

HEALTH CARE REFORM REVIEW COMMITTEE

The Health Care Reform Review Committee was assigned three studies.

Section 1 of House Bill No. 1252 (2011) directed the committee to monitor the impact of the Patient Protection and Affordable Care Act (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010; rules adopted by federal agencies as a result of that legislation; and any amendments to that legislation. The study charge directed the committee to report to the Legislative Management before a special session of the Legislative Assembly if a special session is necessary to adopt legislation in response to the federal legislation.

Senate Concurrent Resolution No. 4005 (2011) directed the committee to study the impact of the PPACA and the Affordable Care Act (ACA) on the Comprehensive Health Association of North Dakota (CHAND) and the statutes governing CHAND.

Legislative Management directive directed the committee to study the feasibility and desirability of developing a state plan that provides North Dakota citizens with access to and coverage for health care which is affordable for all North Dakota citizens.

In addition to the committee's three studies, the Health Care Reform Review Committee was charged with receiving the following updates:

- Regular updates from the Insurance Commissioner during the 2011-12 interim regarding administration and enforcement of the PPACA, proposed legislation for consideration at a special legislative session, and proposed legislation by October 15, 2012, for the 2013 regular session (2011 House Bill No. 1125, Section 2);
- Regular updates from the Insurance Commissioner and Department of Human Services during the 2011-12 interim on planning and implementing an American health benefit exchange for the state and proposed legislation for consideration at a special legislative session, or proposed legislation by October 15, 2012, for the 2013 regular session (2011 House Bill No. 1126, Section 3); and
- Regular updates from the Insurance Commissioner during the 2011-12 interim with respect to steps taken to ensure health insurer procedures are in compliance with the PPACA, proposed legislation for consideration at a special legislative session if the commissioner is required by federal law to implement any requirement before January 1, 2013, and proposed legislation by October 15, 2012, for any requirement that must be implemented between January 1, 2013, and January 1, 2014 (2011 House Bill No. 1127, Section 6).

Committee members were Representatives George J. Keiser (Chairman), Donald L. Clark, Robert Frantsvog, Eliot Glassheim, Nancy Johnson, Lee Kaldor, Jim Kasper, Gary Kreidt, Lisa Meier, Ralph Metcalf, Marvin E. Nelson, Karen M. Rohr, Robin Weisz, and

Lonny B. Winrich and Senators Spencer D. Berry, Dick Dever, Jerry Klein, Judy Lee, and Tim Mathern.

The committee submitted this report to the Legislative Management on November 3, 2011. The Legislative Management accepted the report for submission to the Legislative Assembly.

BACKGROUND

Affordable Care Act

In March 2010 President Barack Obama signed into law two pieces of legislation that laid the foundation for a multiyear effort to implement health care reform in the United States--PPACA (H.R.3590) and the Health Care and Education Reconciliation Act of 2010 (H.R.4872)--which together are referred to as ACA. The ACA crafted new structural models to increase access to and affordability of health care coverage, with as many as 32 million additional Americans being covered; to improve operational governance of the health insurance industry; to provide consumers protection; and to provide new tools for the improvement of the health care delivery system and patient outcomes.

Of particular interest to states regarding the ACA are the multiple specific provisions of the ACA and the implementation timeline of these specific provisions. The National Conference of State Legislatures (NCSL) identified and summarized the following ACA provisions and dates as being of interest to state legislatures:

2010

- High-risk pools established by states or federal government.
- Small business tax credits offered for employees' health coverage.
- Insurance companies required to cover young people to age 26 on their parents' plans.
- Prescription coverage gap for seniors reduced.
- Federal grants awarded to states for insurance premium reviews, health insurance exchanges, and other programs.
- Insurance companies restricted from dropping coverage for people who get sick or excluding coverage for kids with preexisting conditions.
- States offered option to expand Medicaid earlier than 2014 to cover adults with incomes up to 133 percent of poverty, at the state's regular Medicaid matching rate.

2011-13

- Medicare reforms required, such as ensuring access to physicians, improving payment accuracy, and prescription drug coverage.

2014

- Medicaid must cover an estimated 16 million additional people by 2017.
- Health exchanges start, with federal subsidies to help middle-income Americans purchase coverage.
- Individuals must purchase health insurance, with some exceptions.

- Insurance companies must cover people with preexisting conditions and policies must be renewed even if people get sick.
- Employers with 50 or more full-time employees must offer coverage or pay a fee.

2016

- States have option to join multistate compacts.

2018

- High-cost or so-called "Cadillac" health plans will be taxed.

In addition to the items addressed in the NCSL timeline, the ACA provides two deadlines by which a state must meet external review processes. The ACA provides that by January 1, 2012, group health plans and health insurance issuers in the group and individual market must comply with a state external review process that:

1. At a minimum includes the consumer protections set forth in the Uniform Health Carrier External Review Model Act issued by the National Association of Insurance Commissioners (NAIC), referred to as being an "NAIC-parallel process"; or
2. Meets the federal Department of Health and Human Services (HHS) 16-point standards, referred to as being an "NAIC-similar process."

Compliance with the NAIC-similar processes is a temporary status such that by January 1, 2014, all health plans and health insurance issuers in the group and individual market must comply with an NAIC-parallel process. If by January 1, 2012, the state process is neither an NAIC-parallel process nor an NAIC-similar process, and if by January 1, 2014, the state process is not an NAIC-parallel process, the state's health insurance issuers in the state will be subject to a federally-administered external review process. (United States Department of Labor Technical Release 2011-02, dated June 22, 2011.)

2009-10 Interim Industry, Business, and Labor Committee Study

During the 2009-10 interim, the chairman of the Legislative Management directed the interim Industry, Business, and Labor Committee to monitor federal health care reform legislation, including its effect on North Dakota citizens and state government; the related costs and state funding requirements; related tax or fee increases; and the impact on the Medicaid program and costs, other state programs, and health insurance premiums, including the Public Employees Retirement System (PERS).

The interim Industry, Business, and Labor Committee received testimony from a wide range of interested parties, including representatives of the:

1. Insurance Commissioner;
2. Department of Human Services;
3. PERS;
4. State Department of Health;
5. Tax Commissioner;
6. Bank of North Dakota;
7. Cato Institute;

8. George Mason University Center for Health Policy Research and Ethics;
9. Pharmaceutical Research and Manufacturers of America;
10. Cameron Institute;
11. Health Services Management Programme at McMaster University located in Hamilton, Ontario;
12. North Dakota Medical Association;
13. North Dakota Hospital Association;
14. North Dakota Pharmacists Association;
15. Blue Cross Blue Shield of North Dakota; and
16. Business owners and farm groups.

The interim committee recommended House Concurrent Resolution No. 3003 to direct the Legislative Management to continue studying the impact of the ACA during the next interim. Although the resolution was adopted, the Legislative Management did not prioritize the study.

The chairman of the committee developed and the committee approved a summary identifying the anticipated costs to the state of implementation of the ACA.

2011 Legislation

House Bill No. 1004

As introduced, the State Department of Health appropriation bill would have authorized the State Department of Health to apply for and spend ACA-related grants for public health infrastructure in the amount of \$200,000, abstinence programs in the amount of \$182,100, and intensive home visiting in the amount of \$1,413,012. These appropriation clauses were not included in the enrolled version of the bill.

House Bill No. 1125

This bill directed the Insurance Commissioner to administer and enforce the provisions of the ACA.

House Bill No. 1126

This bill directed the Insurance Commissioner and the Department of Human Services to plan for the implementation of a state American health benefit exchange that facilitates the purchase of qualified health benefit plans, provides for the establishment of a small business health options program, implements eligibility determination and enrollment of individuals in the state's medical assistance program and the state's children's health insurance program (CHIP), provides simplification, provides coordination among the state's health programs, and meets the requirements of the ACA; provides deadlines for implementing the exchange; directs the Insurance Commissioner and the Department of Human Services to collaborate with the Information Technology Department; and authorizes the Insurance Commissioner and the Department of Human Services to receive from and provide to federal and state agencies information gathered in the administration of the exchange as necessary. Additionally, this bill authorized the Insurance Commissioner to apply for and spend up to \$1 million in federal grants for establishing the state's health benefit exchange.

House Bill No. 1127

This bill amended North Dakota law impacting health plans in order to implement the necessary provisions of the ACA, including limitations on risks, independent external review, external appeal procedures, and internal claims and appeals procedures.

House Bill No. 1165

This bill provided that subject to certain exclusions, regardless of whether a resident of this state has or is eligible for health insurance coverage under a health insurance policy, health service contract, or evidence of coverage by or through an employer or under a plan sponsored by the state or federal government, the resident is not required to obtain or maintain a policy of individual health coverage except as may be required by a court or by the Department of Human Services through a court or administrative proceeding.

Senate Bill No. 2010

As introduced, the Insurance Commissioner appropriation bill would have appropriated other funds in the amount of \$2,504,005 and authorized five full-time equivalent (FTE) positions for the purpose of funding enhanced insurance premium rate review activities related to the ACA. As enacted, the bill appropriated other funds in the amount of \$1,418,637 and did not authorize any additional FTE positions for this purpose.

Senate Bill No. 2012

As introduced, the Department of Human Services appropriation bill would have appropriated general funds in the amount of \$225,507 and other funds in the amount of \$305,588 and authorized seven FTE positions to fund the expansion of the Medicaid program. As enrolled, this bill did not include the appropriation or the FTE request.

Senate Bill No. 2037

This bill changed the membership of the Health Information Technology Advisory Committee by adding the chairman of the House Human Services Committee and the chairman of the Senate Human Services Committee or, if either or both of them are unwilling or unable to serve, a replacement selected by the chairman of the Legislative Management. The bill authorized the Health Information Technology Advisory Committee to accept private contributions, gifts, and grants. The bill required the director of the Health Information Technology Office to implement and administer a health information exchange that utilizes information infrastructure and systems in a secure and cost-effective manner to facilitate the collection, storage, and transmission of health records; adopt rules for the use of health information, use of the health information exchange, and participation in the health information exchange; and adopt rules for accessing the health information exchange to ensure appropriate and required privacy and security protections and relating to the authority of the director to suspend, eliminate, or terminate the right to participate in the health information exchange. The bill also required the director to

determine fees and charges for access and participation in the health information exchange and to consult and coordinate with the State Department of Health and the Department of Human Services to facilitate the collection of health information from health care providers and state agencies for public health purposes. The bill required each executive branch state agency and each institution of higher education that implements, acquires, or upgrades health information technology systems, by January 1, 2015, to use health information technology systems and products that meet minimum standards adopted by the Health Information Technology Office for accessing the health information exchange. The bill provided that any individually identifiable health information submitted to, stored in, or transmitted by the health information exchange is confidential and any other information relating to patients, individuals, or individually identifiable demographic information contained in a master client index submitted to, stored in, or transmitted by the health information exchange is an exempt record. The bill provided immunity from criminal or civil liability for any health care provider that relies in good faith upon any information provided through the health information exchange in the treatment of a patient for any damages caused by that good-faith reliance. The bill provided that effective January 1, 2015, an executive branch state agency, an institution of higher education, and any health care provider or other person participating in the health information exchange may use only an electronic health record system for use in the exchange which is certified under rules adopted by the Office of the National Coordinator for Health Information Technology.

Senate Bill No. 2309

This bill provided that the ACA likely is not authorized by the United States Constitution and may violate its true meaning and intent as given by the Founders and ratifiers. The bill required the Legislative Assembly to consider enacting any measure necessary to prevent the enforcement of the ACA within this state and provided that no provision of the ACA may interfere with an individual's choice of a medical or insurance provider except as otherwise provided by the laws of this state.

TESTIMONY

The committee held six committee meetings before the 2011 special session. The primary focus of these meetings was determining what actions the state should take to address the health benefit exchange requirement under the ACA and reviewing additional information regarding other elements of the ACA, such as Medicaid expansion and external review requirements.

Health Benefit Exchange

In order to prepare for the 2011 special session, the committee received updates from state agencies regarding the status of other states' implementation of the health benefit exchange requirement under the ACA as well as the status of federal laws and rules relating to the health benefit exchange; received a presentation by

Mr. Michael O. Leavitt of Leavitt Partners, Salt Lake City, Utah, regarding the steps taken in Utah to create a health benefit exchange and how North Dakota may learn from this experience; held panel discussions at which the committee heard health benefit exchange perspectives of insurers, licensed insurance producers, medical professionals, hospitals, consumers, and businesses; informally surveyed state agencies and nonprofit entities for opinions relating to governance of health benefit exchanges and expectations of health benefit exchanges; and reviewed several bill drafts relating to creation of a state administered health benefit exchange.

State Administered Health Benefit Exchange

At the committee's first meeting the committee voted to pursue legislation to provide for a state-administered health benefit exchange while keeping opportunities open for cooperation with other states; however, throughout the committee's meetings the committee continued to discuss the option of federal administration and the option of a federal-state partnership for a federally administered health benefit exchange and continued to discuss the pros and cons of starting under one administration model and transitioning to another.

Montana is the only state that requested information from North Dakota regarding a multistate health benefit exchange, and this inquiry was due to a legislative directive. The committee received information that from an information technology standpoint, integration of the health benefit exchange system would work better if kept in-state. A representative of the Information Technology Department expressed concern regarding difficulties of having states share a health benefit exchange system when the state health benefit requirements vary from state to state. Additionally, a representative of the Information Technology Department testified that as an example of challenges the state may face if working with one or more other states in designing a health benefit exchange, the state is working with a neighboring state on the health information exchange system. Issues arise because that other state is not working as fast as North Dakota. The committee received testimony from a representative of the health insurance industry that although multistate exchanges may allow states to join in vendor contracts with other states, typically an insurer's products vary significantly from state to state.

The committee received testimony from insurers in support of a state-administered health benefit exchange.

The committee received status updates from representatives of the Insurance Department regarding which states have opted to have the federal government administer the state's health benefit exchange and which states have opted to administer their own health benefit exchange. The Insurance Commissioner requested the committee keep an open mind to allowing federal administration of the health benefit exchange because there are several unknowns that may impact the desirability of having a state-administered health benefit exchange, such as essential benefits, the final HHS rules, and the United States Supreme Court's ruling on the constitutionality of the ACA.

The committee received information that by January 1, 2013, HHS will approve, conditionally approve, or reject each state's health benefit exchange plan. The proposed HHS rules clarify that if a state begins with a federally administered health benefit exchange, the state retains the option to take over administration at a later date.

Committee members expressed frustration in being in the position to design health benefit exchange legislation without firm financial figures regarding the costs associated with designing and running an exchange.

The committee received testimony regarding options for administration of a state health benefit exchange, including state administration, federal administration, or a state-federal partnership for administration. Testimony indicated a partnership model technically would be a federally administered health benefit exchange.

Status Reports and Updates

The Insurance Commissioner and representatives of the Insurance Department made regular status reports to the committee regarding:

- The federal grants that are available to states to assist in implementation of the health benefit exchanges--planning grants, innovator grants, and establishment grants--and the status of these grants;
- The NAIC's and Insurance Commissioner's duties under the ACA as well as the timeline for implementation of the ACA;
- The status of states' implementation of the ACA's health benefit exchange requirement; and
- The HHS proposed rules regarding the ACA.

The committee reviewed HHS proposed rules regarding the ACA. The committee received testimony that it is expected the HHS comment period for the proposed rules will close October 31, 2011, and the final rules regarding the definition of essential benefits are not expected until May 2012 at the earliest. The committee referenced the HHS proposed rules in developing the language for the health benefit exchange bill drafts.

On July 22, 2011, North Dakota became the first state for which HHS denied an adjustment request for implementing the ACA medical loss ratio provision. The Insurance Commissioner had requested a three-year phase-in approach to the 80 percent medical loss ratio requirements under the ACA. The HHS decision was based on HHS's finding the state's adjustment request did not prove health insurance issuers would leave the market if the adjustment was not granted. The Insurance Commissioner did not appeal this decision.

The committee received a final report on the Insurance Commissioner's stakeholder meetings held across the state on behalf of the Insurance Commissioner, Department of Human Services, and Information Technology Department. The final report indicated a majority of participants thought the state should administer the health benefit exchange; reoccurring themes included cost concerns, whether health plans will be affordable; confusion, the desire that the health benefit exchange is easy to use and consumers are able to easily compare health plans; the

need for assistance in using the health benefit exchange and the importance of there being a person to answer questions and help those who do not want to or are unable to apply online; and the desire of choice as consumers want competition among carriers but they are also concerned about being overwhelmed by too much choice.

The committee reviewed the Insurance Commissioner's request for proposal (RFP) seeking a qualified and experienced firm to conduct background research, analyze data, identify options, and recommend a viable plan for developing and sustaining a health benefit exchange in the state. The RFP proposed the following contract schedule:

- Contract start date--August 26, 2011;
- Kick-off meeting with Insurance Department and other state agencies--September 6, 2011;
- Contractor begins providing biweekly progress reports--September 9, 2011;
- Contractor submits interim project report--September 28, 2011;
- Insurance Commissioner provides contractor with comments for revision of interim report as needed--October 5, 2011;
- Contractor submits revised interim report--October 10, 2011;
- Contractor submits final report--December 2, 2011; and
- Informal debriefing--December 9, 2011.

The committee received testimony from a representative of HTMS, Indianapolis, Indiana--the firm that was selected under the RFP--regarding the services HTMS is performing for the Insurance Commissioner under the contract. The actual schedule of deliverables varied slightly from the RFP's proposed schedule, but the schedule did provide for an interim report to be delivered by October 31, 2011, in order for the material to be available for the special session scheduled to begin November 7, 2011.

Michael O. Leavitt

The committee received a presentation from Mr. Leavitt regarding the ACA and the steps taken by Utah to create a health benefit exchange. Mr. Leavitt testified:

- North Dakota needs to consider how best to meet the needs of North Dakota.
- HHS will likely acknowledge the state's good faith attempts and recognize the needs of the state.
- A state should not utilize a federally administered exchange.
- The two basic questions are what is the role of government and should the health benefit exchange be inside state government or outside state government? He testified in support of government involvement in health care reform but stressed the importance of focusing on the nature of government involvement. He stated he supports the government role of helping construct an efficient environment for health care.

- The primary problem with the country's current health care system is that it focuses on volume over value, with the system based on fee for services and incentivizing high numbers of procedures instead of quality outcomes.

The Insurance Commissioner reviewed the Utah and Massachusetts health benefit exchanges, and reminded the committee that the Utah exchange does not meet the ACA requirements.

Panel Discussions

The committee held five panel discussions and received information from individuals representing health care insurers, licensed insurance producers, consumers, employers, medical professionals, and hospitals regarding:

1. The impact of the health benefit exchange on the health insurance industry;
2. The impact of the health benefit exchange on health care providers, hospitals, consumers, insurance agents, and employers;
3. Whether the state's health benefit exchange should be designed to include two separate risk pools--one for individuals and one for small businesses, called a small business health insurance program (SHOP) exchange--or whether the exchange should be designed to combine both the individual and the small business policies into a single risk pool;
4. Whether the state should restrict whether health insurers may choose to offer policies outside the state's health benefit exchange; and
5. Whether the state's health benefit exchange under the ACA should limit the qualified health plans offered through the exchange to the four benefit levels--platinum, gold, silver, and bronze--or should allow multiple types of plans within each of the benefit levels.

The committee considered the information provided at these panel discussions as the committee developed the health benefit exchange bill drafts.

Surveys

The committee performed an informal survey of state agencies and nonprofit entities to determine whether any of the state agencies or nonprofit entities in the state were interested in administering the state's health benefit exchange. None of the responding state agencies or state's nonprofit entities expressed a desire to fulfill the primary role of administering the state's health benefit exchange but several did express a willingness to participate in a board designed to govern such a health benefit exchange.

BILL DRAFTS

The committee began the health benefit exchange bill drafting process by reviewing three separate bill drafts, each of which was based on the NAIC American Health Benefit Exchange Model Act:

1. The first bill draft was revised based on the recommendations of a group of stakeholders--AARP, Blue Cross Blue Shield of North Dakota,

Medica, and Sanford Health--which worked together to create a consensus draft;

2. The second bill draft was based on the first bill draft with the primary revisions requiring navigators be licensed insurance producers and to comply with specified continuing education requirements, providing the health benefit exchange would be governed and administered by the Office of Management and Budget (OMB) and an appointed board, providing funding through a premium tax, and clarifying the health benefit exchange would not create dual regulation of health insurance;
3. The third bill draft also was based on the first bill draft with the following revisions:
 - a. The governance model differed, including specific language providing for tribal involvement;
 - b. Repeal of CHAND;
 - c. Provision of a financing mechanism for the health benefit exchange, providing for the funding for CHAND to be transitioned to fund the exchange;
 - d. The conflict of interest restrictions for the health benefit exchange board were more specific; and
 - e. The health benefit exchange board was provided flexibility in several matters, including whether to establish a single risk pool for individual and small group policies and in developing navigator requirements.

The committee used the second bill draft as the vehicle for the design of the state's proposed health benefit exchange. Through the bill draft review process, the bill draft underwent several revisions. In revising the committee health benefit exchange bill draft the topics addressed by the committee included administration, board membership, risk pools, the market inside and outside the exchange, navigators, small employer definition, administrative hearings, funding, and technology.

Administration

The Insurance Commissioner testified in opposition to being charged with building or administering the state's health benefit exchange due to inherent conflicts of interest. However, the commissioner did support the concept of the Insurance Commissioner serving in an advisory capacity or serving as a member of the board of a board-administered exchange.

The committee received testimony from insurers in support of creating a state-administered health benefit exchange that meets the minimum requirements of the ACA, allowing for a design approach that will allow the state to add additional functions to the exchange once the state has a better understanding of what the state's needs are and as the individual and group markets adapt to the ACA.

Although representatives of the health insurance industry testified in support of a state-administered health benefit exchange, the committee also received testimony from insurers in support of a

state-administered health benefit exchange that is governed by a nonprofit board, to ensure decisions are made free from political pressure or influence.

The committee received testimony from a representative of the Governor's office that the Governor would support a state-administered health benefit exchange that would provide for OMB to provide administrative services to a board of stakeholders that would actually govern the exchange, that would provide for the Information Technology Department to provide technology support, and that would provide the Department of Human Services would address eligibility for the Medicaid and CHIP programs.

The committee received testimony that the state's health benefit exchange should ensure that the health insurance plans offered through the exchange should have a high level of transparency and accountability in order for patients to make informed health care purchasing decisions. Additionally, steps should be taken to guard against cost-containment mechanisms that are termed quality measures.

The committee received testimony from a representative of the North Dakota Medical Association that insurance coverage options offered in a health benefit exchange should be self-supporting, have uniform solvency requirements, not receive special advantages from government subsidies, include payment rates established through meaningful negotiations and contracts, not require provider participation, and not restrict enrollees' access to out-of-network physicians.

Board Members

The committee considered several alternatives addressing the makeup of the membership of the health benefit exchange policymaking board. Related to the board composition and board policies, the committee addressed the issue of conflicts of interest for board members. Representatives of consumer organizations testified in opposition to allowing governing board members who have conflicts of interest due to affiliations with health care industries.

In establishing the makeup of the board, the committee considered the appropriate size and makeup of the board, including whether legislators should serve on the board and if so whether they should be voting members; how to define or designate who might qualify as a representative of consumers; whether to include representatives of physicians and other medical professions and whether to include representatives of health care facilities; and whether licensed insurance producers should be represented on the board. Additionally, the committee considered whether the members of the board should receive per diem and reimbursement for board-related expenses such as travel, food, and lodging.

Risk Pools

Although the committee did receive some testimony in support of a single risk pool for the individual market and the small group market, the Insurance Commissioner and representatives of the health

insurance industry testified in support of keeping these two risk pools separate. The committee received testimony there is concern that if the two risk pools are joined, the premiums for small groups would increase as a result.

Market Inside and Outside Exchange

The committee considered whether the health benefit exchange should take steps to minimize adverse selection as it relates to consumers purchasing health coverage from inside the exchange versus outside the exchange or whether steps should be taken to otherwise increase the success and viability of the health benefit exchange, including considering whether the health benefit exchange might provide that in order to sell outside the exchange an insurer is required to also sell inside the exchange. In addition, the committee considered whether the health benefit exchange should have the authority to limit the number of policies offered inside the exchange.

Generally, the committee received testimony from health insurers in support of consumer choice and consumer flexibility. However, at least one insurer testified in support of requiring a company interested in selling a product outside the exchange also be required to offer products inside the exchange in order to address the concern of adverse selection or cherry picking. Additionally, the committee received testimony that in order to keep health benefit exchange administration costs low and to minimize consumer confusion, it may be reasonable to restrict each insurer to two product options within each metallic level in the individual market and the same two product limitations within the small group market and to require that anyone wishing to sell health insurance in North Dakota must be part of the health benefit exchange.

The committee received testimony from a representative of a consumer organization in support of requiring insurers to offer similar products inside and outside the exchange to mitigate adverse selection. The committee also received testimony from a representative of a consumer organization in support of designing a health benefit exchange that acts as an active purchaser.

Navigators

The committee considered how the HHS proposed rules impact the ability of licensed insurance producers to enroll consumers in health policies through the health benefit exchange, receive compensation from an insurer, and receive navigator grants under the health benefit exchange.

The Insurance Commissioner testified the overwhelming opinion is that licensed insurance producers need to continue to be involved in the health benefit exchanges. Additionally, the committee received testimony from licensed insurance producers regarding the value of the services provided by licensed insurance producers, the level of expertise and training required of a licensed insurance producer in order to assist consumers in selecting health policies, and the need to allow licensed insurance producers to continue to

perform their jobs under the new health benefit exchange.

The committee received testimony from representatives of consumer organizations reminding the committee a broad range of consumers will require a broad range of services to utilize the health benefit exchange, stressing there should be a broad range of entities working as navigators, and stating that the navigator program will play a critical role in education of and outreach to consumers.

The committee received testimony from a representative of the Department of Human Services reminding the committee that since the health benefit exchange will be used to enroll consumers in Medicaid and CHIP, for some consumers there will be a need for navigators to have expertise that goes beyond the services typically offered by licensed insurance producers.

Small Employers

The committee received information that the ACA allows states some flexibility in defining the term "small employer." Until 2016, states can limit the maximum size of a small employer to 50 employees, after which time the states will need to increase the maximum size to 100 employees. The committee received testimony from insurers in support of limiting the state's definition of small group employers to no more than 50 employees because this approach will mitigate concerns regarding the self-funded market entering and exiting the small group market.

Administrative Hearings

The committee considered what administrative hearing process should apply to appeals of insurance certification determinations, whether the law should address the award of attorney's fees for appeals, and whether a hearing officer's order should be final and appealable or should be a recommendation to the agency.

Funding

The committee received information from a representative of the Insurance Department that although HHS has unlimited funding for grants to states to implement the health benefit exchange portion of the ACA, by January 1, 2015, the health benefit exchanges must be self-sustaining.

The committee considered whether the revenues that could be raised by an increase in the insurance premium tax imposed on health insurers would be adequate to fund all or a portion of the anticipated cost of sustaining the health benefit exchange; whether an increase in insurance premium tax is a desirable funding mechanism; and whether there might be other funding sources that would be preferable to increasing premium taxes, such as repealing CHAND and diverting the CHAND assessments to the health benefit exchange.

The committee received information from OMB, Department of Human Services, and Information Technology Department regarding the anticipated costs and FTE positions required to establish and implement

the health benefit exchange for the remainder of the biennium.

Technology

The committee received testimony from a representative of the Information Technology Department that the ACA requires the health benefit exchange to provide a coordinated, simple, technology-supported process through which individuals may obtain coverage through Medicaid, CHIP, and health insurance. Although the health benefit exchange is designed to be simple for enrollees on the frontend, it is not a simple process on the backend in the world of technology.

Additional Elements of the ACA

In addition to the ACA requirement for a state health benefit exchange, the ACA also expands Medicaid and requires that insurance companies comply with the ACA external review provisions.

Medicaid Expansion

The committee received the following testimony from representatives of the Department of Human Services regarding Medicaid expansion under the ACA:

- Medicaid expansion effective January 1, 2014, will include a coverage requirement for individuals under age 65 with incomes up to 133 percent of the federal poverty level based on modified adjusted gross income. North Dakota's Medicaid program is expecting up to a 50 percent increase in enrollment because of this expansion. In April 2011 North Dakota's Medicaid enrollment was 64,299. Before January 1, 2014, North Dakota will need to decide if this Medicaid expansion population will receive the current Medicaid services or if the benefit package will be more consistent with the essential health benefits package.
- Extension of Medicaid coverage for foster care children effective January 1, 2014, will provide that all individuals who were in foster care and receiving Medicaid as of the date they turned 18 will continue to be eligible for Medicaid through age 25.
- A required element of the health benefit exchange is that it apply the Medicaid and CHIP eligibility determination and provide for enrollment. In order to achieve this level of interoperability with the health benefit exchange, the Medicaid and CHIP eligibility systems will require significant modifications.

External Review

In July 2011 HHS made a determination that the state's external review law did not meet the minimum federal standards under the ACA. The Insurance Commissioner did not appeal the decision. A representative of the Insurance Department testified 2011 House Bill No. 1127 was prepared by the Insurance Commissioner to satisfy the ACA internal review and external review requirements for health insurance claims. However, that bill was amended and

HHS determined this amended version does not comply with the ACA.

The committee received testimony that if the state's external review process had been determined to be effective, the state would be the entity that assisted consumers with their external review process; however, because the process was found not to be effective, consumers must send their external review requests to the federal government.

The committee considered three alternative bill drafts to provide for a state external review process that is intended to meet the ACA standards. The first bill draft essentially would have reintroduced 2011 House Bill No. 1127, as introduced, which appears to have been intended to be an NAIC-parallel process approach. The second and third bill drafts were drafted to be NAIC-similar approaches, with one bill draft directing the Insurance Commissioner to implement the selection of the independent review organization (IRO) and the other bill draft directing the health insurer to implement the selection of the IRO.

The committee received testimony the NAIC-similar process approach bill draft that directs the Insurance Commissioner to implement the selection of the IRO is the ACA-compliant approach to selecting an IRO. Additionally, the committee discussed the legislative history of House Bill No. 1127 and why it was amended during the 2011 regular session.

A representative of the Insurance Department presented information regarding the 16 points that should be met by an external review process in order to be determined to be an NAIC-similar process and how each of the three bill draft rates on each of these points.

The committee received testimony from a representative of the health insurance industry that meeting the federal external review standards is not a hardship. Regardless of what the state law provides, effective January 1, 2014, all policies certified to be sold through the health benefit exchange will have to comply with the federal requirements, i.e., an NAIC-parallel process.

The committee received testimony from a representative of the health insurance industry in opposition to the bill draft based on House Bill No. 1127, as introduced, stating the proposed language goes beyond what is required by the ACA.

RECOMMENDATIONS

The committee recommends House Bill No. 1474 to provide for a state-administered health benefit exchange. The bill draft would:

- Create the North Dakota Health Benefit Exchange Board, which would include four ex officio nonvoting members as well as nine voting members appointed by the Governor. This board would establish the policy for the administration of the health benefit exchange.
- Create the OMB Health Benefit Exchange Division, charged with implementing the policy established by the board and administering the health benefit exchange.

- Require that by January 1, 2013, the exchange be determined by HHS to be ready to begin operations by October 1, 2013, and be fully operational by January 1, 2014. The bill draft provides if the federal implementation deadlines are delayed, the director of OMB may set a later date consistent with the federal deadlines.
- Clarify the health benefit exchange may not duplicate or replace the duties of the Insurance Commissioner or the duties of the executive director of the Department of Human Services relating to the Medicaid and CHIP programs.
- Direct the Department of Human Services to take steps necessary to create and coordinate with the Health Benefit Exchange Division on those portions of the health benefit exchange relating to eligibility determination in the state's Medicaid and CHIP programs.
- Direct state agencies to cooperate with the board, the Health Benefit Exchange Division, and the Department of Human Services to ensure the success of the health benefit exchange.
- Direct the division to adopt rules consistent with the board's conflict of interest policy.
- Direct the board to regularly consult on an ongoing basis with each of the federally recognized tribes located within the state, consult with the Indian Affairs Commission, and invite the executive director of the Indian Affairs Commission to board meetings.
- Direct the board to establish a Health Benefit Exchange Advisory Group and Technical Advisory Group and allow the board to establish any other temporary advisory groups as may be appropriate.
- Direct the board to establish the criteria and procedures for certifying qualified health plans in conformity with and not exceeding the requirements of the ACA.
- Authorize the division to contract with one or more eligible entities to carry out one or more of the functions of the health benefit exchange.
- Provide the health benefit exchange must allow for a health carrier to offer a plan that provides limited scope dental benefits.
- Provide the health benefit exchange shall foster a competitive marketplace for insurance and may not solicit bids, engage in the active purchasing of insurance, or exclude a health benefit plan from the exchange based on a premium price control.
- Prevent the health benefit exchange from precluding the sale of health benefit plans through mechanisms outside the exchange.
- Prevent the health benefit exchange from precluding a qualified individual from enrolling in or a qualified employer from selecting a health plan offered outside the exchange.
- Create a Navigation Office within the Health Benefit Exchange Division which would provide navigator services, provide navigator grants to the Indian Affairs Commission, and regulate who may charge a fee to or otherwise receive consideration to assist consumers in making health coverage decisions through the use of the health benefit exchange.
- Require a separate risk pool for health plans in the individual market and a separate risk pool for health plans in the small group market.
- Provide the health benefit exchange must be self-sustaining by January 1, 2015, and that until such date the division, the Information Technology Department, and Department of Human Services shall use grant funds to finance the establishment of the exchange.
- Direct that before August 1 of each year the division shall submit a proposal to the board outlining how to raise the funds necessary to fund the board, division, and health benefit exchange.
- Direct that before October 1 of each year the board shall establish a plan for funding the board, division, and health benefit exchange.
- Authorize the board to charge assessments or user fees or otherwise generate funding necessary to support the health benefit exchange operations.
- Create the health benefit exchange fund for the deposit of funds to support the board, division, and exchange operations.
- Repeal North Dakota Century Code Chapter 26.1-54, directing the Insurance Commissioner and Department of Human Services to establish a health benefit exchange.
- Direct the Insurance Commissioner, Department of Human Services, and the Information Technology Department to provide regular updates to the Legislative Management regarding the implementation of the Act.
- Provide it is the legislative intent that OMB apply for federal Level 1 and Level 2 exchange establishment grants to fund the health benefit exchange planning activities.
- Provide it is the legislative intent that the division, Information Technology Department, and the Department of Human Services explore grant opportunities that may become available for the health benefit exchange.
- Provide it is the legislative intent that except as expressly authorized, state entities may not use state funds to fund the planning activities related to the development of and operation of the health benefit exchange.
- Provide a continuing appropriation of federal funds received from federal health insurance exchange grants to the division, Information Technology Department, and Department of Human Services, for the purposes of establishing a state health insurance exchange.
- Provide an appropriation from federal funds to OMB for the purpose of defraying the expenses of establishing and operating the health benefit exchange and authorize nine FTE positions. The federal funding is not subject to the cancellation of

unexpended funds provisions of Section 54-44.1-11.

- Provide an appropriation from federal funds to the Information Technology Department for the purposes of defraying the expenses of establishing and implementing the health benefit exchange and authorize 19 FTE positions. The federal funding is not subject to the cancellation of unexpended funds provisions of Section 54-44.1-11.
- Provide an appropriation from money in the health benefit exchange fund to the Health Benefit Exchange Division for the purpose of funding the operation and activities of the Navigation Office.
- Provide the amount remaining from the Insurance Commissioner's \$1 million federal grant received for planning for the implementation of a health benefit exchange is transferred to the health benefit exchange fund for use by the Health Benefit Exchange Division, Department of Human Services, or Information Technology Department for the planning, establishing, and administering of the health benefit exchange.
- Provide it is the legislative intent that absent legislative authorization, an executive branch state agency may not enter any agreement with the federal government for the state or federal government to establish, manage, operate, or form a relationship to provide a health benefit exchange under the ACA and provide legislative intent that executive branch agencies may not work with the federal government to evade or otherwise circumvent legislative authority to establish, manage, operate, or form a federally administered or state-administered health benefit exchange.
- Provide the bill draft would become effective November 14, 2011.
- Provide the health benefit exchange law under this Act expires if the ACA is repealed by Congress or otherwise rendered invalid, in whole

or in part, by judicial decree or if the state is granted a federal waiver for the health benefit exchange.

The committee also recommends House Bill No. 1475 to provide:

- An appropriation of federal funds received by the Department of Human Services for ACA-related costs of the Department of Human Services and the Information Technology Department relating to incorporating the Medicaid and CHIP eligibility determination functionality into the health benefit exchange and for the purpose of defraying the corresponding costs related to the modification of the department's economic assistance eligibility system, including 1 FTE for the Department of Human Services and 10 FTE positions for the Information Technology Department;
- An appropriation from the general fund and federal funds to the Department of Human Services for the purpose of defraying the expenses of implementation of the ACA's Medicaid expansion provisions, including seven FTE positions for the Department of Human Services; and
- An appropriation of special funds to the Insurance Commissioner for the purpose of defraying the expenses of implementation of the ACA, including four FTE positions.

This bill draft would become effective November 14, 2011.

The committee also recommends House Bill No. 1476 to amend the law relating to the external review procedures required for health insurance policies. The portions addressed by the amendments include clarification of the circumstances under which an external review must be available, expedited external review requirements, notice requirements, allowable filing fees for requesting an external review, and the method by which the Insurance Commissioner shall assign an IRO. This bill draft would become effective December 1, 2011.

LEGISLATIVE PROCEDURE AND ARRANGEMENTS COMMITTEE

The Legislative Management has delegated to the Legislative Procedure and Arrangements Committee the Management's authority under North Dakota Century Code Section 54-35-11 to make arrangements for legislative sessions. Legislative rules also are reviewed and updated under this authority.

Committee members were Representatives Al Carlson (Chairman), David Drovdal, Lee Kaldor, Jerry Kelsh, and Don Vigesaa and Senators Randel Christmann, Ralph L. Kilzer, Mac Schneider, Ryan M. Taylor, and Rich Wardner.

The committee submitted this report to the Legislative Management on November 3, 2011. The Legislative Management accepted the report for submission to the Legislative Assembly.

SPECIAL SESSION ARRANGEMENTS

The committee reviewed three areas of consideration for the special session--legislative rules, session employees, and miscellaneous matters.

Legislative Rules

The committee reviewed the legislative rules amendments adopted during the 2001 special session, which was called primarily for legislative redistricting purposes. The amendments primarily addressed the introduction of measures, length of time to consider a measure after it is reported from committee, length of time to reconsider a measure, and special committees during the special session. The committee's recommendations are substantively similar to those rules amendments adopted during the 2001 special session.

The committee recommends amendment of Senate Rules 401(1), 402(1) and (2), and 403; House Rules 401(1), 402(1) and (3), and 403; and Joint Rule 208 to provide that bills and resolutions, other than bills and resolutions introduced by the Legislative Management, must be introduced through the Delayed Bills Committee of the house of introduction. The requirement for approval by the Delayed Bills Committee is intended to limit introduction of measures to those measures of significant importance for consideration during the special session. The special session is primarily to address legislative redistricting. By requiring measures to be introduced through the Delayed Bills Committees, bills and resolutions would be screened to assure promotion of this objective.

The committee recommends amendment of Senate and House Rules 504 to eliminate specific meeting days for committees. Although meetings may be called at times and on days as determined necessary, the specific listing of days that three-day and two-day committees may meet could cause misconceptions if such committees met on other than regularly scheduled days.

The committee recommends amendment of Senate and House Rules 318(4), 337, and 601 and Joint Rule 207 to authorize a measure to be considered on

the same day it is reported from committee or placed on the consent calendar. Thus, the normal timeframe for consideration of a measure is shortened from the day after a measure is reported from committee or placed on the consent calendar.

The committee recommends amendment of Senate Rule 333 to allow an amendment received on the second reading of a bill providing for redistricting of the Legislative Assembly to be proposed as a "concept" and the exact legal description would be developed after adoption of the "amendment." This is intended to limit the time taken for drafting and proofing exact legal descriptions of legislative districts to those ideas that receive support of a majority of the members.

The committee recommends amendment of Senate and House Rules 346 to authorize a measure to be transmitted to the other house immediately after approval unless a member gives notice of intention to reconsider. If notice is given, the measure cannot be transmitted until the end of that day. Without this amendment, the normal procedure would be to retain the measure until the end of the next legislative day.

The committee recommends amendment of Joint Rule 202 to allow either house to reconsider receding before a conference is called. Without the amendment, reconsideration could not be made until the next legislative day.

The committee recommends amendment of Joint Rule 501(4) to require the return of a fiscal note within one day of the request instead of five days. This recommendation recognizes the shortened timeframes for considering bills and resolutions during the special session.

The committee recommends creation of Joint Rules 303 and 304 to establish a Joint Legislative Redistricting Committee and a Joint Health Care Reform Committee. The Joint Legislative Redistricting Committee would be responsible for all bills and resolutions relating to redistricting. The Joint Health Care Reform Committee would be responsible for all bills and resolutions relating to state implementation of the Patient Protection and Affordable Care Act and related issues. With respect to other issues that may arise, the committee recommends using the regular standing committees of the Legislative Assembly and encourages use of joint hearings to reduce the potential for duplication of hearings within the abbreviated timeframe expected for the special session.

Session Employees

The committee reviewed the employee positions filled during the 2001 special session--10 Senate positions and 12 House positions. The committee determined that the Employment Committee of each house should determine the employee positions to be filled, especially due to the unknowns as to the number and subject matter of bills and resolutions to be considered during

the special session. Based on positions determined as necessary by the Employment Committees, the committee recommends that the Senate Employment Committee employ 10 Senate employees, and the House Employment Committee employ 14 House employees for the 2011 special session. The employees and their positions can be designated by reports of the respective Employment Committees during the special session. The rates of pay for employees during the special session would be the compensation levels established by 2011 House Concurrent Resolution No. 3006, except for committee clerks. The committee recommends the employees assigned to staff committees be paid at the levels for five-day committee clerks because the committees would be meeting throughout the special session, without regard as to the normal five-day, three-day, and two-day classifications.

Miscellaneous Matters

The committee recognizes the nature of a special session for redistricting purposes would be limited in scope. As such, many services or items normally available during a regular session would not be feasible or economical during the special session. During the 2011 regular session, the telephone message, secretarial, and bill and journal room services were

provided by private contractors (these services were not provided during the 2001 special session). During the 2011 special session, constituents can contact their legislators through regular channels or by e-mail directly to a legislator's notebook computer, and legislators can contact their constituents through regular channels or by telephone or e-mail.

The joint bill and journal room will not be open. Measures will be available on the legislative branch website, and copies of measures introduced will be available from the Legislative Council office. Daily journals will be available on the legislative branch website--the journals will not be printed daily but will be consolidated and printed after the session adjourns. The Legislator's Automated Work Station (LAWS) system will be available during the special session.

Committee hearing schedules will not be printed because it is anticipated committee hearings will be called on relatively short notice. Information on committee hearings may be obtained through the monitors on the ground floor and at the information kiosk.

Because of the unscheduled, irregular convening of floor sessions, the live streaming video coverage of floor sessions will not be available on the legislative branch website.

LEGISLATIVE REDISTRICTING COMMITTEE

The Legislative Redistricting Committee was assigned the responsibility to develop a legislative redistricting plan to be implemented in time for use in the 2012 primary election. House Bill No. 1267 (2011) required the chairman of the Legislative Management to appoint a committee to develop a legislative redistricting plan to be implemented in time for use in the 2012 primary election and provided that the committee must consist of an equal number of members from the Senate and the House of Representatives appointed by the chairman of the Legislative Management. In addition, the bill provided:

1. The committee shall ensure that any legislative redistricting plan submitted to the Legislative Assembly for consideration must be of compact and contiguous territory and conform to all constitutional requirements with respect to population equality. The committee may adopt additional constitutionally recognized redistricting guidelines and principles to implement in preparing a legislative redistricting plan for submission to the Legislative Assembly.
2. The committee shall submit a redistricting plan and legislation to implement the plan to the Legislative Management by October 31, 2011.
3. A draft of a legislative redistricting plan created by the Legislative Council or a member of the Legislative Assembly is an exempt record as defined in North Dakota Century Code Section 44-04-17.1 until presented or distributed at a meeting of the Legislative Management or the Legislative Assembly. Any version of a redistricting plan created before the completion of the plan is an exempt record regardless of whether the completed plan is subsequently presented or distributed at a meeting.
4. The chairman of the Legislative Management shall request the Governor to call a special session of the Legislative Assembly pursuant to Section 7 of Article V of the Constitution of North Dakota to allow the Legislative Assembly to adopt a redistricting plan to be implemented in time for use in the 2012 primary election and to address any other issue that may be necessary, including consideration of legislation in response to federal health care reform legislation.

Committee members were Senators Ray Holmberg (Chairman), Randel Christmann, Dwight Cook, Tony Grindberg, Jerry Klein, Stanley W. Lyson, Ryan M. Taylor, and John Warner and Representatives Larry Bellew, Bill Devlin, Richard Holman, Nancy Johnson, Jim Kasper, Jerry Kelsh, David Monson, and Mike Nathe.

The committee submitted this report to the Legislative Management on November 3, 2011. The Legislative Management accepted the report, except for the recommendation of the bill draft that would have required at least six precincts for each legislative district for submission to the Legislative Assembly.

BACKGROUND

Redistricting History in North Dakota

1931-1962

Despite a requirement in the Constitution of North Dakota that the state be redistricted after each census, the Legislative Assembly did not redistrict itself between 1931 and 1963. At the time, the Constitution of North Dakota provided that (1) the Legislative Assembly must apportion itself after each federal decennial census; and (2) if the Legislative Assembly failed in its apportionment duty, a group of designated officials was responsible for apportionment. Because the 1961 Legislative Assembly did not apportion itself following the 1960 census, the apportionment group (required by the constitution to be the Chief Justice of the Supreme Court, the Attorney General, the Secretary of State, and the majority and minority leaders of the House of Representatives) issued a plan, which was challenged in court. In *State ex rel. Lien v. Sathre*, 113 N.W.2d 679 (1962), the North Dakota Supreme Court determined that the plan was unconstitutional, and the 1931 plan continued to be law.

1963

In 1963 the Legislative Assembly passed a redistricting plan that was heard by the Senate and House Political Subdivisions Committees. The 1963 plan and Sections 26, 29, and 35 of the state constitution were challenged in federal district court and found unconstitutional as violating the equal protection clause in *Paulson v. Meier*, 232 F.Supp. 183 (1964). The 1931 plan also was held invalid. Thus, there was no constitutionally valid legislative redistricting law in existence at that time. The court concluded that adequate time was not available with which to formulate a proper plan for the 1964 election, and the Legislative Assembly should promptly devise a constitutional plan.

1965

A conference committee during the 1965 legislative session (consisting of the majority and minority leaders of each house and the chairmen of the State and Federal Government Committees) produced a redistricting plan. In *Paulson v. Meier*, 246 F.Supp. 36 (1965), the federal district court found the 1965 redistricting plan unconstitutional. The court reviewed each plan introduced during the 1965 legislative session and specifically focused on a plan prepared for the Legislative Research Committee (predecessor to the Legislative Council and the Legislative Management) by two consultants hired by the committee to devise a redistricting plan. That plan had been approved by the interim Constitutional Revision Committee and the Legislative Research Committee and was submitted to the Legislative Assembly in 1965. The court slightly modified that plan and adopted it as the plan for North Dakota. The plan contained five multimember senatorial districts, violated county lines in 12 instances, and had 25 of 39 districts within 5 percent

of the average population, 4 districts slightly over 5 percent, and 2 districts exceeding 9 percent.

1971

In 1971 an original proceeding was initiated in the North Dakota Supreme Court challenging the right of senators from multimember districts to hold office. The petitioners argued that the multimembership violated Section 29 of the Constitution of North Dakota, which provided that each senatorial district "shall be represented by one senator and no more." The court held that Section 29 was unconstitutional as a violation of the equal protection clause of the United States Constitution and that multimember districts were permissible. *State ex rel. Stockman v. Anderson*, 184 N.W.2d 53 (1971).

In 1971 the Legislative Assembly failed to redistrict itself after the 1970 federal census, and an action was brought in federal district court which requested that the court order redistricting and declare the 1965 plan invalid. The court entered an order to the effect the existing plan was unconstitutional, and the court would issue a plan. The court appointed three special masters to formulate a plan and adopted a plan submitted by Mr. Richard Dobson. The "Dobson" plan was approved for the 1972 election only. The court recognized weaknesses in the plan, including substantial population variances and a continuation of multimember districts.

1973-75

In 1973 the Legislative Assembly passed a redistricting plan developed by the Legislative Council's interim Committee on Reapportionment, which was appointed by the Legislative Council chairman and consisted of three senators, three representatives, and five citizen members. The plan was vetoed by the Governor, but the Legislative Assembly overrode the veto. The plan had a population variance of 6.8 percent and had five multimember senatorial districts. The plan was referred and was defeated at a special election held on December 4, 1973.

In 1974 the federal district court in *Chapman v. Meier*, 372 F.Supp. 371 (1974) made the "Dobson" plan permanent. However, on appeal, the United States Supreme Court ruled the "Dobson" plan unconstitutional in *Chapman v. Meier*, 420 U.S. 1 (1975).

In 1975 the Legislative Assembly adopted the "Dobson" plan but modified it by splitting multimember senatorial districts into subdistricts. The plan was proposed by individual legislators and was heard by the Joint Reapportionment Committee, consisting of five senators and five representatives. The plan was challenged in federal district court and was found unconstitutional. In *Chapman v. Meier*, 407 F.Supp. 649 (1975), the court held that the plan violated the equal protection clause because of the total population variance of 20 percent. The court appointed a special master to develop a plan, and the court adopted that plan.

1981

In 1981 the Legislative Assembly passed House Concurrent Resolution No. 3061, which directed the Legislative Council to study and develop a legislative redistricting plan. The Legislative Council chairman appointed a 12-member interim Reapportionment Committee consisting of seven representatives and five senators. The chairman directed the committee to study and select one or more redistricting plans for consideration by the 1981 reconvened Legislative Assembly. The committee completed its work on October 6, 1981, and submitted its report to the Legislative Council at a meeting of the Council in October 1981.

The committee instructed its consultant, Mr. Floyd Hickok, to develop a plan for the committee based upon the following criteria:

1. The plan should have 53 districts.
2. The plan should retain as many districts in their present form as possible.
3. No district could cross the Missouri River.
4. The population variance should be kept below 10 percent.

Mr. Hickok presented a report to the committee in which the state was divided into 11 blocks. Each block corresponded to a group of existing districts with only minor boundary changes. The report presented a number of alternatives for dividing most blocks. There were 27,468 different possible combinations among the alternatives presented.

The bill draft recommended by the interim committee incorporated parts of Mr. Hickok's plans and many of the plans presented as alternatives to the committee. The plan was introduced in a reconvened session of the Legislative Assembly in November 1981 and was heard by the Joint Reapportionment Committee.

The committee considered a total of 12 legislative redistricting bills. The Legislative Assembly adopted a redistricting plan that consisted of 53 senatorial districts. The districts containing the Grand Forks and Minot Air Force Bases were combined with districts in those cities, and each elected two senators and four representatives at large.

1991-95

In 1991 the Legislative Assembly adopted House Concurrent Resolution No. 3026, which directed a study of legislative apportionment and development of legislative reapportionment plans for use in the 1992 primary election. The resolution encouraged the Legislative Council to use the following criteria to develop a plan or plans:

1. Legislative districts and subdistricts had to be compact and of contiguous territory except as was necessary to preserve county and city boundaries as legislative district boundary lines and so far as was practicable to preserve existing legislative district boundaries.
2. Legislative districts could have a population variance from the largest to the smallest in population not to exceed 9 percent of the population of the ideal district except as was

necessary to preserve county and city boundaries as legislative district boundary lines and so far as was practicable to preserve existing legislative district boundaries.

3. No legislative district could cross the Missouri River.
4. Senators elected in 1990 could finish their terms, except that in those districts in which over 20 percent of the qualified electors were not eligible to vote in that district in 1990, senators had to stand for reelection in 1992.
5. The plan or plans developed were to contain options for the creation of House subdistricts in any Senate district that exceeds 3,000 square miles.

The Legislative Council established an interim Legislative Redistricting and Elections Committee, which undertook the legislative redistricting study. The committee consisted of eight senators and eight representatives. The Council contracted with Mr. Hickok to provide computer-assisted services to the committee.

After the committee held meetings in several cities around the state, the committee requested the preparation of plans for 49, 50, and 53 districts based upon these guidelines:

1. The plans could not provide for a population variance over 10 percent.
2. The plans could include districts that cross the Missouri River so the Fort Berthold Reservation would be included within one district.
3. The plans had to provide alternatives for splitting the Grand Forks Air Force Base and the Minot Air Force Base into more than one district and alternatives that would allow the bases to be combined with other contiguous districts.

The interim committee recommended two alternative bills to the Legislative Council at a special meeting held in October 1991. Both of the bills included 49 districts. Senate Bill No. 2597 (1991) split the two Air Force bases so neither base would be included with another district to form a multisenate district. Senate Bill No. 2598 (1991) placed the Minot Air Force Base entirely within one district so the base district would be combined with another district.

During a special session held November 4-8, 1991, the Legislative Assembly adopted Senate Bill No. 2597 with some amendments with respect to district boundaries. (The bill was heard by the Joint Legislative Redistricting Committee.) The bill was also amended to provide that any senator from a district in which there was another incumbent senator as a result of legislative redistricting had to be elected in 1992 for a term of four years, to provide that the senator from a new district created in Fargo had to be elected in 1992 for a term of two years, and to include an effective date of December 1, 1991. In addition, the bill was amended to include a directive to the Legislative Council to assign to the committee the responsibility to develop a plan for subdistricts for the House of Representatives.

The Legislative Council again contracted with Mr. Hickok to provide services for the subdistrict study. After conducting the subdistrict study, the interim

committee recommended House Bill No. 1050 (1993) to establish House subdistricts within each Senate district except in Districts 18, 19, 38, and 40, which are the districts that include portions of the Air Force bases. In 1993 the Legislative Assembly did not adopt the subdistricting plan.

In 1995 the Legislative Assembly adopted House Bill No. 1385, which made final boundary changes to four districts, including placing a small portion of the Fort Berthold Reservation in District 33.

2001

In 2001 the Legislative Assembly budgeted \$200,000 for a special session for redistricting and adopted House Concurrent Resolution No. 3003, which provided for a study and the development of a legislative redistricting plan or plans for use in the 2002 primary election. The Legislative Council appointed an interim Legislative Redistricting Committee consisting of 15 members to conduct the study. The Legislative Redistricting Committee began its work on July 9, 2001, and submitted its final report to the Legislative Council on November 6, 2001.

The Legislative Council purchased two personal computers and two licenses for redistricting software for use by each political faction represented on the committee. Because committee members generally agreed that each caucus should have access to a computer with the redistricting software, the committee requested the Legislative Council to purchase two additional computers and two additional redistricting software licenses. In addition, each caucus was provided a color printer.

The Legislative Redistricting Committee considered redistricting plans based on 45, 47, 49, 51, and 52 districts. The committee determined that the various plans should adhere to the following criteria:

1. Preserve existing district boundaries to the extent possible.
2. Preserve political subdivision boundaries to the extent possible.
3. Provide for a population variance of under 10 percent.

The interim committee recommended Senate Bill No. 2456 (2001), which established 47 legislative districts. The bill repealed the existing legislative redistricting plan, required the Secretary of State to modify 2002 primary election deadlines and procedures if necessary, and provided an effective date of December 7, 2001. The bill also addressed the staggering of terms in even-numbered and odd-numbered districts.

Under the 47-district plan, the ideal district size was 13,664. Under the plan recommended by the committee, the largest district had a population of 14,249 and the smallest district had a population of 13,053. Thus, the largest district was 4.28 percent over the ideal district size, and the smallest district was 4.47 percent below the ideal district size, providing for an overall range of 8.75 percent.

During a special session held November 26-30, 2001, the Legislative Assembly adopted the 47-district

plan included in Senate Bill No. 2456 with amendments, most notably amendments to the provisions relating to the staggering of terms. (The bill was heard by the Joint Legislative Redistricting Committee.) The term-staggering provisions provided that a senator and a representative from an odd-numbered district must be elected in 2002 for a term of four years, and a senator and a representative from an even-numbered district must be elected in 2004 for a term of four years. The bill further included provisions to address situations in which multiple incumbents were placed within the same district and in which there were fewer incumbents than the number of seats available. In *Kelsh v. Jaeger*, 641 N.W.2d 100 (2002), the North Dakota Supreme Court found a portion of the staggering provisions to be an impermissible delegation of legislative authority in that it allowed an incumbent senator to decide whether to stop an election for the Senate in a district that had two incumbent senators with terms expiring in different years.

North Dakota Redistricting Law

Constitutional Provisions

Article IV, Section 1, of the Constitution of North Dakota, provides that the "senate must be composed of not less than forty nor more than fifty-four members, and the house of representatives must be composed of not less than eighty nor more than one hundred eight members." Article IV, Section 2, requires the Legislative Assembly to "fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators." In addition, that section provides that the districts ascertained after the 1990 federal decennial census must continue until the adjournment of the first regular session after each federal decennial census, or until changed by law.

Section 2 further requires the Legislative Assembly to "guarantee, as nearly as practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates."

Under that section, one senator and at least two representatives must be apportioned to each senatorial district. Section 2 also provides that two senatorial districts may be combined when a single senatorial district includes a federal facility or installation containing over two-thirds of the population of a single member senatorial district and that elections may be at large or from subdistricts.

Article IV, Section 3, requires the Legislative Assembly to establish by law a procedure whereby one-half of the members of the Senate and one-half of the members of the House of Representatives, as nearly as practicable, are elected biennially.

Statutory Provisions

In addition to the constitutional requirements, Section 54-03-01.5 provides that a legislative apportionment plan based on any census taken after 1999 must provide that the Senate consist of 47 members and the House consist of 94 members. That section also provides that the plan must ensure that population deviation from

district to district be kept at a minimum. In addition, that section provides that the total population variance of all districts, and subdistricts if created, from the average district population may not exceed recognized constitutional limitations.

Sections 54-03-01.8 and 54-03-01.10 provided for the staggering of Senate and House terms after redistricting in 2001. Section 54-03-01.8, which addressed the staggering of Senate terms, was found to be, in part, an impermissible delegation of legislative authority in that it allowed an incumbent senator to decide whether to stop an election for the Senate in a district that had two incumbent senators with terms expiring in different years.

As a result of concerns regarding the timetable for calling a special election to vote on a referral of a redistricting plan, in 1991 the Legislative Assembly amended Section 16.1-01-02.2 during the November 1991 special session. The amendment to the section provided that "notwithstanding any other provision of law, the governor may call a special election to be held in thirty to fifty days after the call if a referendum petition has been submitted to refer a measure or part of a measure that establishes a legislative redistricting plan."

Section 16.1-03-17 provides that if redistricting of the Legislative Assembly becomes effective after the organization of political parties and before the primary or the general election, the Secretary of State shall establish a timetable for the reorganization of the parties before the ensuing election.

Section 16.1-04-03 provides that the board of county commissioners or the governing body of a city responsible for establishing precincts within the county or city must establish or reestablish voting precincts within 35 days after the effective date of a legislative redistricting.

Federal Redistricting Law

Before 1962 the courts followed a policy of nonintervention with respect to legislative redistricting. However, in 1962, the United States Supreme Court, in *Baker v. Carr*, 369 U.S. 186 (1962), determined that the courts would provide relief in state legislative redistricting cases when there are constitutional violations.

Population Equality

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the United States Supreme Court held that the equal protection clause of the 14th Amendment to the United States Constitution requires states to establish legislative districts substantially equal in population. The Court also ruled that both houses of a bicameral legislature must be apportioned on a population basis. Although the Court did not state what degree of population equality is required, it stated that "what is marginally permissible in one state may be unsatisfactory in another depending upon the particular circumstances of the case."

The measure of population equality most commonly used by the courts is overall range. The overall range of a redistricting plan is the sum of the deviation from the ideal district population (the total state population divided

by the number of districts) of the most and the least populous districts. In determining overall range, the plus and minus signs are disregarded, and the number is expressed as an absolute percentage.

In *Reynolds*, the United States Supreme Court recognized a distinction between congressional and legislative redistricting plans. That distinction was further emphasized in a 1973 Supreme Court decision, *Mahan v. Howell*, 410 U.S. 315 (1973). In that case, the Court upheld a Virginia legislative redistricting plan that had an overall range among House districts of approximately 16 percent. The Court stated that broader latitude is afforded to the states under the equal protection clause in state legislative redistricting than in congressional redistricting in which population is the sole criterion of constitutionality. In addition, the Court said the Virginia General Assembly's state constitutional authority to enact legislation dealing with political subdivisions justified the attempt to preserve political subdivision boundaries when drawing the boundaries for the House of Delegates.

A 10 percent standard of population equality among legislative districts was first addressed in two 1973 Supreme Court decisions--*Gaffney v. Cummings*, 412 U.S. 735 (1973), and *White v. Regester*, 412 U.S. 755 (1973). In those cases, the Court upheld plans creating house districts with overall ranges of 7.8 percent and 9.9 percent. The Court determined the overall ranges did not constitute a prima facie case of denial of equal protection. In *White*, the Court noted, "Very likely larger differences between districts would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy'."

Justice Brennan's dissents in *Gaffney* and *White* argued that the majority opinions established a 10 percent de minimus rule for state legislative district redistricting. He asserted that the majority opinions provided that states would be required to justify overall ranges of 10 percent or less. The Supreme Court adopted that 10 percent standard in later cases.

In *Chapman v. Meier*, 420 U.S. 1 (1975), the Supreme Court rejected the North Dakota Legislative Assembly redistricting plan with an overall range of approximately 20 percent. In that case, the Court said the plan needed special justification, but rejected the reasons given, which included an absence of a particular racial or political group whose power had been minimized by the plan, the sparse population of the state, the desire to maintain political boundaries, and the tradition of dividing the state along the Missouri River.

In *Conner v. Finch*, 431 U.S. 407 (1977), the Supreme Court rejected a Mississippi plan with a 16.5 percent overall range for the Senate and a 19.3 percent overall range for the House. However, in *Brown v. Thomson*, 462 U.S. 835 (1983), the Court determined that adhering to county boundaries for legislative districts was not unconstitutional even though the overall range for the Wyoming House of Representatives was 89 percent.

In *Brown*, each county was allowed at least one representative. Wyoming has 23 counties and its

legislative apportionment plan provided for 64 representatives. Because the challenge was limited to the allowance of a representative to the least populous county, the Supreme Court determined that the grant of a representative to that county was not a significant cause of the population deviation that existed in Wyoming. The Court concluded that the constitutional policy of ensuring that each county had a representative, which had been in place since statehood, was supported by substantial and legitimate state concerns and had been followed without any taint of arbitrariness or discrimination. The Court found that the policy contained no built-in biases favoring particular interests or geographical areas and that population equality was the sole other criterion used. The Court stated that a legislative apportionment plan with an overall range of less than 10 percent is not sufficient to establish a prima facie case of invidious discrimination under the 14th Amendment which requires justification by the state. However, the Court further concluded that a plan with larger disparities in population creates a prima facie case of discrimination and must be justified by the state.

In *Brown*, the Supreme Court indicated that giving at least one representative to each county could result in total subversion of the equal protection principle in many states. That would be especially true in a state in which the number of counties is large and many counties are sparsely populated and the number of seats in the legislative body does not significantly exceed the number of counties.

In *Board of Estimate v. Morris*, 489 U.S. 688 (1989), the Supreme Court determined an overall range of 132 percent was not justified by New York City's proffered governmental interests. The city argued that because the Board of Estimate was structured to accommodate natural and political boundaries as well as local interests, the large departure from the one-person, one-vote ideal was essential to the successful government of the city--a regional entity. However, the Court held that the city failed to sustain its burden of justifying the large deviation.

In a federal district court decision, *Quilter v. Voinovich*, 857 F.Supp. 579 (N.D. Ohio 1994), the court ruled that a legislative district plan with an overall range of 13.81 percent for House districts and 10.54 percent for Senate districts did not violate the one-person, one-vote principle. The court recognized the state interest of preserving county boundaries, and the plan was not advanced arbitrarily. The decision came after the Supreme Court remanded the case to the district court. The Supreme Court stated that in the previous district court decision, the district court mistakenly held that total deviations in excess of 10 percent cannot be justified by a policy of preserving political subdivision boundaries. The Supreme Court directed the district court to follow the analysis used in *Brown*, which requires the court to determine whether the plan could reasonably be said to advance the state's policy, and if so, whether the population disparities exceed constitutional limits.

Although the federal courts have generally maintained a 10 percent standard, a legislative

redistricting plan within the 10 percent range may not be safe from a constitutional challenge if the challenger is able to show discrimination in violation of the equal protection clause. In *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004), a federal district court in Georgia found two legislative redistricting plans adopted by the Georgia General Assembly which had an overall range of 9.98 percent violated the "one person one vote" principle. Although legislators and redistricting staff indicated they prepared the plans under the belief that an overall range of 10 percent would be permissible without demonstrating a legitimate state interest, the district court found that the objective of the plan, protection of certain geographic areas and protection of incumbents from one party did not justify the deviations from population inequality, particularly in light of the fact that plans with smaller deviations had been considered. With respect to protection of incumbents, the court indicated that while it may be a legitimate state interest, in this case the protection was not accomplished in a consistent and neutral manner. Although protection of political subdivision boundaries is viewed as a traditional redistricting principle, the court held that regional protectionism was not a legitimate justification for the deviations in the plans. The United States Supreme Court upheld the district court opinion in *Larios*.

If a legislative redistricting plan with an overall range of more than 10 percent is challenged, the state has the burden to demonstrate that the plan is necessary to implement a rational state policy and that the plan does not dilute or eliminate the voting strength of a particular group of citizens. A plan with an overall range under 10 percent may be subject to challenge if the justifications for the deviations are not deemed legitimate and plans with lower deviations have been considered.

Partisan Gerrymandering

Before 1986 the courts took the position that partisan or political gerrymandering was not justiciable. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the United States Supreme Court stated that political gerrymandering is justiciable. However, the Court determined that the challengers of the legislative redistricting plan failed to prove that the plan denied them fair representation. The Court stated that a particular "group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause." The Court concluded that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." Therefore, to support a finding of unconstitutional discrimination, there must be evidence of continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

In 1988 a federal district court in California determined that a partisan gerrymandering case was

justiciable. In *Badham v. Eu*, 694 F.Supp. 664 (1988), the court ruled that the challengers of the California congressional redistricting plan failed to demonstrate that they had been denied a fair chance to influence the political process. The Supreme Court summarily affirmed the district court's ruling without an opinion in 1989.

In 2004 a sharply divided Supreme Court addressed a challenge to a congressional redistricting plan adopted in Pennsylvania. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), four of the justices concluded that partisan gerrymandering cases are nonjusticiable due to a lack of judicially discernible and manageable standards for addressing the claims. One other justice concurred in the opinion, but on other grounds, and the remaining four justices issued three dissenting opinions. Despite the challenge being dismissed, a majority of the court--the four dissenting justices and the one justice concurring in the decision to dismiss the claim--continued to maintain that partisan gerrymandering cases may be adjudicated by the courts.

The Supreme Court again issued a divided opinion two years later in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006). In that decision, six justices wrote opinions and five justices agreed that partisan gerrymandering cases are justiciable. However, the court did not agree on a standard for addressing claims and the partisan gerrymandering claim was dismissed. Thus, although it appears partisan gerrymandering cases may be justiciable, proving unconstitutional discrimination is a very difficult task for which there is no clear standard of proof.

Multimember Districts and Racial or Language Minorities

According to data compiled by the National Conference of State Legislatures, North Dakota is 1 of 13 states that have multimember districts. Section 2 of the federal Voting Rights Act prohibits a state or political subdivision from imposing voting qualifications, standards, practices, or procedures that result in the denial or abridgment of a citizen's right to vote on account of race, color, or status as a member of a language minority group. A violation of Section 2 may be proved through a showing that as a result of the challenged practice or standard, the challengers of the plan did not have an equal opportunity to participate in the political process and to elect candidates of their choice.

Many of the decisions under the Voting Rights Act have involved questions regarding the use of multimember districts to dilute the voting strengths of racial and language minorities. In *Reynolds*, the United States Supreme Court held that multimember districts are not unconstitutional per se; however, the Court has indicated it prefers single-member districts, at least when the courts draw the districts in fashioning a remedy for an invalid plan. The Court has stated that a redistricting plan including multimember districts will constitute an invidious discrimination only if it can be shown that the plan, under the circumstances of a particular case, would operate to minimize or eliminate the voting

strength of racial or political elements of the voting population.

The landmark case addressing a Section 2 challenge is *Thornburg v. Gingles*, 478 U.S. 39 (1986). In that case, the Supreme Court stated that a minority group challenging a redistricting plan must prove that:

1. The minority is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. The minority is politically cohesive; and
3. In the absence of special circumstances, bloc voting by the majority usually defeats the minority's preferred candidate. To prove that bloc voting by the majority usually defeats the minority group, the use of statistical evidence is necessary.

Until redistricting in the 1990s, racial gerrymandering--the deliberate distortion of boundaries for racial purposes--had generally been used in the South to minimize the voting strength of minorities. However, because the United States Department of Justice and some federal courts had indicated that states would be required to maximize the number of minority districts when redistricting, many states adopted redistricting plans that used racial gerrymandering to create more minority districts or to create minority influence districts when there was not sufficient population to create a minority district. As a result, a number of redistricting plans adopted in the 1990s were challenged by white voters on equal protection grounds and the United States Supreme Court has subsequently held several redistricting plans to be unconstitutional as a result of racial gerrymandering.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court invalidated a North Carolina plan due to racial gerrymandering. In that case, the Court made it clear that race-conscious redistricting may not be impermissible in all cases. However, the Court held the plan to a test of strict scrutiny and required that the racial gerrymander be narrowly tailored to serve a compelling state interest. The Court stated if race is the primary consideration in creating districts "without regard for traditional districting principles," a plan may be held to be unconstitutional.

Through the *Shaw* decision and subsequent decisions of the United States Supreme Court, the Court indicated that unless race was the predominant factor in the creation of a district, a racial gerrymander challenge is not likely to be successful. In addition, the Court articulated seven policies that have been identified as being "traditional districting principles." Those policies are:

1. Compactness.
2. Contiguity.
3. Preservation of political subdivision boundaries.
4. Preservation of communities of interest.
5. Preservation of cores of prior districts.
6. Protection of incumbents.
7. Compliance with Section 2 of the Voting Rights Act.

Section 5 of the Voting Rights Act requires certain states and political subdivisions to submit their

redistricting plans to the United States Department of Justice or the district court of the District of Columbia for review. North Dakota is not subject to that requirement.

TESTIMONY AND COMMITTEE CONSIDERATIONS

Redistricting Computers and Software

The Legislative Council purchased a personal computer and a license for the Maptitude for Redistricting software for use by each of the four caucuses represented on the committee. In addition, because there were significantly more members of the majority party caucuses on the committee, the Legislative Council purchased an additional computer and redistricting software license for the shared use of the members of those groups. The members of the committee were encouraged to use the redistricting software to develop redistricting plans to present for the review of the committee at each meeting. Because committee members generally agreed that potential redistricting plans should be based upon the cores of existing districts, a template of the existing legislative districts was provided in the redistricting software to use as a starting point in creating districts.

Size of Legislative Assembly

The committee received testimony requesting the committee to consider redistricting plans that would increase the size of the Legislative Assembly as an attempt to preserve more existing districts and lessen the impact of redistricting on rural areas of the state. Proponents of increasing the size of the Legislative Assembly contended the cost of adding members to the Legislative Assembly would be minimal with respect to the benefits of additional representation for residents of the state in areas that have seen population losses result in legislative districts that are larger in geographic size than some states.

The committee received information estimating the cost of a legislative district, based on a 77-day legislative session and current statutory provisions regarding salary, benefits, per diem, and other reimbursements for members of the Legislative Assembly, would be approximately \$1,190,170 for the decade.

Proponents of maintaining 47 legislative districts argued that increasing the number of districts to 49 or 51 would not significantly change the geographic size of most rural districts and would provide additional representation to the urban areas of the state in which the majority of the population resides. Under a 47-district plan, the ideal district population is 14,310, while under a 49-district plan the ideal district population would decrease by less than 600 to 13,726 and the ideal district population for a 51-district plan would be 13,188. Proponents of a 47-district plan also contended that legislators in North Dakota represent significantly fewer persons than legislators in any other state and there are legislative districts in other large rural states which are significantly larger than the largest district in North Dakota.

Population Deviation

Although an overall range of 10 percent has generally been considered as an acceptable level of population deviation, members of the committee generally agreed any plan recommended by the committee should have an overall range of 9 percent or less.

The committee considered a plan that had an overall deviation of 9.67 percent, with the largest district 4.89 percent over the ideal district population and the smallest district 4.78 percent below the ideal district population. Proponents of this plan contended the higher deviation could be justified as an attempt to preserve county boundaries and other communities of interests. The other plan considered by the committee had an overall deviation of 8.38 percent, with the largest district 4.10 percent over the ideal district population and the smallest district 4.28 percent below the ideal district population.

Preservation of Political Subdivision Boundaries

The redistricting plan adopted by the 2001 Legislative Assembly had 28 counties that were not split, not including 3 counties that were split to keep the Fort Berthold Indian Reservation within one district and 4 counties that were split among districts only because the counties included cities that were too large for one district.

Committee members generally agreed that preservation of county boundaries was a preferred approach to creating district boundaries. The committee received testimony requesting the committee to avoid splitting counties whenever possible. The committee considered a plan that included 32 counties that were not split, 3 counties that were split only to preserve the boundaries of the Fort Berthold Indian Reservation, and 2 counties that were split only because the counties included cities that were too large for one district. The second plan the committee considered included 33 counties that were not split, 3 counties that were split only to preserve the boundaries of the Fort Berthold Indian Reservation, and 3 counties that were split only because the counties included cities that were too large for one district.

Indian Reservations

The members of the committee agreed that splitting the minority population living on the Indian reservations would be contrary to the principle of protecting the interests of racial minority voters. Each plan considered by the committee preserved the boundaries of the Indian reservations.

Urban and Rural Considerations

Committee members discussed the benefits and potential problems associated with creating districts that would split the population of some of the mid-sized cities into two districts and combine the portions of those cities with rural areas. Proponents of this concept contended the geographic area of some rural districts could be reduced significantly while maintaining communities of interest since the rural residents of the areas around

those cities generally migrated toward those cities as trade centers. Other members of the committee stated the concept had been tried in the past and was not generally favored because the residents of the portion of the district with fewer residents often feel disenfranchised.

Committee members also discussed the merits of creating urban districts with population totals below the ideal district size, particularly in areas in which population trends indicate continuing growth, and creating districts with population totals above the ideal district size in areas in which trends indicate continued decreasing population.

Population Growth in Boom Areas

Concerns were expressed regarding the accuracy of census data in areas of the state which have experienced significant population growth as a result of energy development. Because the population results reported by the Census Bureau reflect the population at the time the census is taken, many areas of the state which have experienced dramatic population growth in the last year are likely to have significantly more residents who may not be considered in creating legislative districts.

Identifiable District Boundaries

The committee received testimony from an election officer requesting that district boundaries be easily identifiable for the benefit of voters. It was argued that boundaries should be crafted to follow major streets and other easily identified geographic features rather than features such as city limits. It was also contended that in addition to being difficult to identify, boundaries based on city limits create confusion when cities annex areas throughout the decade and the city limits change due to the annexations.

Staggering of Terms

The committee reviewed information regarding the procedures for staggering the terms of senators from the 1981 and 1991 redistricting processes, and because members of the House of Representatives also now have four-year terms, the committee also reviewed the procedure used for the staggering of terms of House members in 2001. Options that were presented to the committee included requiring each member of the Legislative Assembly to run for election after redistricting, requiring members to run if there is a substantial change in population in the new district, and requiring members to run only if more than the required number of incumbents reside in the new district.

Creation of Voting Precincts

The committee discussed the creation of voting precincts by cities and counties. A member of the committee expressed concerns regarding the governing body of a large county considering having as few as two precincts per district, which could result in making it difficult for officials from political parties to identify where the support for the party is located. The committee considered a bill draft that would require that each

legislative district contain at least six precincts. Opponents of the bill draft contended that voters desire convenience in voting such as vote centers and voting by mail. In addition, it was argued if there is a problem with limited precincts, the problem may be limited to one county and the bill draft may have unintended consequences that should be further explored before approval of the bill draft.

RECOMMENDATIONS

The committee recommends House Bill No. 1473 to establish 47 legislative districts. The bill repeals the current legislative redistricting plan, requires the Secretary of State to modify 2012 primary election deadlines and procedures if necessary, and provides an effective date of December 1, 2011.

The bill also provides that senators and representatives from even-numbered districts must be elected in 2012 for four-year terms; senators and representatives from odd-numbered districts must be elected in 2014 for four-year terms; a senator and two representatives from District 7 must be elected in 2012 for terms of two years; the term of office of a member of the Legislative Assembly elected in an odd-numbered district in 2010 for a term of four years and who as a result of legislative redistricting is placed in an even-numbered district terminates December 1, 2012; and a member of the Legislative Assembly who was elected from an odd-numbered district in 2010 for a term of four years and who as a result of legislative redistricting is placed in an even-numbered district may continue to serve the remainder of the term for which the member was elected beyond December 1, 2012, if the member changes the member's place of residence to a location in the odd-numbered district which is within the geographic area of the odd-numbered district from which the member was elected by March 15, 2012, and certifies in writing to the Secretary of State and the

chairman of the Legislative Management that the member has established a new residence in that district. The bill provides that if the member does not establish residency within the district from which the member was elected by March 15, 2012, the term of office of that member terminates on December 1, 2012.

The bill also provides the term of office of a member of the Legislative Assembly in an odd-numbered district with new geographic area that was not in that member's district for the 2010 election and which new geographic area has a 2010 population that is more than 25 percent of the ideal district population terminates on December 1, 2012. The bill states that a vacancy caused in an odd-numbered district as a result of legislative redistricting must be filled at the 2012 general election by electing a member to a two-year term of office.

Under the 47-district plan, the ideal district size is 14,310. Under the plan recommended by the committee, the largest district has a population of 14,897 and the smallest district has a population of 13,697. Thus, the largest district is 4.10 percent over the ideal district size and the smallest district is 4.28 percent below the ideal district size, providing for an overall range of 8.38 percent. The plan includes 33 counties that were not split, 3 counties that were split only to preserve the boundaries of the Fort Berthold Indian Reservation, and 3 counties that were split only because the counties included cities that were too large for one district. Population data and maps of the proposed districts are included with this report.

[The Legislative Management rejected the following portion of the report. That portion of the report is printed here pursuant to Rule 5 of the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management.*]

The committee also recommends a bill draft that requires that each legislative district contain at least six precincts.