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(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

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(session year)

### Joint

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\* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)



State of Wisconsin  
Jim Doyle, Governor

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Department of Agriculture, Trade and Consumer Protection  
Rod Nilsestuen, Secretary

## PUBLIC NOTICE

### FINAL DRAFT RULE TO LEGISLATURE

The Department of Agriculture, Trade and Consumer Protection announces that it is submitting the following rule for legislative committee review, pursuant to s. 227.19, Stats.:

CLEARINGHOUSE RULE #: **09-037**

SUBJECT: **Selling Commodities by Weight, Measure or Count**

ADM. CODE REFERENCE: **ATCP 91**

DATCP DOCKET #: **09-R-02**

Dated this 13 day of August, 2009.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE AND  
CONSUMER PROTECTION

By Randy Romick  
for Rodney J. Nilsestuen  
Secretary

*Agriculture generates \$51.5 billion for Wisconsin*



State of Wisconsin  
Jim Doyle, Governor

**Department of Agriculture, Trade and Consumer Protection**  
Rod Nilsestuen, Secretary

**DATE:** August 13, 2009

**TO:** The Honorable Fred Risser  
President, Wisconsin State Senate  
Room 220, South, State Capitol  
PO Box 7882  
Madison, WI 53707-7882

The Honorable Michael Sheridan  
Speaker, Wisconsin State Assembly  
Room 211 West, State Capitol  
PO Box 8953  
Madison, WI 53708-8952

**FROM:** Rodney J. Nilsestuen, Secretary *Randy Romulin for Rod Nilsestuen*  
Department of Agriculture, Trade and Consumer Protection

**SUBJECT: Selling Commodities by Weight, Measure or Count**  
*(Clearinghouse Rule #09-037)*

The Department of Agriculture, Trade and Consumer Protection ("DATCP") is transmitting this rule for legislative committee review, as provided in s. 227.19(2) and (3), Stats. DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in s. 227.19(2), Stats.).

This rule modifies current rules to make them consistent with standards published by the National Institute of Standards and Technology ("NIST") and adopted by 45 other states. This rule also reorganizes and clarifies the current rules, so they will be easier to read and understand.

### ***Background***

The Department of Agriculture, Trade and Consumer Protection (DATCP) currently regulates methods of sale of commodities, including required method of sale by weight, measure or count. The current rules are designed to ensure fair competition, to prevent unfair and deceptive sales practices, and to facilitate value comparisons by consumers. Current DATCP rules are contained in ch. ATCP 91, Wis. Adm. Code.

Current DATCP rules spell out general method-of-sale standards for all commodities, and more specific standards for some commodities. The current rules do all of the following:

- Require liquid commodities to be sold by liquid measure and nonliquid commodities by weight, with certain exceptions.

*Agriculture generates \$51.5 billion for Wisconsin*

- Regulate price declarations by weight, to facilitate accurate price comparisons.
- Specify methods of sale for various food commodities including fruits and vegetables, meat, poultry, cheese, frozen desserts, pizza and "ready to eat" foods.
- Specify methods of sale for various non-food commodities including firewood, roofing material, polyethylene sheeting, potpourri and petroleum products.

NIST has published model method-of-sale standards, which are designed to promote reasonable and uniform standards between the states. However, the NIST standards do not have the force of law unless adopted by the states. At least 45 states have adopted some or all of the NIST standards.

Current DATCP rules (ATCP 91) incorporate NIST standards, but also include some non-NIST standards (often because those standards are specifically required by Wisconsin statutes). NIST recently updated its standards. As a result, NIST standards incorporated in current DATCP rules are now out of date. This rule incorporates the latest NIST standards wherever possible.

### ***Rule Contents***

#### **Standards for Specific Commodities**

NIST has published specific method-of-sale standards for certain commodities (these standards typically address consumer protection or fair competition issues that have arisen in connection with those particular commodities). This rule incorporates current NIST standards for the following commodities (subject, in some cases, to exceptions required by Wisconsin law):

- ***Food products***
  - Meat, poultry, fish and seafood.
  - Dairy products.
  - Fresh fruits and vegetables.
  - Butter, margarine and like spreads.
  - Flour, corn meal and like products.
  - Pickles and pickle relish.
- ***Non-food products***
  - Fence wire.
  - Coatings.
  - Fireplace and stove wood.
  - Peat and peat moss.
  - Prefabricated utility buildings.
  - Roofing and roofing material.
  - Sealants.
  - Sod and turf.

- Softwood lumber.
- Carpet.
- Hardwood lumber (retail)
- Polyethylene products.
- Insulation.
- Precious metals.
- Mulch.
- Liquefied petroleum gas.
- Liquid oxygen for respiration.
- Animal bedding.
- Wiping cloths.
- Baler twine.
- Potpourri.
- Communication paper.
- Bulk sand, rock, gravel and stone.

### **General Standards**

This rule incorporates the following general NIST standards (or makes DATCP rules more consistent with those NIST standards):

- Price declarations for food commodities sold from bulk by weight (must be shown per whole unit, not fractional unit, of weight).
- Price presentation (showing fractions of a cent).
- Combination quantity declarations.
- Vending machine labeling.
- Railroad car tare weights.

### ***Public Hearings***

DATCP held one public hearing on this rule. DATCP held the hearing on June 23, 2009 in Madison and accepted written comments until July 3, 2009. No persons attended the hearing. No persons offered written hearing comments.

### ***Changes from Hearing Draft***

DATCP made minor editorial changes to the final draft rule in response to comments from the Legislative Council Rules Clearinghouse. DATCP also modified several notes accompanying the rule, based on comments from the Legislative Council Rules Clearinghouse.

### ***Response to Rules Clearinghouse Comments***

DATCP modified the final draft rule to address the comments from the Legislative Council Rules Clearinghouse.

#### ***Fiscal Impact***

This rule will have no significant fiscal impact on DATCP or local units of government. A complete *fiscal estimate* is attached.

#### ***Business Impact***

This rule will benefit businesses that sell commodities in more than one state, because it incorporates NIST model standards that are used in 45 other states. This rule also reorganizes and clarifies current rules, so they will be easier to read and understand.

This rule adds some new standards to current rules. However, those standards are based on existing NIST standards, and most affected businesses are already complying. This rule will not have any significant adverse impact on small business or other affected businesses. A complete *business impact analysis* is attached.

### ***Federal and Surrounding State Regulations***

#### **Federal Programs**

States have the primary responsibility for regulating methods of sale of commodities. The federal government (NIST) has published model method-of-sale standards, to promote effective state regulation and interstate uniformity. But those standards are not legally binding unless adopted by the states.

#### **Surrounding State Programs**

All surrounding states have adopted the NIST standards that DATCP proposes to adopt in this rule.

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

1 The Wisconsin department of agriculture, trade and consumer protection hereby adopts  
2 the following rule *to repeal* ATCP 91.01(2), (5), (6), (8) to (10) and (12m), 91.041,  
3 91.042, and 91.08 to 91.11; *to renumber* ATCP 91.01(3), (7), (11)(a) to (e), (12), (13)  
4 and (14); *to renumber and amend* 91.01(11)(intro.); *to amend* 91.01(1) and 91.02(1);  
5 and *to repeal and recreate* 91.01(4), 91.015, 91.03, 91.04, and 91.05 to 91.07; *relating to*  
6 method of sale of commodities, including method of sale by weight, measure or count.

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

The Department of Agriculture, Trade and Consumer Protection (DATCP) currently regulates methods of sale of commodities (including required methods of sale by weight, measure or count). The current rules are designed to ensure fair competition, to prevent unfair and deceptive sales practices, and to facilitate value comparisons by consumers. Current DATCP rules are contained in ch. ATCP 91, Wis. Adm. Code.

This rule changes current rules to make them consistent with standards published by the National Institute of Standards and Technology ("NIST") and adopted by 45 other states. This rule also updates and clarifies current rule coverage.

***Statutes Interpreted***

Statutes Interpreted: ss. 98.06, 98.07 and 100.20, Stats.

***Statutory Authority***

Statutory Authority: ss. 93.07(1), 98.07(3) and (4), and 100.20(2), Stats.

### *Explanation of Statutory Authority*

DATCP has authority to regulate methods of competition and trade practices in business under s. 100.20, Stats. DATCP also administers laws, including ss. 98.06 and 98.07, Stats., related to the pricing and sale of commodities by weight, measure or count.

DATCP has general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction. DATCP may adopt rules (general orders) under s. 100.20(2), Stats., to regulate methods of competition and trade practices in business. DATCP may also adopt rules under s. 98.07(3) and (4), Stats., related to the pricing and sale of commodities by weight, measure or count.

### *Related Statutes and Rules*

#### **Statutes**

Chapter 97, Stats., regulates the sale and labeling of food, and ch. 98, Stats., regulates commercial weights and measures. Various statutes specify methods of sale for specific commodities. See, for example, the following statutory sections:

- 97.177, Stats. (cheese).
- 97.176 and 97.18, Stats. (butter and margarine).
- 98.06, Stats. (berries and small fruits).
- 98.12, Stats. (frozen desserts).
- 98.21, Stats. (bread).
- 98.225, Stats. (deliveries of liquid fuel).
- 98.245, Stats. (LP gas).
- 98.246 and 100.18(6) and (8), Stats. (petroleum products and motor fuel).

DATCP has adopted a number of rules affecting the method of sale of commodities. See, for example, the following chapters of the Wisconsin administrative code:

- ATCP 55 (meat and meat food products).
- ATCP 75 (retail food establishments).
- ATCP 81 (cheese grading, packaging and labeling).
- ATCP 85 (butter grading and labeling).
- ATCP 88 (egg grading and labeling).
- ATCP 90 (fair packaging and labeling).
- ATCP 92 (weights and measures).
- ATCP 109 (freezer meat and food service plans).

## ***Rule Background***

Current DATCP rules (ATCP 91) regulate the sale of commodities by weight, measure or count. The current rules spell out general standards for all commodities, and more specific standards for some commodities. The current rules do all of the following:

- Require liquid commodities to be sold by liquid measure and nonliquid commodities by weight, with certain exceptions.
- Regulate price declarations by weight, to facilitate accurate price comparisons.
- Specify methods of sale for various food commodities including fruits and vegetables, meat, poultry, cheese, frozen desserts, pizza and “ready to eat” foods.
- Specify methods of sale for various non-food commodities including firewood, roofing material, polyethylene sheeting, potpourri and petroleum products.

NIST has published model method-of-sale standards, which are designed to promote reasonable and uniform standards between the states. However, the NIST standards do not have the force of law unless adopted by the states. At least 45 states have adopted some or all of the NIST standards.

Current DATCP rules (ATCP 91) incorporate NIST standards, but also include some non-NIST standards (often because those standards are specifically required by Wisconsin statutes). NIST recently updated its methods-of-sale standards. As a result, the NIST standards incorporated in current DATCP rules are now outdated. Wherever possible, this rule incorporates the latest NIST standards.

## ***Rule Content***

### **Standards for Specific Commodities**

NIST has published specific method-of-sale standards for certain commodities (these standards typically address consumer protection or fair competition issues that have arisen in connection with those particular commodities). This rule incorporates current NIST standards for the following commodities (subject, in some cases, to exceptions required by Wisconsin law):

- ***Food products***
  - Meat, poultry, fish and seafood.
  - Dairy products.
  - Fresh fruits and vegetables.
  - Butter, margarine and like spreads.
  - Flour, corn meal and like products.
  - Pickles and pickle relish.

- ***Non-food products***

- Fence wire.
- Coatings.
- Fireplace and stove wood.
- Peat and peat moss.
- Prefabricated utility buildings.
- Roofing and roofing material.
- Sealants.
- Sod and turf.
- Softwood lumber.
- Carpet.
- Hardwood lumber (retail)
- Polyethylene products.
- Insulation.
- Precious metals.
- Mulch.
- Liquefied petroleum gas.
- Liquid oxygen for respiration.
- Animal bedding.
- Wiping cloths.
- Baler twine.
- Potpourri.
- Communication paper.
- Bulk sand, rock, gravel and stone.

### **General Standards**

This rule incorporates the following general NIST standards (or makes DATCP rules more consistent with those NIST standards):

- Price declarations for food commodities sold from bulk by weight (must be shown per whole unit, not fractional unit, of weight).
- Price presentation (showing fractions of a cent).
- Combination quantity declarations.
- Vending machine labeling.
- Railroad car tare weights.

### ***Fiscal Impact***

This rule will have no significant fiscal impact on DATCP or local units of government. A complete *fiscal estimate* is attached.

### ***Business Impact***

This rule will benefit businesses that sell commodities in more than one state, because it incorporates many of the NIST model standards and thus makes Wisconsin standards more consistent with standards used in 45 other states. This rule also reorganizes and clarifies current rules, so they will be easier to read and understand.

This rule adds some new standards to current rules. However, those standards are based on NIST standards with which most affected businesses are already complying. This rule will not have any significant adverse impact on small business or other affected businesses. A complete *business impact analysis* is attached.

### ***Federal and Surrounding State Regulations***

#### **Federal Regulations**

States have the primary responsibility for regulating methods of sale of commodities. The federal government (NIST) has published model method-of-sale standards, to promote effective state regulation and interstate uniformity. But those standards are not legally binding unless adopted by the states.

#### **Surrounding State Regulations**

All surrounding states have adopted the NIST standards that DATCP proposes to adopt in this rule.

### ***Standards Incorporated by Reference***

This rule incorporates, by reference, standards contained in *NIST Handbook 130 (2009 edition)*, published by the national institute of standards and technology, United States department of commerce. Pursuant to s. 227.21, Stats., DATCP has requested permission from the Wisconsin Department of Justice to incorporate the standards by reference in this rule. Copies of the standards will be kept on file with DATCP and the Legislative Reference Bureau.

### ***Data and Analytical Methodologies***

This rule is based on standards published by NIST, and are based on NIST data and analytical methodologies.

### ***DATCP Contact***

Questions and comments related to this rule may be directed to:

Michelle Reinen, Program & Policy Analyst  
Department of Agriculture, trade and Consumer Protection  
P.O. Box 8911  
Madison, WI 53708-8911  
Telephone (608) 224-5160  
E-Mail: [hearingcomments@datcp.state.wi.us](mailto:hearingcomments@datcp.state.wi.us)

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1           **SECTION 1.** ATCP 91.01(1) is amended to read:

2           ATCP 91.01(1) “Commodity” means any product ~~or commodity~~, good or article  
3 of merchandise that is sold, offered for sale, or held or distributed for sale in this state.

4           “Commodity” includes a consumer commodity as defined in s. ATCP 90.01(5).

5           **SECTION 2.** ATCP 91.01(2) is repealed.

6           **SECTION 3.** ATCP 91.01(3) is renumbered (2).

7           **SECTION 4.** ATCP 91.01(4) is repealed and recreated to read:

8           ATCP 91.01(4) “NIST Handbook 130” means *NIST Handbook 130 (2009 edition)*  
9 published by the national institute of standards and technology, United States department  
10 of commerce.

11           **NOTE:** Copies of *NIST Handbook 130 (2009 edition)* are on file with the  
12 department and the legislative reference bureau. Copies may be obtained  
13 from the U.S. Government Printing Office, Stop SSOP, Washington, D.C.  
14 20402-0001, website [www.nist.gov](http://www.nist.gov).

15           **SECTION 5.** ATCP 91.01(5) and (6) are repealed.

16           **SECTION 6.** ATCP 91.01(7) is renumbered (3).

17           **SECTION 7.** ATCP 91.01(8) to (10) are repealed.

18           **SECTION 8.** ATCP 91.01(11)(intro.) is renumbered (5)(intro.) and amended to  
19 read:  
20

1           ATCP 91.01(5)(intro.) “Ready-to-eat food” means food ~~which is sold for~~  
2 ~~immediate~~ that is ready for consumption without further washing, heating, thawing or  
3 other preparation. “Ready-to-eat food” does not include any of the following:

4           **SECTION 9.** ATCP 91.01(11)(a) to (e) are renumbered (5)(a) to (e).

5           **SECTION 10.** ATCP 91.01(12) is renumbered (6).

6           **SECTION 11.** ATCP 91.01(12m) is repealed.

7           **SECTION 12.** ATCP 91.01(13) and (14) are renumbered (7) and (8).

8           **SECTION 13.** ATCP 91.015 is repealed and recreated to read:

9           **ATCP 91.015 Methods of sale; general.** Except as provided in s. ATCP 91.02,  
10 91.03, or other state or federal law:

11           (1) Liquid commodities shall be sold by liquid measure, except that liquid  
12 commodities may be sold by weight if that method is in general use and gives meaningful  
13 and accurate information as to the quantity of the commodity sold.

14           (2) Non-liquid commodities shall be sold by weight, except that non-liquid  
15 commodities may be sold by count or measure if that method is in general use and gives  
16 meaningful and accurate information as to the quantity of the commodity sold.

17           **SECTION 14.** ATCP 91.02(1) is amended to read:

18           91.02(1) Whenever a bulk or unpackaged commodity is offered for sale by  
19 weight, the price of that commodity shall be ~~declared per single whole unit of weight.~~  
20 ~~The price may not be declared per fractional or multiple unit of weight.~~ computed,  
21 advertised and displayed according to *NIST Handbook 130*, ch. IV.B, section 1.9.

22           **SECTION 15.** ATCP 91.03 and 91.04 are repealed and recreated to read:

23           **ATCP 91.03 Commodity types; methods of sale.** (1) FOOD COMMODITIES.

1 Except as provided in sub. (2), the following food commodities shall be sold in  
2 compliance with the following requirements:

3 (a) *Bread.* Bread shall be sold by weight unless it is clearly identified and sold as  
4 "stale bread."

5 **NOTE:** Section 98.21, Stats., also requires bread to be sold by weight unless it is  
6 sold as stale bread.

7 (b) *Butter, margarine and like spreads.* Food commodities covered by *NIST*  
8 *Handbook 130*, ch. IV.B, section 1.3, shall be sold in compliance with that section.

9 **NOTE:** Butter sold in Wisconsin must also comply with grading standards under  
10 s. 97.176. Margarine sold in Wisconsin must also comply with quality  
11 standards under s. 97.18, Stats.

12 (c) *Cheese.* Cheese shall be sold by weight. The declared weight of cheese  
13 coated with wax may not include the wax.  
14

15 **NOTE:** Cheese manufactured in Wisconsin must also comply with the grading  
16 standards under s. 97.177, Stats.

17 (d) *Dairy products.* Except as provided in pars. (b), (c) and (g), food  
18 commodities covered by *NIST Handbook 130*, ch. IV.B, sections 1.6 and 1.7, shall be  
19 sold in compliance with applicable provisions of those sections.  
20

21 (e) *Flour, corn meal, and like commodities.* Food commodities covered by *NIST*  
22 *Handbook 130*, ch. IV.B, section 1.4, shall be sold in compliance with that section.

23 (f) *Fresh fruits and vegetables.* Fresh fruits and vegetables shall be sold at retail  
24 by weight, except that fresh fruits and vegetables identified in *NIST Handbook 130*, ch.  
25 VI., section 2.3.2, shall be sold according to that section. Berries and small fruits such as  
26 cherries, currants and cherry tomatoes, if sold by dry measure, may only be sold in  
27 containers having capacities of one-half dry pint, one dry pint or one dry quart.  
28



1 (3) NON-FOOD COMMODITIES. The following non-food commodities shall be sold  
2 in compliance with the following requirements:

3 (a) *Animal bedding*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
4 section 2.23, shall be sold in compliance with that section.

5 (b) *Baler twine*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
6 2.25, shall be sold in compliance with that section.

7 (c) *Bulk sand, rock, gravel and stone*. Commodities covered by *NIST Handbook*  
8 *130*, ch. IV.B, section 2.29, shall be sold in compliance with that section.

9 (d) *Carpet*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
10 2.11, shall be sold in compliance with that section.

11 (e) *Coatings*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
12 2.3, shall be sold in compliance with that section.

13 (f) *Communication paper*. Commodities covered by *NIST Handbook 130*, ch.  
14 IV.B, section 2.28, shall be sold in compliance with that section.

15 (g) *Fence wire products*. Commodities covered by *NIST Handbook 130*, ch.  
16 IV.B, section 2.2, shall be sold in compliance with that section.

17 (h) *Fireplace and stove wood*. Commodities covered by *NIST Handbook 130*, ch.  
18 IV.B, section 2.4, shall be sold in compliance with that section.

19 (i) *Hardwood lumber*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
20 section 2.12, shall be sold in compliance with that section.

21 (j) *Insulation*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
22 2.14, shall be sold in compliance with that section.

23 (k) *Liquid oxygen for respiration*. Commodities covered by *NIST Handbook 130*,

1 ch. IV.B, section 2.22, shall be sold in compliance with that section.

2 (L) *LP gas*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
3 2.21, shall be sold in compliance with that section.

4 (m) *Mulch*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
5 2.18, shall be sold in compliance with that section.

6 (n) *Peat and peat moss*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
7 section 2.5, shall be sold in compliance with that section.

8 (o) *Petroleum products and motor fuel*. Petroleum products and motor fuel shall  
9 be sold in compliance with ss. 98.246 and 100.18(6) and (8), Stats.

10 (p) *Polyethelene products*. Commodities covered by *NIST Handbook 130*, ch.  
11 IV.B, section 2.13, shall be sold in compliance with that section.

12 (q) *Potpourri*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
13 2.26, shall be sold in compliance with that section.

14 (r) *Precious metals*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
15 section 2.17, shall be sold in compliance with that section.

16 (s) *Prefabricated utility buildings*. Commodities covered by *NIST Handbook*  
17 *130*, ch. IV.B, section 2.6, shall be sold in compliance with that section.

18 (t) *Roofing and roofing material*. Commodities covered by *NIST Handbook 130*,  
19 ch. IV.B, section 2.7, shall be sold in compliance with that section.

20 (u) *Sealants*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section  
21 2.8, shall be sold in compliance with that section.

22 (v) *Sod and turf*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
23 section 2.9, shall be sold in compliance with that section..

1 (w) *Softwood lumber*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
2 section 2.10, shall be sold in compliance with that section.

3 (x) *Wiping cloths*. Commodities covered by *NIST Handbook 130*, ch. IV.B,  
4 section 2.24, shall be sold in compliance with that section.

5 **ATCP 91.04 Presentation of price.** Whenever an advertised, posted or labeled  
6 price per unit of weight, measure or count for any commodity includes a fraction of a  
7 cent, all elements of the fraction shall be prominently displayed in compliance with *NIST*  
8 *Handbook 130*, ch. IV.B, section 3.1.

9 **SECTION 16.** ATCP 91.041 and 91.042 are repealed.

10 **SECTION 17.** ATCP 91.05 to 91.07 are repealed and recreated to read:

11 **91.05 Combination quantity declarations.** Whenever the method of sale of a  
12 commodity includes a statement of count in addition to a statement of weight, measure or  
13 size, the method of sale shall comply with applicable requirements in *NIST Handbook*  
14 *130*, ch. IV.B, section 3.2.

15 **91.06 Vending machines.** Vending machines dispensing packaged commodities  
16 shall comply with *NIST Handbook 130*, ch. IV.B, section 3.3.

17 **91.07 Railroad car tare weights.** Whenever stenciled tare weights on railroad  
18 freight cars are used in the sale of commodities or the assessment of freight charges, the  
19 stenciled tare weights shall comply with *NIST Handbook 130*, ch. IV.B, section 3.4.

20 **SECTION 18.** ATCP 91.08 to 91.11 are repealed.

21 **SECTION 19. EFFECTIVE DATE:** This rule takes effect on the first day of the  
22 month following publication in the Wisconsin administrative register, as provided in s.  
23 227.22 (2) (intro.), Stats.

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

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By \_\_\_\_\_  
Rodney J. Nilsestuen, Secretary

# Wisconsin Department of Agriculture, Trade and Consumer Protection

## Business Impact Analysis

**Rule Subject:** Selling Commodities by Weight,  
Measure or Count  
**Adm. Code Reference:** ATCP 91  
**Rules Clearinghouse #:** 09-037  
**DATCP Docket #:** 09-R-02

### *Background*

The Department of Agriculture, Trade and Consumer Protection (DATCP) currently regulates the sale of commodities by weight, measure or count. Current DATCP rules (ATCP 91) spell out general standards for all commodities, and more specific standards for some commodities.

The National Institute of Standards and Technology ("NIST") has published model method-of-sale standards, which are designed to promote reasonable and uniform standards between states. However, the NIST standards do not have the force of law unless adopted by the states. At least 45 other states (including all of the states surrounding Wisconsin) have adopted some or all of the NIST standards.

The current DATCP rules incorporate NIST standards, but also include some non-NIST standards (often because those standards are specifically required by Wisconsin statutes). NIST recently updated its standards. As a result, NIST standards in the current DATCP rules are now out of date. This rule incorporates the latest NIST standards wherever possible.

### *Rule Content*

#### **Standards for Specific Commodities**

NIST has published specific method-of-sale standards for certain commodities (the standards typically address consumer protection or fair competition issues that have arisen in connection with those particular commodities). This rule incorporates current NIST standards for the following commodities (subject, in some cases, to exceptions required by Wisconsin law):

- **Food products**
  - Meat, poultry, fish and seafood.
  - Dairy products.
  - Fresh fruits and vegetables.
  - Butter, margarine and like spreads.
  - Flour, corn meal and like products.

- Pickles and pickle relish.
- *Non-food products*
  - Fence wire.
  - Coatings.
  - Fireplace and stove wood.
  - Peat and peat moss.
  - Prefabricated utility buildings.
  - Roofing and roofing material.
  - Sealants.
  - Sod and turf.
  - Softwood lumber.
  - Carpet.
  - Hardwood lumber (retail)
  - Polyethylene products.
  - Insulation.
  - Precious metals.
  - Mulch.
  - Liquefied petroleum gas.
  - Liquid oxygen for respiration.
  - Animal bedding.
  - Wiping cloths.
  - Baler twine.
  - Potpourri.
  - Communication paper.
  - Bulk sand, rock, gravel and stone.

### **General Standards**

This rule incorporates the following general NIST standards (or makes DATCP rules more consistent with those NIST standards):

- Price declarations for food commodities sold from bulk by weight (must be shown per whole unit, not fractional unit, of weight).
- Price presentation (showing fractions of a cent).
- Combination quantity declarations.
- Vending machine labeling.
- Railroad car tare weights.

### ***Business Impact***

This rule will benefit businesses that sell commodities in more than one state, because it incorporates NIST standards that are used in 45 other states. This rule also reorganizes and clarifies current rules, so they will be easier to read and understand.

This rule will not have a significant negative impact on small businesses or other affected businesses. However, this rule may have a slight negative impact on some sellers of firewood and mulch. Currently, firewood and mulch may be sold in Wisconsin by volume or by weight, although most businesses sell these commodities by volume. By adopting the NIST standards, this rule will require firewood and mulch to be sold by volume. Those few small businesses that do not sell firewood or mulch by volume will need to develop techniques to determine volume.

### *Steps to Assist Small Business*

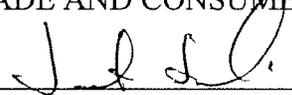
This rule will not have a significant impact on "small business." However, DATCP will contact trade associations representing affected businesses (including "small businesses"), and will help them educate their members about the new rule provisions.

### *Conclusion*

This rule will help maintain fair competition between competing businesses and will have few, if any, negative effects on business. This rule will have no significant effect on "small business," and is not subject to the delayed "small business" effective date provided in s. 227.22(2)(e), Stats.

Dated this 15<sup>th</sup> day of July, 2009

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By   
Janet Jenkins, Administrator,  
Division of Trade & Consumer Protection

**FISCAL ESTIMATE**

DOA-2048 N(R10/98)

 ORIGINAL     UPDATED  
 CORRECTED     SUPPLEMENTAL

LRB No. and Bill/Adm. Rule No.

**CH. ATCP 91**

Amendment No. If Applicable

**Subject**

Selling Commodities by Weight, Measure or Count

**Fiscal Effect****State:**  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum certain 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  
 Permissive     Mandatory  
2.  Decrease Costs  
 Permissive     Mandatory

3.  Increase Revenues  
 Permissive     Mandatory  
4.  Decrease Revenues  
 Permissive     Mandatory

5. Types of Local Governmental Units Affected:  
 Towns     Villages     Cities  
 Counties     Others  
 School Districts     WTCS Districts
**Fund Sources Affected**
 GPR     FED     PRO     PRS     SEG     SEG-S
**Affected Ch. 20 Appropriations****Assumptions Used in Arriving at Fiscal Estimate**

This rule will have no significant fiscal impact on DATCP or local units of government.

**Background**

Current DATCP rules (ATCP 91) regulate the sale of commodities by weight, measure or count. The current rules spell out general standards for all commodities, and more specific standards for some commodities. With some exceptions, the current rules incorporate standards published by the National Institute of Standards and Technology (NIST). This rule updates the current standards. This rule also updates and clarifies rule coverage.

**Impact of the Proposed Rule on State Government**

This rule will have no significant fiscal impact on DATCP or other agencies of state government. The rule does not increase the scope of DATCP regulation or change the method of regulation.

**Impact of the Proposed Rule on Local Government**

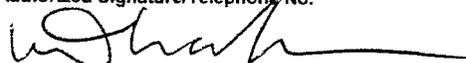
This rule will have no fiscal impact on local government.

**Long-Range Fiscal Implications**

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

Dept of Agriculture, Trade &amp; Consumer Protection

Authorized Signature/Telephone No.



Date

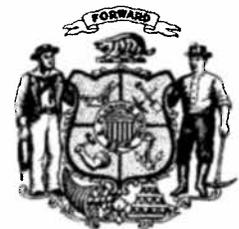
DATCP / Michelle Reinen (608) 2 224-5160

William D. Walker 608-224-4353

7/29/2009



# WISCONSIN STATE LEGISLATURE





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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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**Ronald Sklansky**  
*Clearinghouse Director*

**Richard Sweet**  
*Clearinghouse Assistant Director*

**Terry C. Anderson**  
*Legislative Council Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

### CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

#### CLEARINGHOUSE RULE **09-037**

AN ORDER to repeal ATCP 91.01 (2), (5), (6), (8) to (10), and (12m), 91.041, 91.042, and 91.08 to 91.11; to renumber ATCP 91.01 (3), (7), (11) (a) to (e), (12), (13), and (14); to renumber and amend 91.01 (11) (intro.); to amend 91.01 (1) and 91.02 (1); and to repeal and recreate 91.01 (4), 91.015, 91.03, 91.04, and 91.05 to 91.07, relating to method of sale of commodities, including method of sale by weight, measure or count.

Submitted by **DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION**

05-18-2009 RECEIVED BY LEGISLATIVE COUNCIL.

06-15-2009 REPORT SENT TO AGENCY.

RS:RW

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached            YES             NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached            YES             NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached            YES             NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached            YES             NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached            YES             NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached            YES             NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached            YES             NO



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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 09-037

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]**

#### **2. Form, Style and Placement in Administrative Code**

a. The agency should include a note following s. ATCP 91.01 (4) that describes the procedure for obtaining a copy of the NIST standards. [See s. 2.09, Manual.]

b. In s. ATCP 91.03, the agency may wish to list the affected commodities in alphabetical order for ease of finding, as the sequence is now based on the NIST Handbook order of items.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In the rule preface, a period should be inserted at the end of the second paragraph and, on page 4, at the end of the phrase “Railroad car tare weights.”

b. The rule is not clear as to how it will apply in areas where there is an applicable statute. The placement of a note following select sections stating “See s. \_\_\_\_, Stats.” is not self-explanatory. A clear statement indicating the intended application would be helpful.

c. In the “Rule Background” section of the analysis prepared by the agency, the following statement is made: “Within statutory limits, this rule modifies current DATCP rules (ATCP 91) to make them more consistent with NIST.” A more complete description of the reasons for not making the rule “consistent with” NIST rather than “more consistent with” NIST would be helpful to clarify the application of the rule.

d. As amended, s. ATCP 91.02 (1) is not clear. For example, what is the intended meaning of "common fractional unit" or "decimal fractional unit"? Could a sale under this section be for "one-half pound"? Or, are these phrases recognized terms of art?

e. Section ATCP 91.03 (1) (e) provides that certain frozen desserts must be sold by liquid measure unless they are packaged at the time of retail sale, in which case they shall be sold by weight. The note to the rule cites s. 98.12, Stats. This statute includes an additional exception to the general rule in the case of frozen desserts sold in quantities of less than one-half liquid pint. Why is the statutory exception not included in s. ATCP 91.03 (1) (e)?

f. Does reference in the rule to "sales" include only retail sales, or does it also include wholesale sales and sales at other levels?

g. Given the broad scope of the rule, the agency may wish to include an initial applicability section to allow for compliance with the rule requirements.