold outside of the state.

Section 13. Construction

Committee Counsel said this section does not prohibit the issuing of trading stamps by retailers in connection with the sale of milk products or frozen dairy products, except in those instances where a retailer offers trading stamp bonuses to purchasers of milk products or frozen dairy products. She said if trading stamps are still in use this provision could remain. She said if, however, trading stamps are no longer in use, the section should be removed.

Section 14. Entry, Inspection, and Investigation

Committee Counsel said the first subsection allows a representative of the North Dakota Milk Marketing Board to enter, at all reasonable hours, any place of business operated by a person licensed under this chapter, if raw milk, milk products, or frozen dairy products are produced, stored, processed, manufactured, or sold at that location. She said if one wanted to remove subjectivity, the selection of a phrase such as "daylight" hours or "business" hours would be preferable. She said the committee should also be aware of the broad authority that is extended to the board under this provision.

Committee Counsel said the second subsection authorizes entrance into any place at which a licensee maintains books, papers, accounts, records, or other documents related to the activities identified in subsection 1. She said it is not entirely clear whether this authority is limited to a licensee's place of business, at which the stated activities are occurring, or whether it extends to any place where the licensee maintains such documents.

Committee Counsel said the third subsection allows the board to subpoena, and it allows its representative to inspect, audit, and make copies of "relevant" books, papers, records, accounts, or other documents of persons doing business with licensees. Again, she said, the committee may wish to review the breadth of this authorization and determine its appropriateness.

Committee Counsel said subsection 4 specifies that any information gained in accordance with this section is confidential. She said the information may, however, be used for the administration of this chapter. She said the information may be divulged in an administrative hearing before the board or in a court proceeding, and it may be shared with the Agriculture Commissioner for use in making decisions about a licensee's financial condition.

Committee Counsel said subsection 5 authorizes the board to use any information it procures in compiling and disseminating general statistical data. She said, given the ongoing discussion about data, who has access to the data, and what it is being used for, the committee may wish to examine this section and determine whether the authority to collect data through the inspection of books and documents is compatible with the intended use of the data.

Committee Counsel said subsection 6 provides that it is a Class A misdemeanor for any person to divulge confidential information in violation of the section.

Committee Counsel said subsection 7 provides that the board may also subpoena and take under oath, the testimony of persons believed by the board to have information needed by it in administering and enforcing this chapter. She said the committee may wish to closely examine this verbiage, determine whether this section is actually used, and if so, how.

Section 15. Records

Committee Counsel said subsection 1 provides that the North Dakota Milk Marketing Board shall require licensees to maintain various records. She said it goes on to state that the board may specify by rule which records must be maintained. She said subsection 2, however, specifies the records that the board shall require. She said the Legislative Assembly could statutorily identify the records that must be kept. She said the Legislative Assembly could permit the board to specify which records it requires to be kept via rule. She said the rewrite could even create a situation under which the board determines which records it needs and then require that the licensees, as a condition of licensure, must maintain the records as directed by the board. She said it is simply not necessary to include the entire gamut of options. She said it would also be appropriate for the Milk Marketing Board to review the records that are currently enumerated in statute and ensure that what is being asked for is both clearly delineated and pertinent to their enforcement efforts.

Committee Counsel said current law provides that a "licensee may not be required to reveal that licensee's profit or loss. Such records must be of a nature to permit the board to make statistical studies as it may deem necessary for the proper exercise of its authority under this chapter." She said the section, however, is also requiring licensees to maintain information regarding the quantity of the product sold, the price at which it was sold, direct and indirect expenses incurred in procuring the product, etc. She said the committee might wish to determine if on one hand the law is stating that a licensee is not required to reveal its profit or loss and on the other hand, it is asking for all the component parts and the only thing left to do for the data recipient is to add the columns. She said even though this statute states that a licensee does not have to reveal profit or loss, other sections of current law, such as Section 4-18.1-07, which addresses stabilization plans, maintain the concept of balancing the financial interests of all interested parties. She said it could be argued that the only way one can balance financial interests is if one knows what those financial interests are. She said this harkens back to revelations regarding profits and losses.

Section 16. Cooperation With Other Governmental Agencies

Committee Counsel said this section provides that the North Dakota Milk Marketing Board may cooperate with stabilization agencies in other states and with the United States Secretary of Agriculture, in the manner provided in the Agricultural Marketing Agreement Act of 1937. She said the statutorily cited section in fact directs the United States Secretary of Agriculture to cooperate with the state entities. She said because nothing precludes the board from cooperating with other agencies, it is suggested that the committee consider removing this section.

Section 17. Remedies

Committee Counsel said this is the section that allows the North Dakota Milk Marketing Board to deny an application for a license or to suspend or revoke a license if the person violates the chapter, any applicable rules, or the provisions of a stabilization plan. She said this provision does not apply to a dairy farmer.

Committee Counsel said when dealing with a violator, the board is able to suspend or revoke a license. In the alternative, she said, the board may impose a civil penalty in an amount up to \$500 per day for each violation or continuing violation. She said the statute states that the board may assess a civil penalty "in lieu of" a suspension or revocation. She said the statute also references "an election by a licensee to pay a penalty in lieu of a license suspension." She said clarification is needed with respect to whether the board can decide if the licensee pays a penalty or endures a suspension or whether the licensee determines that.

Section 18. Adjudicatory Functions of the Board

Committee Counsel said this section contains a detailed description of the licensing process and what happens if a license is denied. She said there is reference to a notice, a hearing, and a time for a final decision. She said the pertinent question here is whether there is any reason that the statute should not simply require or allow for a hearing in accordance with Chapter 28-32, in the case of a license denial.

Committee Counsel said this section also states that the "board may deny the issuance of a license if the board finds that the applicant has violated this chapter or a regulation or stabilization plan promulgated by the board." She said this sounds as if these are the only grounds upon which a license of any sort might be denied. However, she said, there are a variety of grounds upon which the North Dakota Milk Marketing Board may deny a license, and ideally, those should be consolidated.

Section 19. Judicial Review of Adjudicatory Action by the Board

Committee Counsel said this section pertains to judicial review of board decisions, i.e., appeals. She said this section references a procedure that is already set forth in Chapter 28-32. She said if the North Dakota Milk Marketing Board is to conduct all administrative hearings in accordance with Chapter 28-32, this section can be removed.

Section 20. Rulemaking Functions of the Board

Committee Counsel said this section pertains to rulemaking and unless the North Dakota Milk Marketing Board has some reason to deviate from Chapter 28-32, that should be the controlling chapter and its provisions do not need to be repeated here.

Section 21. Judicial Review of Rulemaking Action by the Board

Committee Counsel said this section sets forth what is essentially an appeal of the North Dakota Milk Marketing Board's rulemaking decisions. Again, she said, Chapter 28-32 contains all of those machinations and unless there is a specific reason not to rely on Chapter 28-32, this section could be eliminated.

Section 22. Local Advisory Boards

Committee Counsel said, if the North Dakota Milk Marketing Board schedules a public hearing in a marketing area for the purpose of establishing prices, and one is assuming that that means for the purpose of establishing prices in that marketing area, the Milk Marketing Board may appoint a local advisory board. She said the local advisory board would assist and advise the Milk Marketing Board in matters pertaining to the production and marketing of milk in the marketing area. She said, if the advisory board is appointed, it must consist of two producers from the marketing area, two processors from the marketing area, and two retailers. She said this section raise a number of issues. She said, if the Milk Marketing Board is not required to appoint an advisory board, why is this optional language in the Century Code. She said, since the advisory board is not mandatory, why is the makeup of the advisory board statutorily mandated. She said, an administrative rule added in 1980 describes the boundaries of eight marketing areas. She said, in recent testimony, it was indicated that there are only a handful of processors--Kemps in Fargo, Deans in Bismarck, the Bottineau creamery, and a jugger in Jamestown. She said, unless there are more processors, the requirement that the advisory board include two processors from the marketing area makes the whole section void. She said either one should reconfigure the advisory board or consider eliminating the section.

Section 23. Referendum on Continuance of Program - Petitions - Contents

Committee Counsel said, if a petition is presented to the Agriculture Commissioner, if that petition is signed by at least 25 percent of the total Grade A dairy farmers in North Dakota covered by the provisions of this chapter, and if there is at least one signature from each of 27 different counties, the Commissioner must conduct a referendum, by secret ballot and by mail, to determine if this chapter should be continued. She said the Commissioner is to report the results to the next Legislative Assembly. She said one of the slides that was presented to the committee at the last meeting showed that only 29 counties have dairy farmers. So, she said, requiring signatures from 27 counties is a very high threshold. Furthermore, she said, whenever one asks for a percentage of signatories--in this case--25 percent of the total Grade A dairy farmers in the state, one needs to be clear on how the numbers are to be determined. She said it is not clear whether this is intended to mean one signature per operation or one signature from every husband, wife, and child with a 4-H project.

Comments From Others

With the permission of Chairman Schmidt, Mr. John Job, Division Manager, Amcon Distributing, presented testimony regarding the North Dakota Milk Marketing Board. Mr. Job said it is extremely difficult to obtain a license to distribute fluid milk in this state. He said, by virtue of a dairy license issued by the Agriculture Commissioner, Amcon can distribute frozen dairy products, cheeses, yogurts, etc. However, he said, Amcon cannot sell a drop of fluid milk.

Mr. Job said, in 2002 he appeared before the North Dakota Milk Marketing Board and asked for a restricted license under which he would sell ultrapasteurized products such as Grip n' Go. He said he also appeared before the board in pursuit of a fluid milk license in 2012, twice in 2013, and already twice in 2014. He said in February 2014, Amcon acquired a company that had a limited license to distribute fluid milk in this state. He said he had wanted to transfer that license. He said under the current law, an applicant has to establish the need, state to whom the product will be sold, and state how much product will be sold. He said the problem is that there are 280 retailers across this state. He said without turning the sales staff loose, he has no idea who will buy from Amcon, and it is not practical to solicit business without knowing whether Amcon will actually receive a license and be able to provide the product. Furthermore, he said, he would not be willing to provide his customer list and contact information unless he was assured that such would remain confidential. He said how much Amcon would be able to sell would be purely speculative.

Mr. Job said Amcon distributes in South Dakota, Minnesota, Wisconsin, and part of Montana, out of its Bismarck distribution center. He said, in order to sell milk in South Dakota, he fills out the paperwork, he sends in the money, and he receives a license. He said he would like the opportunity to sell fluid milk to Amcon's customer base in North Dakota.

Mr. Job said the board has suggested that Amcon engage in third-party hauling. He said that involves having a less-than-loaded carrier bring milk in from out of state. He said he would just as soon buy from a North Dakota processor who buys milk from a North Dakota producer.

In response to a question from Chairman Schmidt, Mr. Job said Amcon serves 23 states. He said the company has distribution centers in Omaha, Nebraska; Rapid City, South Dakota; Springfield, Missouri; Crossville, Tennessee; and Quincy, Illinois. He said Amcon is permitted to distribute milk in 22 of the 23 states it serves. He said North Dakota is the exception.

In response to a question from Chairman Schmidt, Mr. Job said Amcon would like to provide milk to its customer base. He said, at the present time, competitors from out of state are engaging in third-party hauling. He said the playing field is not level in that his out-of-state competitor can bring into North Dakota milk that was not produced here. He said he has no desire to do that.

In response to a question from Senator Dotzenrod, Mr. Job said Amcon will sell to any entity who wants product, provided the entity pays its bill on time. He said, right now, there is a fraternity of wholesalers who can sell milk and those who cannot. He said it appears that the law was written in 1967 to keep that fraternity closed.

In response to a question from Representative Amerman, Mr. Job said Amcon does not engage in less-than-load or third-party hauling. He said Amcon owns its entire fleet of tri-zone trailers. He said Amcon wishes to put as much of its product on those trucks as possible and sell that product to retailers.

In response to a question from Representative Rust, Mr. Job said why the board denied Amcon a license would be speculative on his part. He said if Amcon is in a town, he sees no reason why Amcon would not serve every entity that is willing to purchase from Amcon.

In response to a question from Chairman Schmidt, Mr. Job said the board's vote to deny Amcon a license was the only official reason he was given regarding the denial.

Representative Hunskor said the reason that the board is in place is to ensure a fair price and service to all customers who want fluid milk. He said it would seem that anyone who can stay within those limits should be afforded a license. He said there must be some reason why Amcon was denied a license.

Mr. Job said Amcon has customers across the length and breadth of North Dakota, and it would be the intent of Amcon to try and sell products to all of its customer base. He said, while he can speculate, he cannot, without having factual data, indicate to the board how much product Amcon would be able to sell.

In response to a question from Representative Hunskor, Mr. Job said Amcon would not deny service. He said Amcon would be able to provide more service or more brand names to retailers.

In response to a question from Chairman Schmidt, Mr. Job said Amcon currently offers 14,000 to 15,000 products to its customers. He said Amcon offers cigarettes, tobacco, beverages, candy, snacks, groceries, health and beauty products, food service components, store supplies, and automotive products. He said Amcon does have a minimum order. He said, with that product category, it is not difficult for a customer to reach that minimum order. He said store supplies, for instance, include can liners, toilet tissue, paper towels, floor cleaners, etc. He said Amcon handles so many products that are used by every business, nursing home, and school. He said Amcon employs commissioned sales staff to ensure that products are on its trucks.

In response to a question from Representative Amerman, Mr. Job said Amcon would like to see the licensing portion of the milk marketing chapter be moved under the Agriculture Commissioner. He said the Agriculture Commissioner already issues dairy licenses. He said the board has its hands full handling pricing and analyses. He said criteria should be established for the licensees. He said the criteria should include whether the applicant will serve customers in North Dakota, whether the applicant has proper equipment, and whether the applicant has experience in the handling of frozen and refrigerated products.

With the permission of Chairman Schmidt, Mr. Larry Cuypers, Core-Mark International, presented testimony regarding the North Dakota Milk Marketing Board. Mr. Cuypers said Core-Mark is a major supplier to convenience stores. He said Core-Mark is a nationwide company, and he works for the Minneapolis division. He said he oversees the representatives that take care of the 200 accounts that Core-Mark has in North Dakota. He said many of his customers have conveyed their wish to have Core-Mark deliver liquid dairy to their convenience store accounts. He said Core-Mark would like to deliver liquid dairy at a competitive price and thereby allow the convenience stores to sell it at retail and be profitable doing so. He said Core-Mark is currently delivering milk out

of its Minneapolis warehouse to South Dakota, Wisconsin, Michigan, Iowa, and Nebraska. He said Core-Mark would like to be licensed to distribute liquid dairy in North Dakota.

In response to a question from Chairman Schmidt, Mr. Cuypers said Core-Mark has not applied to the board for a distributor's license. He said the reason is the current law.

Committee Review of Bill Draft and Discussion

In response to a question from Senator Erbele, Committee Counsel said when sections of the Century Code are amended or repealed, those sections become part of a bill's legislative history and are maintained as a permanent record.

In response to a question from Chairman Schmidt, Mr. John Weisgerber, Executive Director, North Dakota Milk Marketing Board, said the board reviewed this bill draft at a board meeting and is in agreement with the recommended changes in the bill draft. Mr. Weisgerber said the chapter was written in 1967, and there are numerous provisions that are in need of updating or deletion.

In response to a question from Chairman Schmidt, Committee Counsel said this is a first draft and based upon the committee's discussion and directives, another draft will be prepared. She said the committee will have an opportunity to make a formal motion regarding acceptance of the bill draft and its recommendation to the Legislative Management, and the committee will vote on that motion.

Chairman Schmidt said it is the consensus of the committee that the sections containing the declaration of policy and the bill's purpose be deleted.

Chairman Schmidt said it is the consensus of the committee that references to products such as mellorine, olarine, sherine, and sherbines be deleted, together with any other terms that are no longer necessary.

Committee Counsel said that the definition of a milk product includes any product that contains milk solids not fat, butterfat, or a milk derivative, and which is manufactured in the semblance of one of the listed products, and determined by the board to require regulation in order to effectuate the purposes of this chapter. She said this in essence allows an administrative board to determine that which it will regulate. She said the concern is whether such a grant of authority still provides those affected by this law with due notice of that which is being regulated.

Committee Counsel said the list of products that fall within the definition of a milk product is extensive. She said if the board were to become aware of other products that ought to be regulated, the statute can be amended every two years through the legislative process.

Senator Dotzenrod said it appears as if new products are being developed regularly. He said we may want to maintain some way of quickly adding products to the list of regulated products.

Chairman Schmidt said it is the consensus of the committee that Committee Counsel work with the board to review the definitions and recommend changes as appropriate, as well as to streamline the chapter.

Chairman Schmidt said it is the consensus of the committee that the reference to the "milk business" in articulating who is qualified to serve as a consumer member of the Milk Marketing Board should be replaced with a reference to "financial interest."

Mr. Weisgerber said the bill draft's suggested language has the support of the board.

In response to a question from Committee Counsel, Mr. Weisgerber said that the reference to the North Dakota Dairy Industries Association in Section 4-18.1-04 is correct but that the reference to the North Dakota Association of Food Retailers should be replaced by the North Dakota Grocers Association.

Mr. Weisgerber said the draft's reference to geographic areas in which the various board members must reside has its routes in old congressional delineations. He said the board does not believe that the statute needs to contain a list of counties, but it would like to maintain geographically dispersed board membership.

Committee Counsel said one alternative might be to require that the Governor maintain a geographic balance when appointing members to the board.

Chairman Schmidt said it is the consensus of the committee that the reference to counties be removed and replaced with a requirement for geographic balance in the appointment process.

Committee Counsel said the current law does not limit the terms of board members. She said the committee might want to examine whether this provision should be maintained or changed.

Mr. Weisgerber said the board prefers that the current law be maintained, in large part because it takes a while for members to truly understand the machinations of the board.

Senator Luick said this is a complicated chapter. He said he is concerned about the level of complexity. He said, perhaps after the rewrite is completed, one will be in a better position to determine whether changes to the terms of board members should be undertaken.

Representative Rust said the Governor can elect not to reappoint a board member. He said, with this level of protection, it is not necessary to statutorily impose term limits.

Chairman Schmidt said it is the consensus of the committee that the issue of term limits be left as it is under current law.

Mr. Weisgerber said current law provides that board members may be paid up to \$135 per day. He said that change was made several years ago, as part of a multiboard update. However, he said, the chapter still limits payments to board members to \$1,500 per year. He said that language has been in the Century Code since 1967. He said it is no longer a sufficient cap, given the higher authorized payment amount.

In response to a question from Chairman Schmidt, Committee Counsel said when a board is responsible for generating its own income using its members' financial contributions, it is generally allowed to self-govern with respect to the level of its expenditures.

Chairman Schmidt said it is the consensus of the committee that the cap on annual board member compensation should be deleted.

Committee Counsel said, rather than require the bonding of board members, the language could be made parallel with that of other boards and merely authorize the board to employ, bond, and compensate necessary personnel.

Mr. Weisgerber said the board is in favor of that recommendation.

Chairman Schmidt said it is the consensus of the committee that the proposed language regarding the employment, bonding, and compensation of necessary personnel be used.

Committee Counsel said, under current law, the board is permitted to act as a mediator or an arbitrator in connection with any controversy or issue among or between dairy farmers, processors, distributors, retailers, or consumers, if the controversy or issue pertains to the production, transportation, processing, storage, distribution, or sale of milk products or frozen dairy products. She said there is a question with respect to the appropriateness of an administrative board having regulatory authority over the listed individuals and entities serving in the role of a mediator or an arbitrator, in order to settle private disputes.

In response to a question from Chairman Schmidt, Mr. Weisgerber said the board has used this section to settle farm-to-plant hauling rates, i.e., the amount that a dairy farmer must pay a trucker to haul milk from the farm to the processing plant. He said, sometimes when a processor wants to increase its hauling rates, the affected dairy farmers are not in support. He said the board is called in to do an audit of the rates and after reviewing the information, the board then makes a recommendation to the farmers. He said in the past, when the farmers have seen the recommendation of an impartial third party, the matter becomes resolved.

Representative Hunskor said, in a discussion about hauling rates between dairy farmers and processors, it would be difficult to hire an independent third party because of access to information issues and even comprehension of the issues.

Committee Counsel said she wonders if this is an action that rises to the level of a formal, legally recognized mediation or arbitration, or whether the board's participation is more of an informal recommendation.

Mr. Weisgerber said the North Dakota Administrative Code addresses farm-to-plant hauling rates. He said the board's decision is based on the results of an audit and is therefore impartial.

Committee Counsel said the current law does not limit the section to farm-to-plant hauling rates. She said the reference to the board's ability to be a fair and impartial regulator is not directed to its determination in a farm-to-plant hauling rate case, but rather to the board's impartiality with respect to how it treats those parties in all the other regulatory functions that the board has.

Senator Erbele said he is concerned about the breadth of the board's authority. He said, by statute, the board is permitted to supervise, investigate, and regulate every segment of the state's dairy industry. He said this allows for game-changing rules in the middle of the game.

Committee Counsel said that is why the committee is being apprised of lines like that being in the statute. She said authority of this breadth can be utilized in a lot of different circumstances. She said it is up to legislators to discern their comfort level with this type of authority. She said it might or might not have been appropriate in 1967. She said legislators need to determine if that scope is still appropriate for 2015 and beyond.

Representative Damschen said he would like to see additional legislative oversight.

Senator Dotzenrod said this language has been in effect since 1967. He said somewhere there needs to be a dispute-resolving mechanism that is recognized as having authority. He said he would be hesitant to start making changes without learning that there have been problems.

Representative Hunskor said this committee has not received testimony calling for change. He said there are certainly parts of this chapter that could be eliminated.

Chairman Schmidt asked that Committee Counsel work with the board to review the statutory reference to be board functioning as a mediator or arbitrator and provide for the committee's consideration language that accurately reflects the functions that the board needs to have in dispute resolution.

Chairman Schmidt asked the committee to turn its attention to the matter of licensure.

Mr. Weisgerber said the law requires the licensing of Grade A dairy farmers who sell to processors in this state, regardless of whether those dairy farmers reside inside or outside of this state.

In response to a question from Chairman Schmidt, Mr. Weisgerber said the board consists of a dairy farmer, a processor, a retailer, and two consumer representatives. He said impartiality is maintained in the licensing of distributors by engaging in an open hearing process. He said the board hires a hearing officer through the Office of Administrative Hearings and considers the recommendations of that hearing officer.

In response to a question from Committee Counsel, Mr. Weisgerber said a North Dakota processor pays the same amount to an in-state dairy farmer as to an out-of-state dairy farmer for milk delivered to the processing plant. He said, under the pricing structure of the board, and the federal order, the pricing is determined in accordance with the plant's location.

In response to a question from Representative Larson, Mr. Weisgerber said if a customer does not pay the bill, whether wholesale or retail, the board would not force that customer to be provided with service.

Mr. Weisgerber said house-to-house service was standard in 1967, but there is very little that still occurs today. He said requiring someone to provide house-to-house service upon request could be removed.

Chairman Schmidt said removal would be considered appropriate. He said, if a distributor chose to provide the service, the distributor would not be precluded from doing so, but the laws of this state do not need to force a distributor to provide such service.

In response to a question from Representative Rust, Mr. Weisgerber said the board licenses the dairy farmer, the processor, the distributor, and the retailer. He said the whole milk distribution chain has been historically covered. He said the licensing of distributors has been the most controversial.

In response to a question from Senator Erbele, Mr. Weisgerber said the board is by law required to establish the minimum price to dairy farmers, wholesalers, and retailers. He said the issue regarding distributors is not price-related but rather pertains to who will provide service in a particular area. He said, historically, there was concern about distributors coming in from out-of-state, cherry-picking the high-volume accounts along the interstate, and neglecting the lower-volume accounts in more remote areas.

Mr. Weisgerber said when Mr. Job had applied for a distributor's license, he was unwilling to indicate that he would provide service to all who wanted service. He said that is a requirement of the current law. He said Mr. Job did indicate that if an account is profitable, he will service it. He said the law does not provide that one must service only the profitable accounts.

Chairman Schmidt said if the law requires a distributor to service everyone, then had the board licensed Mr. Job, Amcon would have had to service everyone. He said if the distributor fails to service everyone, the distributor will be punished under the law.

Mr. Weisgerber said if during the application process one indicates that one does not intend to service all, the board will not give that person a license.

Chairman Schmidt said if the law requires a distributor to service everyone and if that distributor does not intend to service everyone, why would the distributor even apply for a license.

Mr. Weisgerber said he does not know.

Senator Luick said, since the law was enacted in 1967, we have dramatically different numbers of dairy farmers and we have a dramatically different distribution system.

Mr. Weisgerber said because milk is a perishable commodity, it cannot be treated the same as a storable commodity. He said if a dairy farmer starts losing money and goes out of business, that operation cannot be replaced in short order.

Committee Counsel said as the current law is configured, the board can, through the licensing process, control the number of distributors in the state. She said the committee has been told that there are 78 distributors in the state. She said if the board had accepted Amcon's application for a distributor's license, there would have been 79 distributors in the state. She said perhaps Mr. Weisgerber could help the committee understand why that would present an issue.

Mr. Weisgerber said the issue is not with one additional distributor. He said the problem is that if one distributor receives a license, all the other distributors will want licenses too. He said Amcon is just one distributor. He said Core-Mark is another. He said there is also Sysco, Henry's Foods, United Foods, and a host of others. He said there are corporate entities such as Darden, which owns Olive Garden and Red Lobster, among others. He said Darden has a national contract with Sysco in Lincoln, Nebraska. He said they want to service only their entities. He said Starbucks has a sole source supplier out of Minneapolis. He said that supplier would like to service only Starbucks. He said Starbucks uses a lot of milk.

Representative Trottier said if the distributors stated that they were willing to check the box indicating they would service everyone, he wondered if they would be given licenses.

Mr. Weisgerber said he could not prejudge how the board would vote at a hearing on a license application.

In response to a question from Representative Trottier, Mr. Weisgerber said, in the case of Amcon's application for a distributor's license, the board did issue Findings of Fact and Conclusions of Law. He said those documents, together with the board's conclusion, was provided to Amcon's attorney.

Representative Amerman said he can understand the board serving as a mediator in a dispute but he does not comprehend how the board can function in the role of an arbitrator. He said that is normally a very formal, costly, and binding process. He said if the entire board serves as an arbitrator, how would a 3-2 decision be binding on the parties. He said being a mediator might be fine but being an arbitrator is going too far for an administrative board.

Mr. Weisgerber said that provision was put in when the bill was first enacted in 1967. He said the only use of that section has been in the negotiation of farm-to-plant hauling rates. He said the board would not have a problem with having Section 4-18.1-05 deleted.

In response to a question from Representative Rust, Committee Counsel said the board is authorized to function in the role of a mediator or an arbitrator. She said the statute does not address when a proceeding is voluntary or mandatory.

Representative Amerman said he wonders if the board would even want to find itself in the role of an arbitrator.

Committee Counsel said there is always a way to reword concepts. She said perhaps the committee might wish to consider a situation in which the listed entities are able to ask the board to function in the capacity of a mediator. She said if the board determines that it does not want to be in that role, or if it believes that in a certain situation its regulatory authority might be colored or compromised, then it does not have to accept the request.

Representative Hunskor said there has to be some way of settling a dispute among parties.

In response to a question from Representative Hunskor, Committee Counsel said there are a number of private entities that provide mediation services. She said disputes between parties are private matters, not issues otherwise addressed through regulatory or statutory venues.

Committee Counsel said Mr. Weisgerber has referenced farm-to-plant hauling rates and it sounds as if that is the only issue in which the board involves itself. However, she said, the statute does not limit the board in this fashion. She said the statute allows the board to mediate or arbitrate any controversy or issue among or between the listed parties.

Representative Rust said he is not concerned so long as the board is merely authorized to function in this capacity but not required to function in that manner.

In response to a question from Chairman Schmidt, Committee Counsel said the role of a mediator and the role of an arbitrator are separate. She said mediation is a voluntary dispute resolution process under which the participating parties act in good faith to reach a mutually agreeable solution. She said arbitration is a dispute resolution process under which a neutral party hears both sides, and renders a decision. She said the question for the committee is if the board steps into the role of a mediator or an arbitrator, does that color its administrative or regulatory authority. She said if the board in making a decision as a mediator or as an arbitrator favors one party, does that create a perception of favoritism when the board is functioning in its regulatory or administrative capacity. She said this discussion is not focused on any issue with the current board or its staff, but is applicable to board functions in the future.

In response to a question from Representative Damschen, Committee Counsel said the section does not indicate whether this is a free service that is available to any and all disputing parties.

Representative Hunskor said it is not clear who decides whether the board will function as a mediator or an arbitrator.

Chairman Schmidt said it is the consensus of the committee that the authority for the board to function as an arbitrator be removed.

Representative Larson said she would prefer language that authorizes the board to function as a mediator, but only at the request of the disputing parties. She said she does not want the board to impose itself in a dispute.

Representative Rust said he would like it to be clear that the board does not have to function as a mediator upon request. He said the board should have the right to refuse such a request.

Chairman Schmidt asked the committee to consider Section 4-18.1-11.

Committee Counsel said the current law directs that the board "by regulation prohibit or regulate" each of the listed practices. She said the first issue has to do with when the board should elect to prohibit an activity and when it should elect to regulate an activity.

Representative Damschen said current law gives the board the power to supervise, investigate, and regulate every segment of the state's dairy industry. Here, he said, current law requires the board to prohibit or regulate certain listed activities. He said these directives seem inconsistent.

Committee Counsel said if the board is given the authority to regulate that which it wants, this section is certainly not necessary. She said it is important for this committee to recognize that the members of the Legislative Assembly are the individuals responsible for determining the law. She said the members of the Legislative Assembly are elected and therefore accountable. She said once a determination is made regarding the law, the administering agency is in a position to enact the regulatory parameters necessary for the law's enforcement.

Senator Luick said as he reviews the list of activities that the board can elect to regulate or prohibit, he believes that some should stay but that others should not be regulated by a governmental entity.

In response to a question from Chairman Schmidt, Mr. Weisgerber said the board has further defined the activities in its administrative rules. He said some of these provisions affect the pricing parameters of this chapter. He said, as an example, if there is no governance regarding the giving of rebates, discounts, and allowances, those methods could be used to subvert the statutory pricing parameters. He said that is why the provisions came into being. He said historically, large creameries had deeper pockets and were in a better position to hand out freebies. He said the prohibition against the giving of gifts is another important provision. He said, over the years he has seen everything from brown bag money to fur coats for grocers' wives. He said he would be happy to review this list with Committee Counsel.

In response to a question from Chairman Schmidt, Mr. Weisgerber said in the board's rules, the giving of samples is addressed.

In response to a question from Chairman Schmidt, Committee Counsel said once the Legislative Assembly enacts a law, the agency can fill in the details governing the administration of that law by means of the rulemaking process. She said the difficulty with Section 4-18.1-11 is that by reading the statute, one has no way of knowing whether an activity is prohibited or regulated. She said what is needed is for the committee to determine whether an activity such as the giving of a free milk product to a customer is prohibited or regulated. She said it is not that different than asking for a determination with respect to whether something is a power or a duty of a board.

Chairman Schmidt said the section addresses the giving of gifts by dealers to retailers. He said he questions whether the bringing of a box of chocolates at Christmas is worthy of prohibition or regulation. He said he wonders whether it would be appropriate to insert a dollar value into the statute.

In response to a question from Representative Kiefert, Mr. Weisgerber said it is illegal for an individual store to give away a gallon of milk. However, he said, if a third party such as a cereal company paid for a promotional activity that involved the giving away of milk, that would be permitted.

In response to a question from Representative Larson, Mr. Weisgerber said a retailer would not be permitted to donate milk for a school outing. He said the board did not dream up the rules. He said they are the result of testimony offered at a hearing.

In response to a question from Chairman Schmidt, Mr. Weisgerber said in more than 40 years, the board has used advisory panels only twice. He said the section could be eliminated.

Chairman Schmidt said it is the consensus of the committee that such be done.

Committee Counsel said the committee is also asked to consider whether Section 4-18.1-23, which provides for a referendum vote regarding the existence of this chapter, should be retained. She said the issues pertaining to this section are who constitutes a signatory and whether the threshold of signatories from 27 counties is appropriate at a time when there are dairy farmers in only 29 counties.

In response to a question from Chairman Schmidt, Mr. Weisgerber said when this section was enacted, every county had dairy farmers. He said 27 was selected because it represented half of the counties plus one. He said, if things are not going well, constituents will notify legislators. He said every two years, the Legislative Assembly can determine whether changes need to be made to Chapter 4-18.1.

Chairman Schmidt said it is the consensus of the committee that Section 4-18.1-23 be deleted. He said Committee Counsel is asked to work with Mr. Weisgerber and prepare another draft based on the committee's discussion and directives.

Representative Larson said she is concerned about Section 4-18.1-14 and in particular that it allows the board to enter at all reasonable hours any place of business operated by a licensee if raw milk, milk products, or frozen dairy products are produced, stored, processed, manufactured, or sold at that location.

Mr. Weisgerber said this section needs to be addressed. He said the board does not function in the manner literally permitted by the section. He said the board has used its subpoena power on two occasions. He said the industry tries to work together in this state. He said the industry is paying the assessment required by this chapter. He said it both supports and wants this law.

In response to a question from Representative Damschen, Mr. Thomas B. Bair, Counsel, North Dakota Milk Marketing Board, said even though the law authorizes a representative of the board to enter premises at all reasonable hours, it would be his advice that the board first obtain a subpoena or order signed by the court.

In response to a question from Representative Damschen, Committee Counsel said one of the issues with this section is that a literal reading of the law provides the board with very broad authority to enter premises. She said it will be necessary to meet with the board, review the authority that is actually needed, and then craft language that provides a level of authority to the board while at the same time ensuring the rights of all who might be affected by that authority.

In response to a question from Chairman Schmidt, Mr. Weisgerber said there are currently eight marketing areas in the state.

In response to a question from Chairman Schmidt, Mr. Weisgerber said Amcon had asked for a license to distribute statewide. He said the board has received applications for only limited marketing areas. He said those are, however, rare.

Committee Counsel said when an entity is determined to be in need of service, there must be some method by which the board reviews the 78 distributors and selects the entity that will be asked to provide the service. She said the Century Code does not indicate whether that selection is made by size, proximity, or some other standard or requirement.

Mr. Weisgerber said in Hettinger, one distributor sells Land o' Lakes products and one sells Cass Clay products. He said if a distributor does not want to provide service to a small account, he would sit down with the distributors and work out who will provide the service.

In response to a question from Representative Trottier, Mr. Weisgerber said the Century Code does not require a person who wishes service to meet a minimum product threshold. He said Mr. Job has referenced Amcon's willingness to service an account if it is profitable. He said the Century Code does not address profitability. He said the law requires that everyone be serviced. He said the board also considers the frequency with which an applicant for a distributor's license agrees to provide product to a small retailer.

SOIL CLASSIFIERS

Chairman Schmidt said some of the committee members have thoughts regarding the soil classifier bill draft that the committee considered at its last meeting.

Representative Kiefert said there is concern about the amount of time that it currently takes to become a registered soil classifier in North Dakota.

Representative Rust said he is concerned that we might be requiring a registered soil classifier for jobs that do not now require such an individual.

Senator Luick said perhaps we need to consider different backgrounds for different types of jobs that are currently lumped together under the umbrella of soil classification. He said for 40 years, he has been involved in analyzing soils for septic systems. He said the amount of expertise that is needed to perform that function is not as extensive as that which is needed for wetland delineations. He said what he does can be learned in about a year through various classes and training experiences. He said the education that is needed should be tied to a specific job.

Senator Luick said entities that engage in soil classification are on the hook for the determinations made by their employees. He said another avenue to consider is whether the soil classifier chapter is needed at all. He said whether it is the Department of Transportation or an engineering firm, they have engineers on staff who have the training to understand soils. He said they are just not registered soil classifiers. He said not everybody who wishes to engage in soil classification needs to expend the amount of time currently required for schooling and experience.

Chairman Schmidt said another idea that was posited with him had to do with not exempting a specific employer, such as a governmental agency or a private company, but rather exempting the job. He said, for instance, the delineation of wetlands could be exempt from the definition of soil classification.

Chairman Schmidt said he knows of an individual who took the national fundamentals test. He said there were five students from North Dakota. He said they have not yet received their results. However, he said, when the students finished taking the national fundamentals test, not one of them felt that they had passed it. He said North Dakota State University has input into the content of that national test. He said there is a disconnect somewhere. He said either the students did not grasp what they were taught or they were not taught that which they needed to know. He said he is not certain that all five students graduated from North Dakota State University. He said two, however, did graduate from that institution.

Representative Johnson said if students who have gone through the soils program cannot pass the national fundamentals test, there is no incentive for underclassmen to enter this field. He said perhaps that is why we have so few individuals in this field.

Committee Counsel said the committee might wish to consider the consequences of the suggestions being made. She said the committee was told that there are slightly more than a dozen active soil classifiers in this state. She said if wetland delineation is to be removed from the list of activities requiring a soil classifier, if soil analysis for septic systems is to be removed, and if perhaps a few others are to be removed, which functions actually remain in order to support a program for the registration of soil classifiers.

Chairman Schmidt thanked the committee for its work. He said, with respect to the study of the North Dakota Milk Marketing Board, he has never seen a governmental program that is more geared toward protectionism than this one. However, he said, he is not certain that a "happy medium" is achievable. He said he is not certain if it is possible to protect our state's dairymen while opening up our markets.

No further business appearing, Chairman Schmidt adjourned the meeting at 4:45 p.m.

L. Anita Thomas
Committee Counsel

ATTACH:1