

**OPINION**  
**62-97**

August 24, 1962 (OPINION)

DAIRY PRODUCTS

RE: Use of Sales Devices When Selling Retail

This is in reply to your letter of August 16, 1962, concerning the above-captioned matter. You state the following facts and questions:

A question has arisen regarding the lawfulness in the use of stamps, coupons, or premiums, in the sale of milk or milk products. It has been the custom, in some instances, to give stamps, premiums (such as free tickets to activities, balloons, dishware, and so forth) or coupons, which are redeemable for cash or merchandise, with the sale of milk or milk products to the consumer. The questions I would like an opinion on are:

1. Is it lawful to give away stamps, premiums, or coupons to the consumer, by the processor or distributor of milk or milk products, in the sale of milk or milk products?
2. Is it lawful to give away stamps, premiums, or coupons to the consumer, by the retailer of milk and milk products, in the sale of milk or milk products?

In both previous questions, I have assumed the combined value of the milk or milk products, and the premiums, coupons, or stamps, as the case may be, is less than the actual cost of procuring, processing, distributing and merchandising the milk or milk products. If the combined value of the milk or milk products, and the stamps, premiums, or coupons were more than the actual cost, procuring, processing, distributing and merchandising the milk or milk products, would it affect either of the opinions on the previously asked questions?"

Section 4-14-09 of the North Dakota Century Code concerning unfair trade practices in the dairy industry would appear to govern this matter. Section 4-14-09 of the North Dakota Century Code provides:

UNFAIR TRADE PRACTICES IN THE DAIRY INDUSTRY.

1. As used in this section the term 'dairy products' includes milk, cream, butter, cheese, cheese food, ice cream, frozen desserts, ice milk, sherbet, and any other edible products manufactured or processed which has any of such products as its principal ingredients.
2. Each of the practices described in this subsection is declared to be an unfair trade practice. It shall be unlawful for any person to be engaged in such practices. No person who is a dealer in or a vendor of dairy products, for sale to a retailer or who sells dairy products to any

person for retail sales shall:

- a. Give or extend discounts on dairy products sold to retail outlets, except for standard printed public discounts which fairly represents costs savings which may be passed on to the consumer.
  - b. Repealed by omission from this code as unconstitutional, see 81 N.W.2d. 639.
  - c. Make payments of money, credit, gifts, or loans to retail outlets as rental for the storage or display of dairy products on the premises where they are offered for sale.
  - e. Repealed by omission from this code as unconstitutional, see 81 N.W.2d. 639.
  - f. Maintain or make repairs of any equipment owned by a retail outlet, except that used exclusively for dairy products, charging comparative, competitive commercial fees and charges for the service and parts.
  - g. Repealed by omission from this code as unconstitutional, see 81 N.W.2d. 639.
  - h. Give any gift of money, merchandise, services or materials of any value to any retail outlet, except bona fide charities, except such services heretofore specifically permitted.
3. Nothing in this section shall be interpreted to prohibit the operation of a retail outlet by a person who is also a dealer in or a vendor of retail products for sale to a retailer or for retail sales or to prohibit the use by him in such retail outlet any equipment or advertising or miscellaneous matter owned by him provided that such retail outlet is under direct control and management of the dealer.
  4. Nothing in this section shall be interpreted to prohibit the giving away of merchandise to be consumed on the premises.
  5. For the purpose of this section any subsidiary or affiliate corporation, cooperative, officer, director or partner of a corporation, a cooperative, or partnership which is a dealer in or a vendor of dairy products shall be deemed to be a dealer in or vendor of dairy products."

You will note that the prohibitions contained in the above section are concerned primarily with discounts, gifts, merchandise, etc., given to retail dealers of milk and dairy products. There would appear to be no prohibition against a dealer in or a vendor of dairy products for sale to a retailer or who sells dairy products to any person for retail sales, from giving discounts, gifts, merchandise, etc., directly to the ultimate consumer of such products. If,

however, such products are sold through retail outlets, it would appear to us that the vendor of the products would have to offer such discounts, gifts, merchandise on the dairy products sold through all of the retail outlets which carry a specific brand of dairy products. Thus, for example, if a vendor of dairy products sells through five retail outlets and offers discounts, merchandise, gifts, etc., to the ultimate consumer, we believe such offer would have to be made with the dairy products sold through all five retail outlets. It would not appear to be within the spirit of the law to make such offer on products sold to the ultimate consumer in only one or two of the retail outlets. This belief is substantiated by the provisions of subsection 2(a) of the above-quoted section.

Thus, in reply to your first question, it is our opinion that it is lawful for the processor or distributor of milk or milk products to give away stamps, premiums, or coupons to the ultimate consumer if such stamps, premiums, or coupons are offered with all of the milk or milk products sold by such processor or distributor through all of the retail outlets handling the products of such processor or distributor.

In regard to your second question, we are not aware of any statute which would prohibit a retailer of milk or milk products to give away stamps, premiums or coupons to the consumer in the sale of milk or milk products. It is, therefore, our opinion that such practice is not prohibited by law.

The above-quoted statute does not appear to distinguish between those situations in which the combined value of the milk or milk products, and the premiums, coupons, or stamps, as the case may be, is less than the actual cost of procuring, processing, distributing and merchandising the milk or milk products and those situation in which the combined value of the milk or milk products and the stamps, premiums, or coupons, is more than the actual cost of procuring, processing, distributing and merchandising the milk or milk products.

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