

State of Wisconsin  
Tommy G. Thompson, Governor

COPY



Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary

May 15, 1998

Daniel Kryzanek  
Inspection Division  
Weights and Measures  
100 N. Jefferson  
Green Bay, WI 54301

Dear Mr. Kryzanek:

Your proposed changes to Wisconsin's Methods of Sale of Commodities law, ATCP 91, Wis. Adm. Code, have been forwarded to our department by State Representative Al Ott.

Although the deadline has passed for considering further changes, I am pleased to report that the specific section you addressed was carefully reviewed during the rulemaking process and modified.

One of our primary goals while updating ATCP 91 was to clarify the existing language, to avoid confusion by affected businesses and field inspectors. I enclosed a copy of ATCP 91 in its final version for your review. The rule is anticipated to take effect on July 1, 1998.

If you have any further questions, please feel free to call me directly. Thank you for your concerns.

Sincerely,

David D. Tatar, Compliance Officer  
Weights and Measures Technical Section  
**DIVISION OF TRADE AND CONSUMER PROTECTION**  
608/224-4947

Enc.

cc: Representative Ott  
Representative Green  
Fran Tryon, Bureau Director



Chairman:  
Agriculture Committee

Member:  
Consumer Affairs  
Government Operations  
Natural Resources



# Al Ott

State Representative • 3rd Assembly District

May 13, 1998

State Representative Mark Green  
115 West, State Capitol  
Madison, WI 53708

Dear Representative Green:

Thank you for your letter on behalf of your constituent, Mr. Daniel Kryzanek, regarding Clearinghouse Rule (CR) 97-127. I appreciate you making me aware of your constituents concerns.

Unfortunately, the Assembly Agriculture Committee's 30 day review of CR 97-127 ended May 9, 1998. CR 97-127 was reported out of the Committee on May 11, 1998.

Although CR 97-127 has been reported out of the Assembly Agriculture Committee, I will contact DATCP and forward a copy of Mr. Kryzanek's proposed rule changes so they will have them on record.

Thank you again for letting me know of your concerns. If you have any further questions, please feel free to contact me again.

Sincerely,

Al Ott  
State Representative  
3<sup>rd</sup> Assembly District



**Mark Green**  
State Representative  
Majority Caucus Chair

May 7, 1998

Representative AJ Ott  
Chairman, Committee on Agriculture  
318 North, State Capitol  
Madison, WI

Dear Chairman Ott:

I am writing this letter on behalf of a constituent, Mr. Daniel Kryzanek, regarding Clearinghouse Rule 97-127 – relating to changes in Administrative Code 91, which is currently being reviewed by the Committee on Agriculture. Mr. Kryzanek is concerned that the language contained in CR 97-127 is confusing and needs to be clarified.

I am enclosing a copy of Mr. Kryzanek's proposed rule changes for the Committee's review. This proposal attempts to simplify and clarify the rule by replacing references to other sections of the code with the specific language contained from those referenced sections. Additionally, words and acronyms used in the code are clearly defined using standard NIST definitions. These clarifications will make the code more understandable for all people who read and use the code.

I would appreciate your reviewing this proposal and sharing it with the Department of Agriculture, Trade and Consumer Protection to determine if it could be used as a model to replace the language contained in CR 97-127. If you have any questions, please feel free to call me.

Thank you for your attention to this matter.

Best Regards,

A handwritten signature in black ink that reads "Mark Green".

MARK GREEN  
State Representative  
Majority Caucus Chair

MAG:jc

cc: Mr. Daniel Kryzanek

**Fourth Assembly District**

Office: P.O. Box 8952, Madison, WI 53708-8952 • 608 266-5840  
District: P.O. Box 13103, Green Bay, WI 54307-3103 • 414 497-0838  
Toll-Free Hotline: 1 800-362-WISC (9472) • Printed on recycled paper

# REPRESENTATIVE AL OTT

State Representative  
3<sup>rd</sup> Assembly District  
PO Box 8953 - Madison, WI 53708

---

To: Kathy Dresser, DATCP  
From: Rep. Ott  
Date: 5-12-98

fax number 224-4939

Re: Clearinghouse Rule 97-127 (ATCP 91)

4 pages

Enclosed are the following:

- 1.) A copy of the letter I received from State Representative Mark Green's office regarding his constituent's, Daniel Kryzanek, concerns about CR 97-127.
- 2.) A copy of Rep. Ott's letter to Rep. Green.
- 3.) A copy of Mr. Kryzanek's proposed changes.

Thank you for your assistance. If you have any questions, please feel free to contact me.

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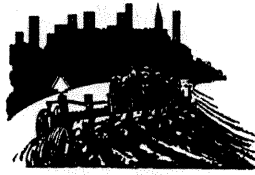
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Chairman:  
Agriculture Committee

Member:  
Consumer Affairs  
Government Operations  
Natural Resources



Al Ott

State Representative • 3rd Assembly District

May 13, 1998

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115 West, State Capitol  
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Dear Representative Green:

*Mark,*  
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Unfortunately, the Assembly Agriculture Committee's 30 day review of CR 97-127 ended May 9, 1998. CR 97-127 was reported out of the Committee on May 11, 1998.

Although CR 97-127 has been reported out of the Assembly Agriculture Committee, I will contact DATCP and forward a copy of Mr. Kryzanek's proposed rule changes so they will have them on record.

Thank you again for letting me know of your concerns. If you have any further questions, please feel free to contact me again.

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Al Ott  
State Representative  
3<sup>rd</sup> Assembly District

Proposed Changes ATCP 91.04

MEAT, POULTRY, SEAFOOD AND CHEESE.

(1) Definitions:

- (a) "Seafood" Edible marine fish and shellfish.
- (b) "Fish" Includes all fresh or saltwater finfish, molluscan, shellfish, crustaceans, and other forms of aquatic animal life.
- (c) "Shellfish" Shellfish are aquatic animals having a shell, such as mollusks (for example, scallops, clams, oysters, mussels) or crustaceans (for example, lobster or shrimp). ["NIST Handbook 130 pg.83"]
- (d) "Standard pack" That type of package in which a commodity is put up with identical labels and only in certain specific quantity sizes. Examples of goods so packed are canned, boxed, bottled and bagged foods, and over-the-counter drugs. ["NIST Handbook 133 pg.C-4"]
- (e) "IQF" Individually quick frozen.

(2) Except as otherwise provided in this chapter or other applicable state or federal law, meat, poultry, seafood, cheese or products derived in whole or substantial part therefrom, shall be sold by net weight subject to the following:

- (a) Meat, poultry, seafood and cheese that are not standard pack, shall include the price per whole unit of weight of the commodity in any labeling, placarding or advertising.
- (b) Whole clams, oysters, mussels, snails or other mollusks in the shell (fresh or frozen) shall be sold by net weight (including the weight of the shell, but not including the liquid or ice packed with them), by count or by dry measure (e.g., bushel). If removed from the shell, the mollusks shall be sold by net weight. In addition, size designations may be provided.
- (c) Shelled fresh mollusks packed in liquid shall be sold by drained weight or fluid volume. The free liquid may not exceed 15 percent by weight of the package contents.
- (d) Fresh or frozen processed mollusks on the half shell shall be sold by count or by weight, excluding the weight of the shell.
- (e) Live fish shall be sold by net weight or by count.
- (f) Frozen, glazed, and IQF pieces of seafood shall be sold by net weight. No part of the declared weight may consist of ice.
- (g) Cheese coated with wax shall be sold by net weight of the cheese excluding the weight of the wax.

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May 7, 1998

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- (f) Frozen, glazed, and IQF pieces of seafood shall be sold by net weight. No part of the declared weight may consist of ice.
- (g) Cheese coated with wax shall be sold by net weight of the cheese excluding the weight of the wax.

## **Assembly Agriculture Committee**

### **MEMO**

**To: Members of the Assembly Agriculture Committee**

**From: Representative Al Ott, Chair**

**Date: April 9, 1998**

---

**The following clearinghouse rule has been referred to the Assembly Agriculture Committee:**

**Clearinghouse Rule 97-127**

**Relating to weighing and measuring devices, fair packaging and labeling and selling commodities by weight, measure or count**

**The deadline for action on this rule is 5-11-98. If you would like a copy of the rule, please contact my office at 266-5831.**

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF SUBMISSION OF PROPOSED RULES TO PRESIDING  
OFFICERS OF EACH HOUSE OF THE LEGISLATURE

NOTICE IS HEREBY GIVEN, pursuant to s. 227.19(2), Stats., that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection is submitting a final draft of proposed Clearinghouse Rule Number 97-127 to the presiding officer of each house of the legislature for standing committee review. The proposed rule repeals and recreates Chapter ATCP 90 relating to fair packaging and labeling, Chapter ATCP 91 relating to selling commodities by weight, measure or count, and Chapter ATCP 92 relating to weighing and measuring devices.

Dated this 31 day of March, 1998.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By Ben Brancel  
Ben Brancel, Secretary



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary



DATE: March 27, 1998

TO: The Honorable Fred Risser  
President, Wisconsin State Senate  
Rm. 301, 119 Martin Luther King, Jr. Blvd.  
Madison, WI 53707

The Honorable Scott Jensen  
Speaker, Wisconsin State Assembly  
Rm. 211W, State Capitol  
Madison, WI 53708-8952

FROM: Ben Brancel, Secretary *Ben Brancel*  
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Proposed Rules Relating to Weighing and Measuring Devices, Fair Packaging and Labeling and Selling Commodities by Weight, Measure or Count (Clearinghouse Rule 97-127)

The Department of Agriculture, Trade and Consumer Protection hereby transmits the above rule for legislative committee review, pursuant to ss. 227.19(2) and (3), Stats. We are enclosing 3 copies of the final draft rule, together with the following report. Pursuant to ss. 227.19(2), Stats., the department will publish a notice of this referral in the Wisconsin Administrative Register.

This rule relates to:

- Weighing and measuring devices.
- Fair packaging and labeling.
- Selling commodities by weight, measure or count.

This rule will modify current DATCP rules under chs. ATCP 90-92, Wis. Adm. Code. A copy of the rule is attached.

### Weighing and Measuring Devices

Current law prohibits any person from causing a weight or measure to be incorrect. This rule clarifies that a person who manufactures or distributes a weighing or measuring device causes a weight or measure to be incorrect if:

- The person knows or reasonably should know that the weighing or measuring device has a defect that may cause an incorrect weight or measure.



The Honorable Fred Risser  
The Honorable Scott Jensen  
March 27, 1998  
Page 2

- The person fails to take steps, which that person is reasonably capable of taking, which would prevent the defect from causing incorrect weights or measures.
- The defective weighing or measuring device causes an incorrect weight or measure which is attributable, at least in part, to the defect.

### **LP Gas Labeling**

Current DATCP rules spell out fair packaging and labeling requirements for consumer commodities. Among other things, a package must be labeled to show the identity of the product, the net quantity of the product, and the identity of the responsible seller.

The current rules do not adequately address the labeling of liquefied petroleum gas (LP gas) in portable cylinders. This rule establishes the following labeling requirements for LP gas sold in portable containers:

- The tare weight of each container must appear on the outside of the container.
- The net quantity of LP gas must be disclosed on a label or tag attached to the container.
- A declaration of responsibility (identifying the responsible seller) must be attached to the container or posted at the point of sale.

### **Testing Samples for Net Quantity**

Current DATCP rules spell out the statistical sampling procedures and compliance standards which DATCP uses to determine whether packages contain the full amounts claimed on package labels. This rule modifies the current rules to conform to current standards specified by the National Institute of Standards and Technology (NIST) Handbook 133, "Checking the Net Contents of Packaged Goods."

### **Selling Commodities By Weight, Measure or Count**

Under s. 98.06(1), Stats., liquid commodities must ordinarily be sold by liquid measure and nonliquid commodities must ordinarily be sold by weight. Other methods of sale are allowed if they are in general use and give accurate information as to the quantity of

The Honorable Fred Risser  
The Honorable Scott Jensen  
March 27, 1998  
Page 3

the commodity sold. However, DATCP rules regulate methods of sale to prevent unfair competition and deception of consumers.

Current DATCP rules spell out uniform methods of sale for certain commodities including fresh fruits, fresh vegetables, meat, poultry, seafood, cheese, bulk commodities and ready-to eat foods. This rule modifies the current rules to reflect current market practices and national standards. This rule:

- Incorporates the general requirements of s. 98.06, Stats.
- Clarifies current standards related to the sale of bulk commodities by weight.
- Gives retailers greater flexibility to sell "ready to eat" foods by weight, measure or count, at the retailer's option.
- Defines "weight" to exclude packaging materials and other extraneous materials.
- Modifies current standards related to fresh fruits, fresh vegetables, meat, poultry, seafood, cheese and pizza.
- Incorporates, without change, current statutory standards related to sales of petroleum products and motor fuel.
- Makes organizational and drafting changes to streamline and clarify the current rules.

### **Hearing Comments**

The department held 4 public hearings in Madison, Milwaukee, Eau Claire and Green Bay on October 27, 30 and 31, 1997. A total of 6 people attended the hearings. Two persons testified on behalf a large Wisconsin grocery chain, two persons testified on behalf of Wisconsin gas dealer associations, and one person testified as a private consumer. No one opposed the rules. The hearing record remained open until November 14, 1997. The City of Milwaukee (weights and measures program) submitted the only written comments.

The Honorable Fred Risser  
The Honorable Scott Jensen  
March 27, 1998  
Page 4

### **Changes from Hearing Draft**

The department made the following changes to the final draft rule:

- In response to hearing testimony from a grocery chain and the City of Milwaukee, the department withdrew its proposal to allow the sale of bananas by count or weight. Under the final draft rule, as under current law, bananas must be sold by weight.
- In response to hearing testimony from a grocery chain and the City of Milwaukee, the department withdrew its proposal to allow the sale of certain fresh vegetables by "bunch" or by weight. Under the final draft rule, as under current law, asparagus, broccoli and cauliflower must be sold by weight.
- The department also made nonsubstantive editorial changes, including changes suggested by the Legislative Council Rules Clearinghouse.

### **Fiscal Estimate**

The department does not expect this rule to have any fiscal effect on the department or local units of government. A fiscal estimate is attached.

### **Small Business Analysis**

The department does not expect this rule to have any adverse impact on small business. This rule will maintain protection for consumers while allowing small businesses greater flexibility in their methods of sale.

Proposed Final Draft  
February 20, 1998

**PROPOSED ORDER OF THE STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION  
ADOPTING, AMENDING AND REPEALING RULES**

1 The state of Wisconsin department of agriculture, trade and consumer protection proposes the  
2 following order to amend ATCP 90.09(4)(a); to repeal and recreate ATCP 90.09(2), 91(title)  
3 and (note), 91.01(11), and 91.02 to 91.05; and to create ATCP 90.08(21) and (note),  
4 91.01(12m) and (14), 91.015, 91.041, 91.042, 91.11 and (note) and 92.02(6) and (7); relating  
5 to weighing and measuring devices, fair packaging and labeling, and selling commodities by  
6 weight, measure or count.

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**Analysis by the Department of Agriculture,  
Trade and Consumer Protection**

Statutory authority: ss. 93.07(1), 97.09(1) and (4), 97.42(4)(j), 98.07(3) and (4),  
98.26(1)(b) and 100.20(2), Stats.

Statutes interpreted: ss. 98.06, 98.07 and 98.26(1)(b), Stats.

The Department of Agriculture, Trade and Consumer Protection ("DATCP") administers state laws related to weights and measures, fair packaging and labeling, and the methods by which commodities are sold. DATCP has adopted rules under chs. ATCP 90-92, Wis. Adm. Code, to interpret these laws. This rule modifies portions of those rules.

**Weighing and Measuring Devices**

Section 98.26(1)(b), Stats., currently prohibits any person from causing a weight or measure to be incorrect. This rule also prohibits any person from causing a weight or measure to be incorrect. A person who manufactures or distributes a weighing or measuring device violates this prohibition if all of the following apply:

- The person knows or reasonably should know that the weighing or measuring device has a defect that may cause an incorrect weight or measure.

- The person fails to take steps, which that person is reasonably capable of taking, which would prevent the defect from causing incorrect weights or measures.
- The defective weighing or measuring device causes an incorrect weight or measure which is attributable, at least in part, to the defect.

### **Fair Packaging and Labeling**

#### Overview

Under current DATCP rules, consumer commodities sold in package form must bear declarations of seller identity, product identity and net quantity. The current rules also spell out sampling methods used to determine whether packages contain the full amounts claimed on the package labels.

This rule modifies current rules as follows:

- It establishes fair packaging and labeling standards for liquefied petroleum gas (LP gas) sold in portable refillable containers.
- It modifies current sampling procedures used to determine whether packages contain the full amounts claimed on the package labels.

#### Liquefied Petroleum Gas

DATCP's current fair packaging and labeling rules do not apply to the sale of LP gas in portable refillable containers (cylinders). This rule establishes fair packaging and labeling rules for LP gas sold in portable refillable containers. Under this rule:

- The tare weight of each container must appear on the outside of the container.
- The net quantity of LP gas in each container must be disclosed on the container label, or on a tag attached to the container.
- A declaration of responsibility (identifying the responsible seller) must be attached to the container or posted at the point of sale.

#### Enforcement Samples

Current DATCP rules spell out statistical sampling procedures and compliance standards used to determine whether packages contain the full amounts claimed on the package labels. This rule modifies the current standards to conform to current standards specified by the National

Institute of Standards and Technology (NIST) Handbook 133, "Checking the Net Contents of Packaged Goods."

### Selling Commodities By Weight, Measure or Count

#### Overview

Under s. 98.06(1), Stats., liquid commodities must ordinarily be sold by liquid measure and nonliquid commodities must ordinarily be sold by weight. Other methods of sale may be used if they are in general use and provide accurate information as to the quantity of commodity sold. However, DATCP rules regulate methods of sale to prevent unfair competition and deception of consumers.

Current DATCP rules under ch. ATCP 91, Wis. Adm. Code, spell out uniform methods of sale for certain commodities. This rule modifies current rules as follows:

- It incorporates the general requirements of s. 98.06, Stats.
- It clarifies current standards related to the sale of bulk commodities by weight.
- It gives retailers greater flexibility to sell "ready-to-eat" foods by weight, measure or count, at the retailer's option.
- It defines "weight" to exclude packaging materials and other extraneous materials.
- It modifies current standards related to fresh fruits and vegetables, meat and poultry, seafood, cheese and pizza.
- It incorporates, without change, current statutory standards related to sales of petroleum products and motor fuel.
- It makes organizational and drafting changes to streamline and clarify the current rule.

#### Bulk Commodities Sold by Weight

This rule clarifies current rules related to the sale of bulk commodities by weight. Under this rule:

- Whenever a bulk or unpackaged commodity is offered for sale by weight, the price for that commodity must be declared per single whole unit of weight. The price may not be declared per fractional or multiple unit of weight.
- If a retailer displays more than one type of bulk or unpackaged commodity for sale by weight in the same retail display, the retailer must declare all of the prices of the displayed commodities per the same whole unit of weight.
- No person may sell a bulk or unpackaged commodity by weight at retail unless one of the following applies:
  - \* The commodity is weighed at the time of sale.
  - \* The weights of individual commodity units are accurately premarked on those units.
  - \* A placard stating the guaranteed minimum individual weight of the individual commodity units displayed for sale is conspicuously posted at the display location.
- The weight of a bulk or unpackaged commodity sold by weight may not include the weight of the containers or wrappers, if any, in which those commodities are sold.
- Whenever a bulk commodity sold by weight is delivered by vehicle to an individual purchaser, the bulk delivery must comply with s. 98.22, Stats. Under s. 98.22, the seller must provide the purchaser with a delivery ticket that shows the seller's name and address, the name and address of the purchaser, the net weight of the delivery in pounds, and the gross and tare weights of the delivery if gross and tare weights are used in determining the net weight.

### Fresh Fruits and Vegetables

Under current rules, fresh fruits and vegetables must be sold by weight unless exemptions authorize other methods of sale. The current rules exempt 29 fruits or vegetables that may be sold by weight or count, 15 that may be sold by weight or "bunch," 11 that may be sold by weight or specified dry measure (e.g., berries sold by 1/2 pint, pint or quart), and 2 that may be sold by weight, count or specified dry measure.

This rule modifies the current exemptions, adding or deleting certain fruits or vegetables in each exemption category. Under this rule, 33 fruits or vegetables may be sold by weight or count, 15 may be sold by weight or "bunch," 9 may be sold by weight or specified dry measure, and 4 may be sold by weight, count or specified dry measure.

### Meat, Poultry and Cheese

Under current rules, meat, poultry, cheese, and foods made from meat, poultry or cheese must ordinarily be sold by weight. This rule maintains the current requirement, but creates an exemption for certain "ready to eat" foods (see below). This rule also provides that the declared weight of cheese coated with wax may not include the weight of the wax.

### Seafood

Under current rules, seafood and seafood products must ordinarily be sold by weight, except that current rules authorize different methods of sale for mollusks, live fish and live shellfish. This rule maintains the current requirements, with minor modifications. This rule also creates an exemption for certain "ready to eat" foods (see below).

### Pizza

This rule clarifies that pizza must be sold by weight, except that "made to order" pizzas may be sold by weight or count.

### Ready-to-Eat Foods

Supermarkets and convenience stores are currently offering more restaurant-style or "ready-to-eat" foods for consumption on or off the premises. Current rules unnecessarily restrict the methods by which many of these foods may be sold (e.g., by requiring weight declarations on restaurant-style foods which the consumer does not expect to purchase by weight).

In recognition of current market trends, this rule gives retailers greater flexibility to sell certain "ready-to-eat" foods by weight, measure or count. Under this rule, for example, a grocery store could sell individual "ready to eat" sandwiches or salads without having to weigh them. The grocery store could sell these items by count -- e.g., \$2.00 per sandwich, or \$1.50 per individual salad. This treatment of "ready-to-eat" foods is consistent with allowed methods of sale in restaurants.

Under this rule, "ready-to-eat" food means food which is sold for immediate consumption without further washing, heating, thawing or other preparation. "Ready-to-eat food" does not include any of the following:

- Raw fruits or vegetables, except when sold as part of a ready-to-eat meal.



- Sliced meat or poultry, or other sliced luncheon products, except when sold as part of a ready-to-eat meal.
- Cheese, except when sold as part of a ready-to-eat meal.
- Candy or snack foods, except when sold as part of a ready-to-eat meal.
- Beverages in hermetically sealed containers.

Under this rule, the following foods may be sold by weight, measure or count (at the seller's option):

- Foods sold for immediate consumption on the premises where sold.
- Ready-to-eat foods sold from bulk.
- Ready-to-eat foods in single-serving packages that are sold as part of a meal.

This rule prohibits any person from misrepresenting the weight, measure or count of any ready-to-eat food. Weight declarations for cooked ready-to-eat foods are considered declarations of cooked weight unless they are identified as declarations of precooked weight.

1        **SECTION 1.** ATCP 90.08(21) and (note) are created to read:

2        **ATCP 90.08(21) LIQUEFIED PETROLEUM GAS IN PORTABLE REFILLABLE**

3 **CONTAINERS.** No person may sell or exchange at retail, or offer for sale or exchange at

4 retail, liquefied petroleum gas in a portable refillable container unless all of the following

5 apply:

6        (a) The tare weight of the container is clearly and conspicuously disclosed on the

7 container, as required under s. 98.245(2), Stats.

1 (b) The net quantity of liquefied petroleum gas in the container is clearly and  
2 conspicuously disclosed on the container, or on a tag attached to the container. The format of  
3 the declaration shall comply with s. ATCP 90.04.

4 (c) A declaration of responsibility is attached to the container, or conspicuously posted  
5 at the location where the liquefied petroleum gas is offered or displayed for sale or exchange.  
6 The declaration shall comply with s. ATCP 90.03, except as provided in this paragraph.

7 NOTE: See also s. 98.245, Stats., and s. ATCP 92.05..

8 **SECTION 2.** ATCP 90.09(2) is repealed and recreated to read:

9 ATCP 90.09(2) ENFORCEMENT SAMPLE AND INSPECTION LOT. (a) The  
10 department or a municipal sealer may determine the net contents of packaged commodities in  
11 an inspection lot based on an enforcement sample collected from that inspection lot. The  
12 enforcement sample shall be collected, tested and analyzed according to applicable provisions  
13 of the national institute of standards and technology handbook 133, "Checking the Net  
14 Contents of Packaged Goods." Unless otherwise specified by handbook 133, the inspection lot  
15 shall be determined according to par. (b).

16 (b) The department or municipal sealer shall determine the scope of an inspection lot  
17 before collecting an enforcement sample from that lot under par. (a). An inspection lot may  
18 consist of any group of identically labeled packages found at the same manufacturing,  
19 wholesale or retail premises. An inspection lot may include packages from different  
20 manufacturing or production lots, and from different wholesale shipments or deliveries.

1 (c) For purposes of par. (b), packages are identically labeled if they are of the same  
2 size and if they bear the same declaration of product identity under s. ATCP 90.02, the same  
3 declaration of responsibility under s. ATCP 90.03, and the same declaration of net quantity  
4 under s. ATCP 90.04, regardless of any other differences in label content or format.

5 NOTE: A copy of the national institute of standards and technology handbook 133,  
6 "Checking the Net Contents of Packaged Goods," is on file with the department, the secretary  
7 of state, and the revisor of statutes.

8

9 **SECTION 3.** ATCP 90.09(4)(a) is amended to read: - -

10 ATCP 90.09(4)(a) If, in any enforcement sample under sub. (2)(a), the number of  
11 unreasonable shortages in individual packages exceeds the number specified in ~~table 2~~ for an  
12 enforcement sample of that size in the national institute of standards and technology handbook  
13 133, the department or a municipal sealer shall issue an order prohibiting the sale of the entire  
14 inspection lot from which that enforcement sample is collected.

15 **SECTION 4.** Ch. ATCP 91(title) and (note) are repealed and recreated to read:

16

## CHAPTER ATCP 91

17

### SELLING COMMODITIES BY WEIGHT, MEASURE OR COUNT

18 NOTE: This chapter is adopted under authority of ss. 93.07(1), 98.07(3) and (4),  
19 Stats. Violations are subject to the penalties and remedy provided under s. 98.26, Stats. See  
20 also chs. ATCP 90 (fair packaging and labeling) and ATCP 92 (weighing and measuring  
21 devices).

22

23 **SECTION 5.** ATCP 91.01(11) is repealed and recreated to read:

1           ATCP 91.01(11) "Ready-to-eat food" means food which is sold for immediate  
2 consumption without further washing, heating, thawing or other preparation. "Ready-to-eat  
3 food" does not include any of the following:

4           (a) Raw fruits or vegetables, except when sold as part of a ready-to-eat meal.

5           (b) Sliced meat or poultry, or other sliced luncheon products, except when sold as part  
6 of a ready-to-eat meal.

7           (c) Cheese, except when sold as part of a ready-to-eat meal.

8           (d) Candy or snack foods, except when sold as part of a ready-to-eat meal.

9           (e) Beverages in hermetically sealed containers.

10          **SECTION 6.** ATCP 91.01(12m) and (14) are created to read:

11          ATCP 91.01(12m) "Single serving" means an amount of food that is reasonably  
12 designed to be consumed by one individual on one eating occasion.

13          (14) "Weight" means the weight of a commodity excluding any materials, substances  
14 or items that are not part of the commodity.

15          **SECTION 7.** ATCP 91.015 is created to read:

16          **ATCP 91.015 METHODS OF SALE; GENERAL.** (1) Except as provided in sub.  
17 (2) or (3), liquid commodities shall be sold by liquid measure and nonliquid commodities shall  
18 be sold by weight.

19          (2) Liquid commodities may be sold by weight, and nonliquid commodities may be  
20 sold by count or measure, if those methods of sale are in general use and give meaningful and  
21 accurate information as to the quantity of the commodity sold.

1 (3) This section does not apply to either of the following:

2 (a) Commodities for which methods of sale are more specifically prescribed by this  
3 chapter, or by other state or federal law.

4 (b) Commodities sold for immediate consumption on the premises where sold as  
5 provided in ATCP 91.05.

6 NOTE: See s. 98.06, Stats.

7  
8 **SECTION 8.** ATCP 91.02 to 91.04 are repealed and-recreated to read:

9 **ATCP 91.02 BULK COMMODITIES SOLD BY WEIGHT.** (1) Whenever a bulk  
10 or unpackaged commodity is offered for sale by weight, the price for that commodity shall be  
11 declared per single whole unit of weight. The price may not be declared per fractional or  
12 multiple unit of weight.

13 (2) If a retailer displays more than one type of bulk or unpackaged commodity for sale  
14 by weight in the same retail display, the retailer shall declare all of the prices of the displayed  
15 commodities per the same whole unit of weight.

16 (3) No person may sell a bulk or unpackaged commodity by weight at retail unless one  
17 of the following applies:

18 (a) The commodity is weighed at the time of sale.

19 (b) The weights of individual commodity units are accurately premarked on those  
20 units.

21 (c) A placard stating the guaranteed minimum individual weight of the individual  
22 commodity units displayed for sale is conspicuously posted at the display location.

1 (4) The weight of a bulk or unpackaged commodity sold by weight may not include  
2 the weight of the containers or wrappers, if any, in which those commodities are sold.

3 NOTE: For example, the weight of candy sold in bulk by weight may not include the  
4 weight of individual candy wrappers.  
5

6 (5) When a bulk commodity sold by weight is delivered by vehicle to an individual  
7 purchaser, the bulk delivery shall comply with s. 98.22, Stats.

8 **ATCP 91.03 FRUITS AND VEGETABLES.** (1) FRESH FRUITS AND  
9 VEGETABLES. (a) Except as provided in pars. (b) to (g), fresh fruits and vegetables shall  
10 be sold at retail by weight.

11 (b) The following fresh fruits and vegetables may be sold at retail by weight or by  
12 count: artichokes, avocados, cantaloupes, cauliflower, celery, corn on the cob, coconuts,  
13 cucumbers, eggplant, garlic, grapefruit, head lettuce, kiwanos, kiwi fruit, lemons, limes,  
14 loquats, mangoes, melons (whole), nectarines, oranges, papayas, peppers, persimmons,  
15 pineapples, pomegranates, prickly pear, pumpkins, quince, squash, star fruit, tangerines and  
16 ugli fruit.

17 (c) The following fresh vegetables may be sold at retail by weight or bunch: chard,  
18 dill, endive, escarole, green or spring onions, greens, kale, kohlrabi, leaf lettuce, leeks,  
19 parsley, root vegetables with green tops attached, spinach, thyme and watercress.

20 (d) The following fruits may be sold at retail by weight or by dry measure units of one  
21 quart, one pint, or one-half pint: berries, cherries, cherry tomatoes, chokecherries, currants,  
22 concord grapes and plum tomatoes.

23 NOTE: See s. 98.06(2), Stats.

1  
2 (e) Plums and tomatoes may be sold by weight or by dry measure in units of not less  
3 than one peck.

4 (f) Apples, cucumbers, peaches and pears may be sold by weight, by count or by dry  
5 measure in units of not less than one peck.

6 (g) Mixed whole fresh fruits or vegetables gift wrapped in baskets or other reusable  
7 containers may be sold at retail by weight or by count of the individual fruits or vegetables in  
8 the container.

9 NOTE: Pre-packaged fresh fruits and vegetables, other than unprocessed fruits or  
10 vegetables sold in transparent wrappings or containers, must comply with applicable packaging  
11 and labeling requirements under ch. ATCP 90.

12  
13 (2) PICKLED FRUITS AND VEGETABLES. (a) Except as provided in par. (b),  
14 pickled fruits and vegetables shall be sold by drained weight.

15 (b) Pickled cucumbers and relishes shall be sold by fluid measure, except that 1 or 2  
16 whole pickled cucumbers in transparent wrapping and pickled cucumbers sold from bulk  
17 containers may be sold by count.

18 **ATCP 91.04 MEAT, POULTRY AND CHEESE.** Meat, poultry, cheese, and food  
19 primarily composed of meat, poultry or cheese shall be sold by weight, except as otherwise  
20 provided by this chapter or other state or federal law. The declared weight of cheese coated  
21 with wax may not include the weight of the wax.

22 **SECTION 9.** ATCP 91.04(note) is created to read:

23 NOTE: See also ch. ATCP 109 related to freezer meat and foods service plans and the  
24 sale of "wholesale cuts" to consumers.

25

1           **SECTION 10.** ATCP 91.041 and 91.042 are created to read:

2           **ATCP 91.041 SEAFOOD.** (1) Seafood and food primarily composed of seafood  
3 shall be sold by weight, except as provided by this chapter or other state or federal law.

4           (2) Mollusks in the shell may be sold by weight, count or dry measure bushel.

5           (3) Mollusks removed from the shell shall be sold by weight, except as provided in  
6 sub. (4).

7           (4) Shelled fresh mollusks packed in liquid shall be sold by drained weight or fluid  
8 volume. The free liquid may not exceed 15 percent by weight of the package contents.

9           (5) Fresh and frozen processed mollusks on the half shell shall be sold by count or by  
10 weight, excluding the weight of the shell.

11          (6) Glazed, individually frozen pieces of seafood shall be sold by weight. No part of  
12 the declared weight may consist of ice or other glazing.

13          (7) Live fish and live shellfish may be sold by weight or by count.

14          **ATCP 91.042 PIZZA.** (1) Pizza shall be sold by weight, except as provided under  
15 sub. (2).

16          (2) Pizza made to order, other than dessert pizza, may be sold by weight or by count.

17          **SECTION 11.** ATCP 91.05 is repealed and recreated to read:

18          **ATCP 91.05 READY-TO-EAT FOODS.** (1) The following foods may be sold by  
19 weight, measure or count:

20          (a) Foods sold for immediate consumption on the premises where sold.

21          (b) Ready-to-eat foods sold from bulk.



- 1 (c) Ready-to-eat foods in single-serving packages that are sold as part of a meal.
- 2 (2) No person may misrepresent the weight, measure or count of any ready-to-eat food
- 3 under sub. (1). Weight declarations for cooked ready-to-eat foods shall be declarations of
- 4 cooked weight unless they are identified as declarations of precooked weight.

5 **SECTION 12.** ATCP 91.11 and (note) are created to read:

6 **ATCP 91.11 PETROLEUM PRODUCTS AND MOTOR FUEL.** A person

7 advertising, offering for sale or selling petroleum products or motor fuel shall comply with

8 applicable requirements under ss. 98.246 and 100.18(6) and (8), Stats.

9 NOTE: See also s. ATCP 92.04.

10 **SECTION 13.** ATCP 92.02(6) and (7) are created to read:

11 ATCP 92.02(6) No person may cause a weight or measure to be incorrect.

12 (7) A person who manufactures or distributes a commercial weighing or measuring

13 device violates sub. (6) if all of the following apply:

14 (a) The person knows or reasonably should know that the weighing or measuring

15 device has a latent or patent defect that may cause an incorrect weight or measure.

16 (b) The person fails to take steps, which that person is reasonably capable of

17 taking, which would prevent the defect from causing incorrect weights or measures.

18 (c) The defective weighing or measuring device causes an incorrect weight or

19 measure which is attributable, at least in part, to the defect in the device.

20

1           **EFFECTIVE DATE.** The rules contained in this order shall take effect on the first  
2 day of the month following publication in the Wisconsin administrative register, as provided  
3 under s. 227.22(2)(intro.), Stats.

4

5 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

6   STATE OF WISCONSIN  
7   DEPARTMENT OF AGRICULTURE,  
8   TRADE AND CONSUMER PROTECTION

9  
10  
11   By \_\_\_\_\_  
12   Ben Brancel, Secretary

ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.  
ATCP 90  
ATCP 91  
ATCP 92

Amendment No. if Applicable

FISCAL ESTIMATE  
DOA-2048 (R10/92)

**Subject**

Fair Packaging and Labeling, Methods of Sale of Commodities, Weighing and Measuring Devices

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues
- Decrease Existing Appropriation       Decrease Existing Revenues
- Create New Appropriation

- Increase Costs - May be possible to Absorb Within Agency's Budget     Yes     No
- Decrease Costs

Local:  No Local Government Costs

- 1.  Increase Costs      3.  Increase Revenues
- Permissive     Mandatory       Permissive     Mandatory
- 2.  Decrease Costs      4.  Decrease Revenues
- Permissive     Mandatory       Permissive     Mandatory

5. Types of Local Governmental Units Affected
- Towns       Villages       Cities
  - Counties       Others \_\_\_\_\_
  - School Districts       VTAE Districts

**Fund Sources Affected**

- GPR     FED     PRO     PRS     SEG     SEG-S

**Affected Ch. 20 Appropriations**

**Assumptions Used in Arriving at Fiscal Estimate**

The proposed amendments alter the existing packaging and labeling and methods of sale rules for some commodities and expand the scope of the code to cover a number of commodities not discussed in the existing rules.

The proposed regulations affect enforcement activities in which the Trade and Consumer Protection Division's Weights and Measures staff are already engaged. Therefore no fiscal effect is estimated.

Under Chapter 98, Wisconsin Statutes, each municipality of more than 5,000 is charged with enforcing weights and measures laws within their respective jurisdictions. To the extent that these municipalities are enforcing ATCP 90, ATCP 91, and ATCP 92, there should be no fiscal effect on them, as the amendments impose no additional responsibilities.

**Long-Range Fiscal Implications**

None anticipated.

Agency/Prepared by: (Name & Phone No.)

DATCP David D. Tatar 224-4947

Authorized Signature/Telephone No.

*Barbara Knapp*  
Barbara Knapp 224-4746

Date

August 6, 1997

FINAL REGULATORY FLEXIBILITY ANALYSIS

Proposed Ch. ATCP 90, ATCP 91, and ATCP 92, Wis. Adm. Code (Fair Packaging and Labeling, Selling Commodities by Weight, Measure or Count, Weighing and Measuring Devices)

The department's proposed rule amendments will have an impact on some retailers of various commodities. Many of these retailers are small businesses as defined by s.227.114(a), Stats.

In the area of marketing fruits and vegetables, the proposals expand the number of fruits and vegetables which can be sold by other methods rather than only by weight. And pizza, made to order for the customer, may be sold by weight or count under the new rules. As a result, some small businesses that might have had to buy and use scales under the current rules will not have to under the proposed rules, thereby decreasing their costs.

In the area of ready-to eat foods, the proposals decrease the number of commodities that must be sold by weight, once again decreasing the costs of doing business for retailers of these products.

The proposed creation of packaging and labeling requirements on liquified petroleum gas in portable cylinders should have little impact since these standards have already been in existence in the marketplace for sometime.

The remaining provisions of the proposed amendments to ch. ATCP 90, ATCP 91, and ATCP 92 should have no significant effect on small business.

The division anticipates a period of education and information to assist business in compliance with the new revisions.

The essence of the three rules and the proposed amendments is to protect the consumer from unfair trade practices while also providing a level playing field for good businesses to prosper. The revisions do not create additional financial burdens and therefore are not expected to have an adverse impact on small business.

Dated this 26th day of January, 1998.

State of Wisconsin  
Department of Agriculture,  
Trade and Consumer Protection

By William L. Oemichen  
William L. Oemichen,  
Administrator  
Trade and Consumer Protection  
Division