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Clearinghouse Rule 09-002

DATCP Docket No. 08-R-05
Rules Clearinghouse No. _____

Revised Hearing Draft
November 26, 2008

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

3 The Wisconsin department of agriculture, trade and consumer protection proposes the
4 following rule *to renumber and amend* ATCP 139.01; *to amend* ATCP 139.04; and *to*
5 *repeal and recreate* ATCP 139.055; and *to create* ATCP 139.12; *relating to* consumer
6 product safety.

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).

DATCP Contact

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

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SECTION 1. ATCP 139.01(1) is renumbered (1m).

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SECTION 2. ATCP 139.01(1) is created to read:

1 (1) "Children's product" means a consumer product, toy or other article designed
2 or intended primarily for children 12 years of age or under.

3 **SECTION 3.** ATCP 139.01(2m) is created to read:

4 ATCP 139.01(2m) "Infant walker" means a mobile unit that enables a child to
5 move on a horizontal surface when propelled by the child sitting or standing within that
6 mobile unit. "Infant walker" includes products commonly known as "baby walkers,"
7 "baby-bouncers" or "walker-jumpers."

8 **SECTION 4.** ATCP 139.04(title) and (intro.) are repealed and recreated to read:

9 **ATCP 139.04 Banned products; general.** The following consumer products or
10 hazardous substances present an unreasonable hazard to public health and safety that
11 cannot be adequately cured by product labeling, and are banned from sale or distribution
12 in this state pursuant to s. 100.37(2) or 100.42(2), Stats., or both ss. 100.37(2) and
13 100.42(2), Stats.:

14 **SECTION 5.** ATCP 139.04(6) is amended to read:

15 ATCP 139.04(6) Paint or other similar surface-coating materials, intended for
16 household use or packaged in a form suitable for household use ~~in and around the~~
17 ~~household, including use on toys or articles intended for use by children, containing lead~~
18 ~~compounds of which the lead content, calculated as the metal, is in excess of , which~~
19 contain lead or lead compounds in which the weight of lead metal (Pb) exceeds 0.06% of
20 the total weight of the contained solids or of the total nonvolatile content of the paint or
21 the weight of the dried paint film. This subsection does not apply to artists' paints and
22 related materials.

23 **SECTION 6.** ATCP 139.04(12) is created to read:

1 ATCP 139.04(12) All lawn darts banned under 16 CFR 1306.

2 **SECTION 7.** Section ATCP 139.05(title) is repealed and recreated to read:

3 **ATCP 139.05(title) Children’s products; general.**

4 **SECTION 8.** Section ATCP 139.05(4) is repealed.

5 **SECTION 9.** ATCP 139.055 is repealed and recreated to read:

6 **ATCP 139.055 Banned children’s products.** The following children’s
7 products, which present a serious and unreasonable hazard to child health and safety that
8 cannot be adequately cured by product labeling, are banned from sale or distribution in
9 this state pursuant to s. 100.37(2) or 100.42(2), Stats., or both ss. 100.37(2) and
10 100.42(2), Stats.:

11 (1) Toy rattles that are banned under 16 CFR 1500.18(a)(1).

12 **NOTE:** 16 CFR 1500.18(a)(1) bans toy rattles that contain internal or external
13 rigid wires, sharp protrusions, or loose small objects that may cause
14 laceration, puncture wound, aspiration, ingestion or other injury.

15 (2) Toys that are banned under 16 CFR 1500.18(a)(2).

16 **NOTE:** 16 CFR 1500.18(a)(2) bans toys that have noise-making components
17 which may be dislodged by the operation of the toy or deliberately
18 removed by a child, and which may cause laceration, puncture wound,
19 aspiration, ingestion or other injury.

20 (3) Dolls, stuffed animals or similar toys that are banned under 16 CFR
21 1500.18(a)(3).

22 **NOTE:** 16 CFR 1500.18(a)(3) bans dolls, stuffed animals or similar toys that
23 have internal or external components which may cause laceration,
24 puncture wound injury, or other injury.

25 (4) Lawn darts and similar sharp-pointed toys that are banned under 16 CFR
26 1500.18(a)(4).

27 **NOTE:** 16 CFR 1500.18(a)(4) bans lawn darts and similar sharp-pointed toys

1 that are usually intended for outdoor use, and which may cause puncture
2 wound injury.

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4 (5) Infant walkers that are banned under 16 CFR 1500.18(6), or that fail to
5 comply with the stair-fall protection standard in the “Standard Consumer Safety
6 Specification for Infant Walkers,” ASTM F977-07, published by ASTM International
7 (2007).

8 **NOTE:** 16 CFR 1500.18(6) bans infant walkers which have exposed parts
9 capable of amputating, crushing, lacerating, fracturing, bruising, or
10 causing hematomas or other injuries to fingers, toes, or other parts of a
11 young child’s anatomy.

12 Copies of ASTM 977-07 are on file with the department and the
13 legislative reference bureau. Copies may be obtained from ASTM
14 International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken,
15 PA 19428-2959, telephone 610-832-9585, website www.astm.org.

16 (6) Children’s bicycle helmets, manufactured or imported into the United States
17 after March 10, 1999, that do not meet the federal bicycle helmet safety standard under
18 16 CFR 1203.

19 (7) Children’s clothing, sizes 0 to 16, with drawstrings in the neck area.

20 (8) Children’s upper outerwear, sizes 0 to 16, with a drawstring at the waist or
21 bottom of the garment, unless all the following apply:

22 (a) Not more than 3 inches of any drawstring is outside the drawstring channel
23 when the garment is expanded to its fullest width.

24 (b) There is no toggle, knot or other attachment at the free end of any drawstring.

25 (c) Every drawstring is sewn to the garment at the midpoint of the drawstring
26 channel so the drawstring cannot be pulled out of the channel.

27 (9) Children’s products that contain elemental mercury.

1 (10) Children’s products which contain magnets that do not comply with the
2 mandatory toy safety standards adopted under 15 USC 2056b.

3 **NOTE:** 15 USC 2056b adopts the standards established by the “Standard
4 Consumer Safety Specification for Toy Safety,” ASTM 963-07, published
5 by ASTM International (2007) as it exists on August 14, 2008. These
6 standards do not apply to toys in which the magnets are used only as
7 internal components of motors, relays, speakers or other electrical
8 components, provided that magnetism is not part of the play pattern of the
9 toy. Copies of ASTM 963-07 are on file with the department and the
10 legislative reference bureau. Copies may be obtained from ASTM
11 International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken,
12 PA 19428-2959, telephone 610-832-9585, website www.astm.org.

13 (11) Baby cribs and related enclosures that are banned under 16 CFR
14 1500.18(13) or (14).

15 **NOTE:** 16 CFR 1500.18(13) and 16 CFR 1500.18(14) ban full-size and non-full
16 size baby cribs that do not meet federal standards intended to reduce the
17 risk of injury.

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19 (12) Yo-yo elastic tether toys that do not comply with the mandatory toy safety
20 standards adopted under 15 USC 2056b.

21 **NOTE:** 15 USC 2056b adopts the standards established by the “Standard
22 Consumer Safety Specification for Toy Safety,” ASTM 963-07, published
23 by ASTM International (2007) as it exists on August 14, 2008. Copies of
24 ASTM 963-07 are on file with the department and the legislative reference
25 bureau. Copies may be obtained from ASTM International, 100 Barr
26 Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959,
27 telephone 610-832-9585, website www.astm.org.

28
29 (13) Children’s products, containing lead, which are banned hazardous
30 substances under 15 USC 1278a.

31 **NOTE:** 15 USC 1278a treats as a banned hazardous substance any children’s
32 product that contains more lead than 600 parts per million beginning 180
33 days after August 14, 2008, 300 parts per million beginning on the date
34 that is one year after August 14, 2008, and 100 parts per million beginning
35 on the date that is 3 years after August 14, 2008.

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37 **SECTION 9.** ATCP 139.12 is created to read:

1 **ATCP 139.12 Unfair methods of competition and unfair trade practices.** A
2 violation of this chapter is an unfair method of competition and unfair trade practice in
3 business under s. 100.20(1), Stats., and is hereby prohibited under s. 100.20(2)(a), Stats.

4 **SECTION 10. EFFECTIVE DATE AND INITIAL APPLICABILITY.** (1) Except as
5 provided in subs. (2) and (3), this rule takes effect on the first day of the month following
6 publication in the Wisconsin administrative register, as provided under s.
7 227.22(2)(intro.).

8 (2) This rule first applies to small businesses as defined in s. 227.114(1), Stats.,
9 on the first day of the third month commencing after the rule publication date, as required
10 by s. 227.22(2)(e), Stats.

Dated this _____ day of _____, _____.

STATE OF WISCONSIN
DEPARTMENT OF
AGRICULTURE TRADE AND
CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary