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Details: Public Hearing notices by Department of Agriculture, Trade, and Consumer Protection.
(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

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- Miscellaneous ... **Misc**

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

Senator Jim Holperin
JCRAR Co-Chair
409 South, State Capitol

State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

HEARING NOTICE

Rule Related to Consumer Product Safety

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold a public hearing on a proposed amendment to chapter ATCP 139, Wis. Adm. Code, relating to Consumer Product Safety.

DATCP will hold the public hearing at the time and location shown below. DATCP invites the public to attend the hearing and comment on the rule. Following the hearing, the hearing record will remain open until Friday, February 27, 2009 for additional written comments. Comments may be sent to the Division of Trade and Consumer Protection at the address below, by email to michelle.reinen@wi.gov or online at <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

You may obtain free copy of this proposed rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Trade and Consumer Protection, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You may also obtain copies by calling (608) 224-5160 or emailing michelle.reinen@wi.gov. Copies will also be available at the hearing. To view the proposed rule online, go to: <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

To provide comments or concerns relating to small business, you may also contact DATCP's small business regulatory coordinator Keeley Moll at the address above, or by emailing to Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by February 2, 2009, by writing to Michelle Reinen, Division of Trade and Consumer Protection, P.O. Box 8911, Madison, WI 53708-8911, michelle.reinen@wi.gov, telephone (608) 224-5160. Alternatively, you may contact the DATCP TDD at (608) 224-5058. Handicap access is available at the hearings.

Hearing Dates and Locations:

February 12, 2009
Commencing at 10:00 AM
WI Department of Agriculture, Trade & Consumer Protection
2811 Agriculture Drive – Board Room, 1st Floor
Madison, WI 53718

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

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers state laws to protect consumers from hazardous consumer products, including hazardous household substances and toys. DATCP has adopted consumer product safety rules under ch. ATCP 139, Wis. Adm. Code. This rule updates and reorganizes current rules, and bans the sale of certain products that pose an unreasonable hazard which cannot be adequately cured by product labeling.

Statutes Interpreted

Statutes Interpreted: ss. 100.37, 100.42 and 100.20, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 100.37(2), 100.42(2), and 100.20(2), Stats.

Explanation of Statutory Authority

DATCP has general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction. DATCP has authority, under s.100.37, Stats., to regulate hazardous substances including toys and other articles intended for use by children. DATCP has authority under s. 100.42, Stats., to regulate unsafe consumer products. DATCP also has broad authority, under s. 100.20, Stats., to regulate unfair methods of competition and unfair trade practices in business.

Related Statutes

DATCP administers several consumer product safety statutes including s. 100.37, Stats. (hazardous household substances), 100.42, Stats. (consumer product safety), 100.41, Stats. (flammable fabrics) and 100.43, Stats. (poison prevention packaging).

Background

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers state laws to protect consumers from hazardous consumer products, including hazardous household substances and toys. DATCP has adopted consumer product safety rules under ch. ATCP 139, Wis. Adm. Code. Current DATCP rules do all of the following:

- Require warning labels on certain products.
- Ban certain products that pose serious hazards which cannot be adequately cured by labeling. Most of these products are also banned by federal rules.
- Provide exemptions for certain small packages and minor hazards.

DATCP last updated its consumer product safety rules 8 years ago. Since then, the federal consumer product safety commission and DATCP have identified serious product safety hazards that are not addressed by current DATCP rules. This rule does all of the following:

- Reorganizes and clarifies current rules.
- Bans certain products, because they pose serious safety hazards that cannot be adequately cured by labeling (see below). Some of these products are also banned by federal rules.
- Provides that violations of consumer product safety rules also constitute unfair business practices under s. 100.20, Stats.

Rule Content

Current DATCP rules ban a number of dangerous consumer products, including dangerous children's products (most of the products are also banned by federal rules). This rule reorganizes and clarifies a number of the current product bans, without substantially altering those bans. This rule also adds new bans related to the following consumer products:

- *Lawn darts that can cause puncture wounds.*
 - Current DATCP rules ban "lawn darts" that are intended for use by children. The current DATCP rules are based on federal rules (16 CFR 1500.18(a)(4)). Recently, the federal Consumer Product Safety Commission adopted additional rules (16 CFR 1306) to ban "lawn darts" labeled for adult use, because those "lawn darts" are often used by children and pose a serious puncture wound hazard to children *and* adults.
 - Consistent with current federal rules, this rule bans all "lawn darts," regardless of whether they are intended for use by children or adults.
- *Infant walkers that may propel infants down stairways.*
 - Current DATCP rules and federal rules (16 CFR 1500.18(a)(6)) ban hazardous infant walkers, but do not address stair-fall hazards. There is a voluntary industry standard (ASTM standard) for stair-fall protection, but some manufacturers and importers are not complying. The federal consumer product safety commission has documented that most "baby walker" incidents now involve children falling down stairs.
 - This rule bans infant walkers that are banned by 16 CFR 1500.18(a)(6) and that fail to meet the stair-fall protection standard in ASTM standard F 977-07 ("Standard Consumer Safety Specification for Infant Walkers"). This rule applies to infant walkers, also known as "baby walkers," "baby bouncers," and "walker jumpers," that are propelled by infants. It does *not* apply to baby strollers that are propelled by attending adults.
- *Toys with magnets that can be swallowed and can cause serious intestinal injury or death.*
 - Small and powerful rare-earth magnets are now widely used in toys, building sets and jewelry. As the number of products with magnets has increased, so has the number of

serious injuries to children. In several reported incidents, magnets have fallen out of toys and been swallowed by children. Swallowed magnets can attract separately-swallowed metal objects through intestinal walls, and get trapped in place. The trapped magnets can twist or pinch the intestines, and can cause holes, blockages, infection and death if not treated properly and promptly. These injuries are difficult to diagnose. In the United States over the past 3 years, there have been 86 reported injuries, one reported death, and about 8 million magnetic toys recalled.

- This rule bans products which contain magnets that may be swallowed by a child. The ban does *not* apply to toys that comply with 15 USC 2056b which adopts ASTM standard 963-07 (“standard consumer safety specification for toy safety”). Nor does it apply to toys in which the magnets are used only as internal parts of motors, relays, speakers or other electrical components, provided that the magnetic action is not part of the play pattern of the toy.
- *Cribs that can strangle or suffocate infants.*
 - Over the past 20 years, more than 1,100 children have died from crib-related injuries in the United States, and more than 11,600 children are hospitalized with crib-related injuries each year. Current federal rules (16 CFR 1500.18(13) and (14)) ban cribs and related enclosures that fail to comply with applicable federal standards under 16 CFR 1508 and 1509 (the federal rules apply to cribs manufactured after 1974 and 1983, respectively).
 - This rule bans baby cribs and related enclosures that are currently banned by federal law under 16 CFR 1500.18(13) or (14).
- *Yo-yo elastic tether toys that can strangle children.*
 - Yo-yo elastic tether toys, often called “yo-yo waterballs,” have a weighted object attached to a stretchable elastic cord that can extend to over 2 feet. (These “yo-yo waterballs” are different from traditional yo-yos, which do not have stretchable elastic cords). Instructions tell children to “throw the ball into the air and try and catch it,” encouraging a lasso-like movement. But the weighted object is heavy enough to generate significant momentum when swung like a lasso, which makes the toy difficult to control. In Wisconsin, there have been 7 reported incidents in which children became unconscious after the cord wrapped tightly around the child’s neck and cut off circulation. In other cases, children have suffered broken blood vessels affecting eyes, face and head areas. Illinois, New Jersey, the United Kingdom and Australia have already banned this toy from sale.
 - This rule bans yo-yo elastic tether toys that do not comply with the standards for yo-yo elastic tether toys established by 15 USC 2056b which adopts ASTM standard 963-07 (“standard consumer safety specification for toy safety”).

- *Toys containing excessive concentrations of lead, which can cause serious long-term health effects.*
 - Recently enacted federal law (15 USC 1278a) treats as a hazardous substance any children's products that contain more lead than 600 parts per million beginning 180 days after August 14, 2008, 300 parts per million beginning on the date that is one year after August 14, 2008, and 100 parts per million beginning on the date that is 3 years after August 14, 2008.
 - This rule bans children's products, containing lead, which are treated as banned hazardous substances under 15 USC 1278a. This ban does not apply to any of the following:
 - * Electronic devices, including batteries, which meet alternative federal standards related to lead exposure.
 - * A product component that is fully covered or encased (by something more than paint or electroplating), so that the component is inaccessible to a child despite normal and reasonably foreseeable use and abuse of the product.

Fiscal Impact

This rule will not have significant fiscal impact on DATCP or local units of government. A complete fiscal estimate is attached.

Business Impact

This rule may have an adverse impact on some businesses that manufacture, sell or distribute articles banned by this rule. Some of those businesses may be "small businesses." A complete business impact is attached.

Federal and Surrounding State Regulations

Federal Regulations

The following federal regulations apply to consumer products that are newly banned under this rule (federal regulations also apply to some products banned by current DATCP rules):

- *Lawn darts.* Lawn darts intended for use by children are currently banned under 16 CFR 1500.18(a)(4). Lawn darts intended for use by adults are currently banned under 16 CFR 1306. This rule bans lawn darts, consistent with the federal bans.
- *Infant walkers.* 16 CFR 1500.18(a)(6) bans infant walkers which have exposed parts capable of amputating, crushing, lacerating, fracturing, bruising, or causing hematomas or other injuries to fingers, toes, or other parts of a young child's anatomy. This rule bans infant walkers that are banned by the federal rules. The current federal ban does not address "stair-

fall” hazards. This rule bans infant walkers that fail to comply with recognized industry standards related to “stair-fall” protection (ASTM standard F 977-07).

- *Toys with magnets.* Newly-enacted 15 USC 2056b adopts ASTM standard 963-07 (“standard consumer safety specification for toy safety”) which establishes standards for, among other things, toys with magnets that may be swallowed by a child. This rule bans toys with magnets that do not comply with the standards established by 15 USC 2056b.
- *Baby cribs.* 16 CFR 1508 and 16 CFR 1509 bans baby cribs that do not meet federal standards intended to reduce the risk of injury. This rule bans cribs that are banned by federal rules
- *Yo-yo elastic tether toys.* Newly-enacted 15 USC 2056b adopts ASTM standard 963-07 (“standard consumer safety specification for toy safety”) which establishes standards for, among other things, yo-yo elastic tether toys. This rule bans yo-yo elastic tether toys that do not comply with the standards established by 15 USC 2056b.
- *Lead in children’s products.* 15 USC 1278a treats as a hazardous substance any children’s products that contain more lead than 600 parts per million beginning 180 days after August 14, 2008, 300 parts per million beginning on the date that is one year after August 14, 2008, and 100 parts per million beginning on the date that is 3 years after August 14, 2008. This rule bans children’s products containing excessive lead, consistent with the federal law.

Surrounding State Regulations

Wisconsin has a fairly well-developed consumer product safety program, with broad authorizing legislation modeled after federal law. Wisconsin statutes authorize DATCP, as Wisconsin’s equivalent of the federal consumer product safety commission, to issue orders and adopt rules regulating dangerous consumer products.

Surrounding states have less comprehensive consumer product safety programs, and fewer administrative options for regulating dangerous consumer products. Surrounding states tend to regulate consumer product safety on a more *ad hoc* basis, with special legislation aimed at specific products. However, several surrounding states have banned many of the same products that are newly banned under this rule.

Lawn darts

None of the surrounding states has banned lawn darts under state law.

Infant walkers

Illinois and Michigan ban infant walkers that are the subject of federal product recalls. The federal consumer protection safety commission has published an industry guidance stating that it will seek to recall infant walkers that fail to comply with relevant federal standards or ASTM standards.

Magnets in toys

Illinois and Michigan ban toys with magnets if the toys are the subject of a federal recall. The federal consumer protection safety commission has recalled 17 toys since 2007 because the toys contained magnets that could detach and be swallowed or aspirated. Those toys are accordingly banned in Illinois and Michigan.

Cribs

Illinois, Minnesota and Michigan have adopted "safe crib" laws that ban unsafe cribs, including cribs banned by this rule.

Elastic tether toys

Illinois bans elastic tether toys, also known as "yo-yo waterballs" (New Jersey has a similar ban).

Lead in children's products

Illinois and Michigan ban children's products containing more than 600 ppm lead by weight. None of the other surrounding states regulates the lead content of children's products. However, some other states have enacted more stringent bans:

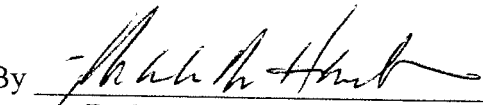
- Washington bans children's products containing more than 90 ppm lead by weight.
- Connecticut bans children's products containing more than 300 ppm lead by weight (or 100 ppm after 2 years). The Connecticut law is consistent with federal legislation and this rule.

Data and Analytical Methodologies

DATCP relies on incident data from consumer complaints and from the federal consumer product safety commission. DATCP uses test methods prescribed by federal rules, or by relevant industry standards (ASTM standards, published by ASTM International).

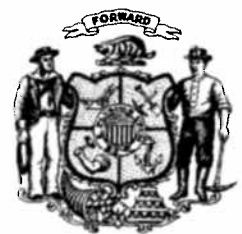
Dated this 7th day of January, 2009

STATE OF WISCONSIN,
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 
Rodney J. Nilsestuen, Secretary



WISCONSIN STATE LEGISLATURE



Senator Jim Holperin
JCRAR Co-Chair
409 South, State Capitol

State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

HEARING NOTICE

Food Processing Plant Rules – ATCP 70

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold public hearings on proposed changes to the rules relating to Food Processing Plants in ch. ATCP 70, Wis. Adm. Code.

DATCP will hold the public hearings at the times and locations shown below. DATCP invites the public to attend the hearings and comment on the rules. Following the hearings, the hearing record will remain open through Monday, March 30, 2009 for additional written comments. Comments may be sent to the Division of Food Safety at the address below, by email to arthur.ness@wisconsin.gov, or online at <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

You may obtain a free copy of the proposed rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Food Safety, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You may also obtain copies by calling (608) 224-4700 or emailing Arthur.ness@wi.gov. Copies will also be available at the hearing. To view the proposed rule online, go to: <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

To provide comments or concerns relating to small business, you may also contact DATCP's small business regulatory coordinator Keeley Moll at the address above, or by emailing to Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by February 20, 2009, by writing to Arthur Ness, DATCP Division of Food Safety, P.O. Box 8911, Madison, WI 53708-8911, or e-mailing to Arthur.Ness@wi.gov. Alternatively, you may contact the DATCP TDD at (608) 224-5058. Handicap access is available at the hearings.

For more information: You may contact Arthur Ness at (608) 224-4715.

Hearing Dates and Locations:

March 3, 2009
1:00 PM to 4:00 PM
Meeting Room
Eau Claire Office, Division of Food Safety
3610 Oakwood Hills Parkway Eau Claire, WI

March 12, 2009
9:30 AM to 12:00 PM

Room C (Downstairs)
Appleton Public Library
225 N. Oneida St. Appleton, WI

March 13, 2009
9:00 AM to 12:00 PM
Board Room, 1st Floor
WI Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI

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

The department of agriculture, trade and consumer protection (DATCP) currently licenses and regulates food processing plants to protect public health and safety. This rule updates current DATCP rules and harmonizes them with current federal rules.

Statutes Interpreted

Statutes interpreted: ss. 97.02, 97.03, 97.09, 97.10, 97.29 and 97.34, Stats.

Statutory Authority

Statutory authority: ss. 93.07(1), 97.09, 97.29(5) and 97.34(2)(a) and Stats.

Explanation of Statutory Authority

DATCP has general authority under 93.07(1) to adopt rules interpreting statutes under its jurisdiction. DATCP is specifically authorized under ss. 97.09, 97.29(5) and 97.34(2)(a) and (c), Stats., to adopt rules to regulate food processing, labeling and distribution.

Related Rules or Statutes

This rule incorporates, by reference, parts or all of the following rules:

- DATCP rules related to retail food establishments (ATCP 75) and fair packaging and labeling (ATCP 90).
- Department of natural resources (DNR) rules related to safe drinking water (NR 809), community water systems (NR 811) and well construction (NR 812).
- Federal rules adopted by the United States food and drug administration (FDA). These include 21 CFR 101 (food labeling), 21 CFR 113 (low-acid food packaged in hermetically sealed containers), 21 CFR 120 (juice processing), 21 CFR 123 (fish processing), 21 CFR 129 (bottled water), and 21 CFR 165.110 (bottled water labeling).

Rule Contents

This rule does all of the following:

- **Definitions.** This rule harmonizes current definitions with federal rules, as well as with Wisconsin retail food rules under ch. ATCP 75. For example, this rule creates or modifies definitions of “juice,” “major food allergen,” “potentially hazardous food,” “ready-to-eat food,” “reduced oxygen packaging” and “safe temperatures” to be consistent with other state and federal rules.
- **Handwashing facilities.** This rule updates current standards related to handwashing facilities serving toilet rooms and food processing areas. New requirements apply only to facilities installed after the effective date of this rule, to food processing plants initially licensed after the effective date of this rule, or to food processing plants licensed to a new operator after the effective date of this rule.
- **Hand contact with ready-to-eat food.** This rule prohibits bare hand contact with ready-to-eat food, unless bare hand contact is reasonably necessary and does not contaminate food. If a food processing plant operator allows bare-hand contact with ready-to-eat food, the operator must do all of the following (requirements are consistent with current rules for retail food establishments):
 - Establish written policies and procedures related to bare-hand contact. These must identify authorized employees and tasks, affected foods, and the procedures that employees must follow to prevent food contamination from bare-hand contact.
 - Provide advance training to employees who may have bare hand contact with ready-to-eat food. A written training plan must identify responsible training providers, training contents (including operator policies and procedures related to bare-hand contact), the form of initial training, the form and frequency of follow-up training, and measures to ensure that effective training is provided as planned.
 - Keep records to document compliance with bare-hand food handling policies, procedures and training requirements.
- **Cleaning and sanitizing procedures.** This rule updates and clarifies current requirements for cleaning and sanitizing food processing equipment and utensils, and creates procedures by which DATCP may authorize alternative procedures and sanitizing materials.
- **Reclaimed water.** This rule updates and clarifies current standards related to use of reclaimed water in food processing plants.
- **Re-circulated water systems.** This rule regulates the use of re-circulated water in coolers and heat exchangers (if there is any possibility that the re-circulated water may come in contact with any food product or food contact surface).

- **Water and potable liquids transported in bulk.** This rule regulates the transportation and handling of water and other potable liquids transported to or from a food processing plant. Transported water must be obtained from a potable source that complies with DNR rules. Bulk tankers must be constructed, maintained, cleaned and sanitized for sanitary operation, and bulk liquids must be loaded and unloaded in a sanitary manner.
- **Labeling packaged food.** This rule incorporates, by reference, current federal and state food packaging and labeling requirements. Among other things, this rule incorporates current federal rules related to disclosure of major food allergens.
- **Recall plan.** Consistent with current federal rules, this rule requires a food processing plant operator to have a written plan for identifying and recalling food produced at the plant, should a food recall become necessary. This rule does not dictate the contents of the plan, but it does provide content suggestions in an accompanying note.
- **Low-acid food packaged in hermetically sealed containers.** This rule clarifies that low-acid food packaged in hermetically sealed containers (including aseptically processed food as well as thermally processed food) must be processed according to federal rules under 21 CFR 113.
- **Fish processing; general.** This rule repeals and recreates current rules related to fish processing, in order to make the rules consistent with federal rules under 21 CFR 123.
 - Under federal rules and this rule, fish processors must have a HACCP plan to identify and control food safety hazards associated with fish processing. Plans must meet federal standards.
 - This rule repeals current required procedures related to smoked-fish processing, in favor of the more flexible HACCP plan approach. However, this rule encourages smoked fish processors to incorporate and adapt the repealed procedures, as appropriate, in their HACCP plans (this rule includes the repealed procedures in an appendix, which processors may consult for guidance).
 - This rule updates and clarifies current rules related to the labeling and sale of smoked fish. Among other things, this rule repeals the current 21-day shelf-life limit on sales of smoked fish (this rule requires a stated shelf-life expiration date for smoke fish, but the shelf-life will be based on the HACCP plan per federal rules).
 - This rule updates and clarifies current rules related to processing, labeling and sale of fish eggs (roe). This rule applies to all fish roe, not just "caviar." This rule clarifies current labeling requirements related to processed fish roe. A fish roe product, other than a sturgeon roe product, may not be labeled as "caviar" unless the name of the fish species is also disclosed (e.g., "whitefish caviar").
- **Bottling establishments.** This rule updates and clarifies current rules related to bottling establishments.

- Bottling establishments producing bottled water must comply with federal rules under 21 CFR 129.
- Bottling establishments engaged in juice processing must comply with federal rules under 21 CFR 120.
- This rule updates and clarifies current product testing requirements, including test frequencies, and harmonizes current requirements with applicable federal rules. Operators who obtain ingredient water from municipal sources are exempt from some, but not all, testing requirements.
- This rule regulates the transportation and handling of water and other potable liquids transported to or from a bottling establishment (see above). If ingredient water is transported to a bottling establishment in bulk, the operator must test the ingredient water at least weekly for coliform bacteria and heterotrophic plate count. An operator must keep records of bulk shipments.
- Labeling of bottled products must comply with general food labeling standards (see above). Bottled water labeling must also comply with specific federal requirements under 21 CFR 165.110. A juice label may not misrepresent that juice has been pasteurized. A juice label may not represent as “fresh” any juice that has been treated with ultra-violet light.
- **Lab test methods.** This rule updates required laboratory methods for food safety tests, based on updated official methods published by the association of official analytical chemists.
- **Organizational and technical drafting changes.** This rule makes other organizational, technical and drafting changes to update and clarify current rules.

Fiscal Impact

This rule will have no significant fiscal impact on Wisconsin state government and no fiscal impact on local units of government. DATCP will incur some costs to provide information and education to affected businesses. However, DATCP expects to absorb those costs. A complete *fiscal estimate* is attached.

Business Impact

This rule will help Wisconsin food processors to produce safe food products. Food safety regulation is important not only for consumers, but also for the food processors themselves. Food safety problems can harm individual businesses and the overall food industry.

For the most part, this rule merely updates and clarifies current rules and makes the rules consistent with other federal and state rules. These modifications will eliminate inconsistent and duplicative regulation, which will make it easier for food processors to comply. Generally, this rule gives affected food processors more flexibility to design effective food safety systems

tailored to their operations. But in some instances, this rule provides definite compliance standards that are not provided by federal rules.

This rule requires fish processors and juice processors to implement hazard analysis and critical control point (HACCP) plans. But there will be no added costs to affected businesses because those plans are already required by federal rules. DATCP will help train affected businesses on the implementation of HACCP plans and other food safety measures. The University of Wisconsin-Extension may offer seminars and training sessions at modest cost.

Consistent with current federal rules, this rule requires food processors to have written recall plans. However, this rule gives processors considerable flexibility to design recall plans that are tailored to their operations. This rule provides guidance on plan contents, but it does not impose specific content requirements.

This rule incorporates current state and federal labeling requirements for processed food, including current federal requirements related to disclosure of major allergens. This rule may prompt food processors to review their labels for compliance with current law, but it does not add any major new labeling requirements.

This rule requires food processors to keep certain records related to food processing operations to help ensure food safety. Since the recordkeeping requirements are consistent with normal business practice, they will not impose significant new burdens or costs. There are no new professional skills required.

This rule may require some changes in some food processing facilities and operations. But for most food processors, the changes (if any) will not be large or costly. Most food processors are already complying with most of the requirements. New requirements related to hand-washing facilities will apply prospectively to newly installed facilities or newly licensed operations.

Many of the food processing plants affected by this rule are "small businesses." This rule will not have a significant adverse effect on small businesses, and it will help many small businesses by making food safety regulations clearer and more consistent. This rule does not exempt small businesses, because food safety risks affect small as well as large businesses. DATCP will help train affected businesses on the implementation of HACCP plans and other food safety measures. The University of Wisconsin-Extension may offer seminars and training sessions at modest cost.

This rule will promote food safety for the benefit of consumers *and* food processors. This rule will clarify current regulations, and make them more consistent. That will facilitate compliance by food processors. This rule will not have a significant adverse impact on small businesses (or other businesses), and it is not subject to the delayed small business effective date under s. 227.22(2)(e), Stats.

Federal and Surrounding State Regulation

Federal Regulation

At the federal level, the United States food and drug administration (FDA) is primarily responsible for regulating food processing plants. FDA has established basic food safety standards and requirements for food processing plants, but those standards do not preempt consistent or more rigorous state standards. Most food processing plant inspections are conducted by the states (FDA does few inspections). States generally coordinate their regulatory programs with FDA, and state regulations are based to a considerable degree of federal regulations.

This rule incorporates by reference parts or all of the following FDA regulations: 21 CFR 101 (food labeling), 21 CFR 113 (low-acid food packaged in hermetically sealed containers), 21 CFR 120 (juice processing), 21 CFR 123 (fish processing), 21 CFR 129 (bottled water), and 21 CFR 165.110 (bottled water labeling).

Surrounding State Regulation

Michigan, Minnesota, Illinois and Iowa all regulate and inspect food processing plants. Rules in those states are broadly consistent with this rule and federal rules, although there are a number of specific variations between the states.

Data and Analytical Methodologies

This rule relies, generally, on a large body of generally-accepted scientific information related to food safety hazards (and effective means for preventing or controlling those hazards). That information also provides the basis for federal and state rules that DATCP has incorporated by reference in this rule.

This rule incorporates, by reference, laboratory test methods published in the official methods of analysis of the association of official analytical chemists, 18th edition revision 2 (2007).

Technical Standards Incorporated by Reference

This rule incorporates, by reference, laboratory test methods published in the official methods of analysis of the association of official analytical chemists (AOAC), 18th edition revision 2 (2007). Pursuant to s. 227.21, Stats., DATCP will request permission from the attorney general to incorporate the AOAC methods by reference in this rule. Copies will be kept on file with DATCP and the legislative reference bureau.

DATCP Contact

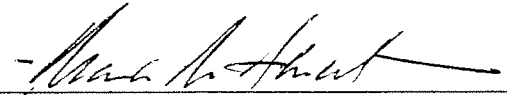
Questions and comments related to this rule may be directed to:

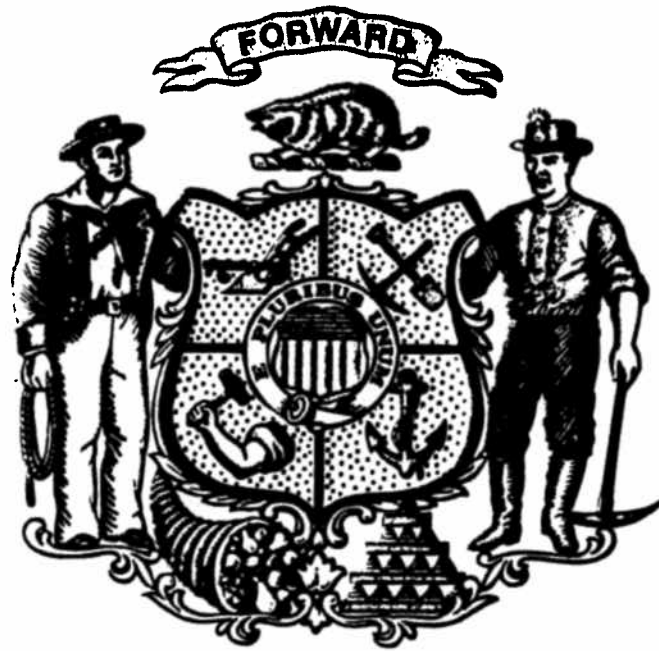
Arthur Ness

Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911
Telephone (608) 224-4715
E-Mail: arthur.ness@wi.gov

Dated this 29th day of January, 2009

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 
Rodney J. Nilsestuen, Secretary



Senator Jim Holperin
JCRAR Co-Chair
409 South, State Capitol

State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

NOTICE OF HEARING

Rule Related to ATCP 149, Potato Marketing Order

The state of Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold public hearings on proposed amendments to chapter ATCP 149, Wis. Adm. Code, relating to the Potato Marketing Order.

DATCP will hold two public hearings at the times and places shown below. DATCP invites the public to attend the hearings and comment on the proposed rule. Following the public hearings, the hearing record will remain open until Thursday, April 30, 2009, for additional written comments. Comments may be sent to the Division of Agricultural Development at the address below or by e-mail to noel.favia@wi.gov.

You may obtain a free copy of this rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Agricultural Development, Marketing Order Program, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You can also obtain a copy by calling (608) 224-5140 or emailing noel.favia@wi.gov.

Copies will also be available at the hearings. To view the proposed rule online, go to:

<http://adminrules.wisconsin.gov>

To provide comments or concerns relating to small business, please contact DATCP's small business regulatory coordinator Keeley Moll at the address above, by emailing to Keeley.Moll@wi.gov or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by April 8, 2009, by writing to Noel Favia, Division of Agricultural Development, P.O. Box 8911, Madison, WI 53708-8911, telephone (608) 224-5140. Alternatively, you may contact the DATCP TDD at (608) 224-5058. Handicap access is available at the hearings.

Hearing Dates and Locations:

Antigo

Tuesday, April 14, 2009
1:00 p.m. to 2:30 p.m.
Langlade County, UW Extension Office
837 Clermont Street
Antigo, WI 54409

Stevens Point

Wednesday, April 15, 2009
1:00 p.m. – 2:30 p.m.
Portage County, UW Extension
County Annex Building, Rm 2
1462 Strongs Ave.
Stevens Point, WI 54481

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

The department of agriculture, trade and consumer protection (DATCP) has adopted a potato marketing order (ch. 149, Wis. Adm Code), pursuant to ch. 96, Stats. (Wisconsin agricultural marketing act). A potato industry board, elected by potato producers, administers the marketing order. The potato industry board collects assessments from potato producers, and spends assessment revenues for potato market development, research and education.

This rule changes the election and membership of the potato industry board, and authorizes the board to charge higher assessments to potato producers. This rule must be approved in a referendum of affected producers, as provided in s. 96.08 (1) (b) 3., Stats., before it can take effect.

Statutes Interpreted

Statutes interpreted: Chapter 96, Stats.

Statutory Authority

Statutory authority: ss. 93.07(1) and 96.15, Stats.

DATCP has general authority, under s. 93.07(1), Stats., to adopt rules interpreting statutes under its jurisdiction. DATCP is specifically authorized, under s. 96.15, Stats., to adopt rules to administer the marketing order program under ch. 96, Stats.

Related Statutes and Rules

DATCP has adopted general rules under ch. ATCP 140, Wis. Adm. Code, to govern the creation and operation of marketing orders, including the operation of marketing boards.

Background

DATCP administers Wisconsin's agricultural marketing order program under ch. 96, Stats. DATCP may adopt marketing orders for Wisconsin agricultural commodities, with the approval of affected commodity producers. DATCP has adopted marketing orders for cherries, cranberries, corn, milk, mint, soybeans, ginseng and potatoes.

Each marketing order, including the potato marketing order, provides for assessments on commodity producers. Affected producers elect a marketing board that establishes assessment levels within limits specified by the marketing order, and spends assessment revenues for purposes identified in the marketing order. The current potato industry board (potato marketing board) includes 10 members elected from 5 geographic districts for staggered 3-year terms. DATCP monitors marketing board activities for compliance with applicable law, including the marketing order.

Under the current potato marketing order, the potato industry board is authorized to collect potato marketing assessments of up to 6 cents per hundredweight. The board has implemented an actual assessment rate of 5 cents per hundredweight – one cent per hundredweight below the maximum assessment currently allowed. Assessments may be used to finance market development, research and education, subject to the terms of the marketing order.

DATCP has adopted general rules under ch. ATCP 140, Wis. Adm. Code, to govern the operation of marketing orders and marketing boards. DATCP must adopt marketing orders as rules. Affected producers must approve (by referendum) the adoption, amendment or repeal of a marketing order.

Rule Contents

This rule modifies the current potato marketing order (ATCP 149) to do all of the following:

- Increase the maximum assessment that the potato industry board is authorized to charge to producers. This rule changes the maximum assessment rate from 6 cents to 10 cents per hundredweight on potatoes sold into commercial channels.
- Change the election and membership of the potato industry board. This rule reduces the number of election districts from 5 to 3, and reduces the number of board members from 10 to 9. Eight of the 9 members of the modified board will be elected by producers from districts identified in this rule, and one board member will be chosen by all potato producers in a statewide “at large” election. Under this rule, all board members will be elected for 3-year terms.
- Provide for a gradual changeover to the new board membership. Current board members will continue to hold office until their current terms expire.

Under this rule, potato industry board election districts will be as follows:

- ***District 1*** will be represented by 3 board members and will include Ashland, Barron, Bayfield, Brown, Burnett, Chippewa, Clark, Door, Douglas, Dunn, Eau Claire, Florence, Forest, Iron, Kewaunee, Langlade, Lincoln, Marinette, Menominee, Oconto, Oneida, Pepin, Pierce, Polk, Price, Rusk, Sawyer, St. Croix, Taylor, Vilas, and Washburn counties.
- ***District 2*** will be represented by 3 board members and will include Marathon, Outagamie, Portage, Shawano, Waupaca and Waushara counties.

- **District 3** will be represented by 2 board members and will include Adams, Buffalo, Calumet, Columbia, Crawford, Dane, Dodge, Fond du Lac, Grant, Green, Green Lake, Iowa, Jackson, Jefferson, Juneau, Kenosha, LaCrosse, Lafayette, Manitowoc, Marquette, Milwaukee, Monroe, Ozaukee, Racine, Richland, Rock, Sauk, Sheboygan, Trempealeau, Vernon, Walworth, Washington, Waukesha, Winnebago and Wood counties.

The changes to the current election districts, and the election of one "at large" representative, will address changes in the geographic distribution of potato production in the state. The increase in the maximum authorized marketing order assessment will facilitate additional funding for market development and research, including University of Wisconsin research related to new potato varieties and pesticide and chemical management.

Fiscal Impact

This rule will not have no significant fiscal impact on DATCP or local government.

Business Impact

The current potato marketing order is designed to improve the production and marketing of potatoes in this state, for the benefit of potato producers. This rule, initiated at the request of potato producers, is intended to improve the current potato marketing order. This rule must be approved in a referendum of affected producers before it can take effect. Many of the affected producers are "small businesses."

This rule will change the composition and election of the current potato industry board. The changes reflect changes in the geographic distribution of the Wisconsin potato industry. The changes will have little, if any, impact on affected producers.

This rule also authorizes the potato industry board to increase the current potato marketing assessment from a maximum of 6 cents per hundredweight to a maximum of 10 cents per hundredweight of potatoes sold in commercial channels. The board may not increase the actual assessment rate by more than one cent per year.

While the authorized increase may eventually add expense for producers, the added expense will be small. Wisconsin has over 150 farms that produce nearly 23 million hundredweight of potatoes annually. The current marketing assessment is 5 cents per hundredweight. With potatoes currently selling at nearly \$25 per hundredweight, the current assessment represents only 2/10ths of 1% of the current market value of potatoes. Even if the potato industry board were to increase the assessment (over a period of at least 5 years) to the maximum 10 cents per hundredweight allowed by this rule, the assessment would still amount to only 4/10 of 1% of potato market value.

Federal Regulations

The United States department of agriculture (USDA) administers an agricultural marketing order program, under which USDA has broad authority to regulate prices and production, as well as to charge assessments for market development, promotion, research and education. USDA has

adopted marketing orders for some of the same commodities covered by Wisconsin marketing orders (including potatoes). However, the state marketing orders do not directly duplicate or conflict with the federal marketing orders.

Surrounding State Regulation

Michigan and Minnesota have marketing assessments for potatoes produced within those states. Minnesota's current assessment is 3 cents per hundredweight and Michigan's assessment is 5 cents per hundredweight (the same as Wisconsin's current assessment).

Factual Data and Analytical Methods

DATCP keeps an updated list of potato producers for the purpose of determining eligible voters in marketing order referenda and marketing board elections. Changes in that list reflect significant changes in the geographic distribution of potato producers in the state. DATCP has worked with affected producers and the potato marketing board to obtain information related to assessment revenues and revenue needs.

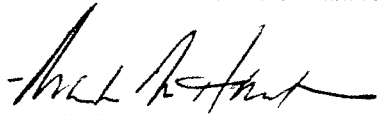
Agency Contact Person

Questions and comments on this rule may be directed to Noel Favia, Wisconsin department of agriculture, trade and consumer protection, PO Box 8911, Madison, WI 53708-8911, Tel: 608-224-5140, e-mail noel.favia@datcp.state.wi.us.

Written hearing comments may be sent by mail or e-mail to the above address. Written comments will be included in the formal hearing record if received within 14 days after the last public hearing on this rule.

Dated this 13th day of March, 2009.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 

Rodney J. Nilsestuen,
Secretary



Senator Jim Holperin
JCRAR Co-Chair
409 South, State Capitol

State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

HEARING NOTICE

Rule Related to Selling Commodities by Weight, Measure or Count

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold a public hearing on a proposed amendment to chapter ATCP 91, Wis. Adm. Code, relating to Selling Commodities by Weight, Measure or Count.

DATCP will hold the public hearing at the time and location shown below. DATCP invites the public to attend the hearing and comment on the rule. Following the hearing, the hearing record will remain open until Friday, July 3, 2009 for additional written comments. Comments may be sent to the Division of Trade and Consumer Protection at the address below, by email to michelle.reinen@wi.gov or online at <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

You may obtain free copy of this proposed rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Trade and Consumer Protection, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You may also obtain copies by calling (608) 224-5160 or emailing michelle.reinen@wi.gov. Copies will also be available at the hearing. To view the proposed rule online, go to:

<http://adminrules.wisconsin.gov>

To provide comments or concerns relating to small business, you may also contact DATCP's small business regulatory coordinator Keeley Moll at the address above, or by emailing to Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by Monday, June 15, 2009, by writing to Michelle Reinen, Division of Trade and Consumer Protection, P.O. Box 8911, Madison, WI 53708-8911, michelle.reinen@wi.gov, telephone (608) 224-5160. Alternatively, you may contact the DATCP TDD at (608) 224-5058. Handicap access is available at the hearings.

Hearing Dates and Locations:

June 23, 2009
Commencing at 9:30 AM
WI Department of Agriculture, Trade & Consumer Protection
2811 Agriculture Drive – Board Room, 1st Floor
Madison, WI 53718

**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 are, in some respects, inconsistent with NIST. The Wisconsin statutes also include some requirements that differ from NIST. Within statutory limits, this rule modifies current DATCP rules (ATCP 91) to make them more consistent with NIST. This rule also makes non-substantive changes to reorganize and clarify current rules.

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

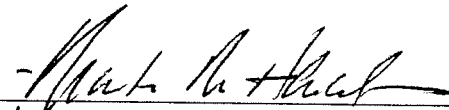

This rule incorporates, by reference, standards contained in *NIST Handbook 130 (2009 edition)*, published by the national institute of standards and technology, United States department of commerce. Pursuant to s. 227.21, Stats., DATCP has requested permission from the Wisconsin Department of Justice 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.

Dated this 15th day of May, 2009

STATE OF WISCONSIN,
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 
 Rodney J. Nilsestuen, Secretary