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Clearinghouse Rule 09-037

DATCP Docket No. 09-R-02
Rules Clearinghouse No. ____

Proposed Hearing Draft
May 15, 2009

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

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

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.

DATCP Contact

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

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DATCP will publish a hearing notice announcing public hearings on this rule. DATCP will also accept written and e-mail comments for the hearing record. Hearing comments directed to the above address will be included in the official hearing record if they are received prior to a deadline date that will be specified in the hearing notice.

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 **SECTION 5.** ATCP 91.01(5) and (6) are repealed.

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

13 **SECTION 7.** ATCP 91.01(8) to (10) are repealed.

14 **SECTION 8.** ATCP 91.01(11)(intro.) is renumbered (5)(intro.) and amended to
15 read:

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~~ , and not per common fractional unit, decimal fractional
21 unit or multiple unit of weight. Prices of food commodities sold from bulk by weight
22 shall be computed, advertised and displayed according to NIST Handbook 130, ch. IV.B,
23 section 1.9.

1 **SECTION 15.** ATCP 91.03 and 91.04 are repealed and recreated to read:

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

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

5 (a) *Meat, poultry, fish and seafood.* Food commodities covered by *NIST*
6 *Handbook 130*, ch. IV.B, sections 1.5, 1.10 and 1.11 shall be sold in compliance with
7 applicable provisions of those sections. The declared weight of glazed, individually
8 frozen pieces of seafood may not include any weight of ice or other glazing.

9 **NOTE:** See also ch. ATCP 109 related to freezer meat and food service plans,
10 and the sale of “wholesale cuts” to consumers.

11
12 (b) *Dairy products.* Except as provided in pars. (c) to (e), food commodities
13 covered by *NIST Handbook 130*, ch. IV.B, sections 1.6 and 1.7, shall be sold in
14 compliance with applicable provisions of those sections.

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

17 **NOTE:** See s. 97.177, Stats.

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

20 **NOTE:** See also ss. 97.176 and 97.18, Stats.

21 (e) *Frozen desserts.* Packaged ice cream, ice milk, water ices, and frozen
22 desserts of a similar nature shall be sold by liquid measure unless they are packaged at
23 the time of retail sale, in which case they shall be sold by weight.

24 **NOTE:** See s. 98.12, Stats.

25 (f) *Flour, corn meal, and like commodities.* Food commodities covered by *NIST*

1 *Handbook 130*, ch. IV.B, section 1.4, shall be sold in compliance with that section.

2 (g) *Bread*. Bread shall be sold by weight unless it is clearly identified and sold as
3 “stale bread.”

4 **NOTE:** See s. 98.21, Stats.

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

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

14
15 (i) *Pickles and pickle relishes*. Commodities covered by *NIST Handbook 130*,
16 ch. IV.B, section 1.8, shall be sold in compliance with that section.

17 (j) *Pizza*. Pizza shall be sold by weight except that pizza made to order, other
18 than frozen pizza, may be sold by weight or by count.

19 (2) **READY-TO-EAT FOOD**. Ready-to-eat food sold from bulk or in single servings
20 packed at the point of sale may be sold by weight, measure or count. For purposes of this
21 subsection, count may include a serving count. If cooked ready-to-eat food is sold by
22 weight, its declared weight shall be its cooked weight unless the declared weight is
23 clearly identified as pre-cooked weight.

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

26 (a) *Fence wire products*. Commodities covered by *NIST Handbook 130*, ch.

1 IV.B, section 2.2, shall be sold in compliance with that section.

2 (b) *Coatings*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section
3 2.3, shall be sold in compliance with that section.

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

6 (d) *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 (e) *Prefabricated utility buildings*. Commodities covered by *NIST Handbook*
9 *130*, ch. IV.B, section 2.6, shall be sold in compliance with that section.

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

12 (g) *Sealants*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section
13 2.8, shall be sold in compliance with that section.

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

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

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

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

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

1 (m) *Insulation*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section
2 2.14, shall be sold in compliance with that section.

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

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

7 (p) *LP gas*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section
8 2.21, shall be sold in compliance with that section.

9 (q) *Liquid oxygen for respiration*. Commodities covered by *NIST Handbook 130*,
10 ch. IV.B, section 2.22, shall be sold in compliance with that section.

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

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

15 (t) *Baler twine*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section
16 2.25, shall be sold in compliance with that section.

17 (u) *Potpourri*. Commodities covered by *NIST Handbook 130*, ch. IV.B, section
18 2.26, shall be sold in compliance with that section.

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

21 (w) *Bulk sand, rock, gravel and stone*. Commodities covered by *NIST Handbook*
22 *130*, ch. IV.B, section 2.29, shall be sold in compliance with that section.

23 (x) *Petroleum products and motor fuel*. Petroleum products and motor fuel shall

1 be sold in compliance with ss. 98.246 and 100.18(6) and (8), Stats.

2 **ATCP 91.04 Presentation of price.** Whenever an advertised, posted or labeled
3 price per unit of weight, measure or count for any commodity includes a fraction of a
4 cent, all elements of the fraction shall be prominently displayed. The numerals
5 expressing the fraction shall be immediately adjacent to, of the same general design and
6 style as, and at least one-half the height and width of the numerals representing the whole
7 cent amount.

8 *NOTE: See NIST 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