



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Secretary Randy Romanski

DATE: May 13, 2024

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FROM: Randy Romanski, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Fair packaging and labeling; selling commodities by weight, measure, or count; and weights and measures. Wis. Admin. Code chs. ATCP 90, 91, and 92; Final Draft Rule (Clearinghouse Rule #23-057)

Introduction

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in Wis. Stat. § 227.19 (2) and (3). DATCP will publish notice of this referral in the *Wisconsin Administrative Register*, as provided in Wis. Stat. § 227.19 (2). This rule revises Wis. Admin. Code chs. ATCP 90, 91, and 92, which regulate fair packaging and labeling; selling commodities by weight, measure, or count; and weights and measures.

Background

The Wisconsin Department of Agriculture, Trade and Consumer Protection administers Wis. Stat. ch. 98, titled *Weights and Measures*. In fulfilling that responsibility, the department has promulgated administrative rules that incorporate by reference specifications and standards set forth in handbooks published by the National Institute of Standards and Technology (NIST), which is “a science, engineering, technology, and measurement laboratory” within the United States Department of Commerce. *See* 15 U.S.C. § 272 (a). NIST works with and supports the National Conference on Weights and Measures (NCWM) in developing the standards set forth in NIST Handbooks. NCWM is a professional not-for-profit association of state and local weights and measures officials, federal agencies, manufacturers, retailers, and consumers. Under 15 U.S.C. § 272 (b) (10) and (c) (4),

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NIST is directed to cooperate with states in securing uniformity of weights and measures laws and methods of inspection. In partial fulfillment of that duty, NIST publishes handbooks with standards for weights and measures. Periodically, NIST updates those handbooks, thus leading the department to update its rules to incorporate by reference the latest version of relevant NIST handbooks.

The department proposes to update the NIST technical standards incorporated by reference in Wis. Admin. Code chs. ATCP 90, 91, and 92 to newer editions of technical references already cited in current rules. The code currently incorporates by reference the 2018 editions of *NIST Handbook 44 Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices*, *NIST Handbook 130 Uniform Laws and Regulations in the areas of legal metrology and fuel quality*, and *NIST Handbook 133 Checking the Net Contents of Packaged Goods*. The proposed rule incorporates by reference the 2024 editions of *NIST Handbook 44* and *NIST Handbook 130*. The proposed rule incorporates by reference the 2023 edition of *NIST Handbook 133*, as it is the most recent.

Rule Content

This rule revision makes minor technical changes to the three rules (Wis. Admin. Code chs. 90, 91, and 92).

As previously stated, the revision updates the rules to incorporate by reference the most recent editions of relevant *NIST Handbooks*. In addition, the revision changes the notes that explain how to obtain the handbooks, corrects various typographical errors, and makes other changes to adhere to the *Administrative Rules Procedures Manual*. For instance, the examples in § 1.06 (3) of the *Administrative Rules Procedures Manual* implicitly advise against using the percentage sign and instead recommend using the word “percent.” With respect to the general topic of spelling, § 1.05 (1) (g) of the *Manual* directs, “Use the current edition of Webster’s New International Dictionary as the standard for spelling conventions.” Therefore, terms such as “corn meal” and “dish cloths” became “cornmeal” and “dishcloths.” *Administrative Rules Procedures Manual* § 1.06(c) reads, “Avoid using parentheses or dashes. If certain material is important to the thought or concept expressed in the rule, the material should be set apart with commas, not parentheses or dashes.” Finally, NIST does not “certify” laboratories; it instead “recognizes or accredits” them. To reflect the NIST terminology, rule language has been changed.

This rule specifically does not adopt Section 3.40, Electric Vehicle Fueling Systems, in *NIST Handbook 44*. The 2018 edition of *NIST Handbook 44* lists this section as tentatively adopted. However, the 2023 edition permanently adopted this section. The department believes that the adoption of the Electric Vehicle Fueling Systems section would be a substantive rather than a technical revision. Therefore, if necessary or appropriate to do so in the future, the department will commence a separate rulemaking to address that section of *NIST Handbook 44* and its incorporation into the *Wisconsin Administrative Code*.

The department also proposes to repeal part of Wis. Admin. Code § ATCP 92.43 (3) (a) and all of § ATCP 92.50 (3) (a) since the affected license years have passed.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

While NIST is “a science, engineering, technology, and measurement laboratory” within the United States Department of Commerce (*See* 15 U.S.C. § 272(a)), NIST develops recommended national standards through participation from state and local weights and measures officials and industry representatives during annual meetings of the National Conference on Weights and Measures. The specifications and standards set forth in NIST handbooks are themselves recommendations, not federal laws.

Comparison with Rules in Adjacent States

Illinois

Illinois uses *NIST Handbook 44* and *NIST Handbook 130*.

The Uniform Packaging and Labeling Regulation and the Uniform Regulation for the Method of Sale of Commodities in the *National Institute of Standards and Technology Handbook 130*, and any of its subsequent supplements or revisions, shall be the requirements and standards governing the packaging, labeling, and method of sale of commodities for this State, except insofar as specifically modified, amended, or rejected by regulation issued by the Director.

The following sections of the Method of Sale of Commodities requirements shall not be adopted: Section 1.2 (Bread), Section 2.20 (Gasoline-Oxygenate Blends), and Section 1.9.2 (Unit Price Advertising).

Iowa

The National Institute of Standards and Technology (NIST) Handbook 130, Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality, *Handbook 133*, Checking the Net Contents of Packaged Goods, Type Evaluation, and all supplements to these handbooks, as published by NIST amended or revised as of January 1, 2020, are adopted in their entirety by reference except as modified by state statutes, or by rules adopted and published by the Iowa department of agriculture and land stewardship.

Michigan

Michigan has passed a Weights and Measures act that regulates and provides standards for weights and measures, and the packaging and advertising of certain commodities; provides a fee system for certain inspections and tests; and provides penalties for fraud and deception in the use of false weights and measures and other violations.

Minnesota

Weighing and measuring equipment manufactured, offered, or exposed for sale or sold or given away for use in trade or commerce in Minnesota must conform to the requirements and specifications of *NIST Handbook 44*.

NIST Handbook 44 (2019), "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," as adopted by the 103rd National Conference on Weights and Measures and published by the United States Department of Commerce, NIST, is incorporated by reference subject to some exceptions.

Summary of Factual Data and Analytical Methodologies

To develop this rule, the department reviewed the most current editions of *NIST Handbook* standards and verified they were still correct. Because this is a technical rule revision, no further analyses were needed.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

NIST Handbooks are available online at no cost. Also, no major changes within the *NIST Handbooks* themselves over the past five years have required major costs for businesses.

Effect on Small Business

A complete *regulatory flexibility analysis* is attached.

Small Business Regulatory Review Report

The Small Business Regulatory Review Board did not issue a report or raise objections.

Hearings

The department held a hearing on December 4, 2023, and received no comments.

After the hearing, the department accepted formal written comments until December 18, 2023. No written comments were received.

Changes from Hearing Draft

The only comment the department received during the comment period came internally. *NIST Handbook 44* and *NIST Handbook 130* received 2024 updates and *NIST Handbook 133* did not. In the interest of using the most recent versions, the department changed the references from 2023 to 2024 editions in those two cases.