

CR 89-92

STATE OF WISCONSIN)
) ss.
DEPARTMENT OF AGRICULTURE,)
TRADE AND CONSUMER PROTECTION)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS;

I, Donald J. Soberg, Administrator, Trade and Consumer Protection Division, State of Wisconsin, Department of Agriculture, Trade and Consumer Protection, and custodian of the official records of said Division, do hereby certify that the annexed order amending rules relating to method of sale of commodities, Chapter Ag 54, Wis. Adm. Code, was duly approved and adopted by the Department on December 12, 1990.

I further certify that said copy has been compared by me with the original on file in the Department and that the same is a true copy thereof, and of the whole of such original.

In TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the Department offices in the city of Madison, this 12th day of December, 1990.

Donald J. Soberg

Donald J. Soberg, Administrator
Trade & Consumer Protection Division

CR 89-92

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DEC 17 1991

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ORDER OF THE STATE OF WISCONSIN

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

ADOPTING, AMENDING AND REPEALING RULES

The Wisconsin Department of Agriculture, Trade and Consumer Protection adopts an order to repeal Ag 54.01; to renumber Ag 54.02 (title) and (3) and Ag 54.07; to renumber and amend Ag 54.02(1), (2) and (4), Ag 54.04(1), and Ag 54.05; to amend Ag 54.03(1)(intro.); to repeal and recreate Ag 54.03(1)(a) to (d) and Ag 54.04(2); and to create Ag 54 (Prefatory Note), Ag 54.01(1), (2), (4), (5), (8), (9), (10), (11), and (12), Ag 54.02(2) and (3), Ag 54.03(1)(e), Ag 54.03(3), Ag 54.04(3) to (6), Ag 54.05 (1)(a) to (d) and (2), Ag 54.06, Ag 54.07, Ag 54.08, Ag 54.09, and Ag 54.10, relating to the method of sale of commodities.

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

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

Statutes Interpreted: ss. 98.02(2), 98.06 and 98.07, Stats.

Wisconsin law requires in s. 98.06(1), Stats., that commodities in liquid form be sold by liquid measure and commodities not in liquid form be sold by weight. The statute permits other methods of sale to be used if they are in general use and provide accurate information as to the quantity of a commodity sold. However, the proliferation of alternative methods of sale can and does result in consumer deception and confusion and unfair competition in the marketplace. Section 98.07(4), Stats., requires the Department of Agriculture, Trade and Consumer Protection (DATCP) to prescribe by rule methods for determining and declaring weight, measure or count to prevent consumer deception.

The existing ch. Ag 54 permits 16 fruits and vegetables to be sold by weight, count or bunch, 6 fruits and vegetables to be sold by weight or dry measure units of one bushel or 1/2 bushel, and one vegetable to be sold by weight, dry measure or count. The existing rules also list 4 small fruits that may be sold by weight or dry measure under the exception in s. 98.06(2)(a), Stats.

The new rules will:

1. Permit 29 fruits and vegetables to be sold by weight or count,
2. Permit 17 vegetables to be sold by weight or bunch,
3. Add the peck to the dry measure units that can be used to sell vegetables and large fruits,
4. Permit 5 large fruits and vegetables to be sold by weight or dry measure,
5. Permit apples and cucumbers to be sold by weight, dry measure or count.
6. Increase to 6 the small fruits that may be sold under s. 98.06(2)(a), Stats., and,
7. Permit mixed fruits and vegetables gift wrapped in reusable containers to be sold by weight or count.

Chapter Ag 54 clarifies that meat, poultry, seafood and cheese must be sold by weight, except that mollusks in the shell may be sold by count. The new rules add provisions to:

1. Permit mollusks in the shell to be sold by weight or dry measure,
2. Clarify that mollusks on the half shell must be sold by weight,
3. Permit oysters, clams or mussels removed from the shell to be sold by weight or liquid measure,
4. Clarify that glazed seafood must be sold by weight with no part of the declared weight representing ice,
5. Permit live fish or live shellfish to be sold by weight or count, and
6. Clarify that waxed cheese must be sold by weight excluding the weight of the wax.

A provision in the current rules requiring that ready-to-cook stuffed poultry products bear 2 weight declarations - the total weight and the weight of the poultry without stuffing - is repealed.

Currently ch. Ag 54 exempts food sold for consumption on the premises where sold or as all or part of a single ready-to-eat meal for consumption off the premises where sold. The new rules clarify the existing language and extend the exemption to:

1. Individual food items including pre-wrapped sandwiches sold as all or part of a ready-to-eat meal,
2. Single service beverages other than those in hermetically sealed containers, and
3. Ready-to-eat chicken, chicken parts and fish pieces prepared on the retailer's premises and not packaged prior to sale.

A provision is adopted to clarify that if a retailer makes a representation of the quantity of a meal, ready-to-eat food or delicatessen item, it must be accurate.

The existing code requires that the prices of bulk commodities or unpackaged commodities be expressed in whole units of weight, not in fractions of units or multiples of whole units. The new rules expand that requirement to require that when multiple bulk commodities are advertised or displayed together, their prices must be displayed in terms of the same whole unit of weight. The new rules also provide that if multiple units of an unpackaged commodity are displayed for sale with a placarded weight declaration, the weight of each item so displayed must equal or exceed the weight declared on the placard.

These rules contain additional provisions to:

1. Repeal the existing statement of policy and replace it with a prefatory note,
2. Require that frozen desserts packed at time of sale be sold by weight,
3. Require that firewood sold in quantities exceeding 4 cubic feet be sold by weight, cord or fraction of a cord, or "face cord" if the measure is modified by the length of the pieces of wood in the face cord,
4. Require sellers of bulk firewood to give buyers delivery tickets or invoices declaring the quantity delivered, the price and the identity of the seller,
5. Permit firewood bundled in quantities of less than 4 cubic feet to be sold by weight, volume or count,
6. Require that roofing and siding materials be sold by the square foot or square meter of coverage, or by the "square," a unit of 100 square feet of coverage, all exclusive of laps and joints,
7. Require that polyethylene sheeting and film, other than food wrap in consumer size packages, be labeled as to its length and width and thickness and, if packaged or cut prior to sale, its weight,
8. Require that polyethylene food wrap in consumer size packages be labeled as to its length, width and area,
9. Permit potpourri to be sold by weight or dry measure, but excepting potpourri from all quantity declarations if sold in a package containing a vase, sensor or similar article, as stuffing for a sachet or other cloth article, or in a package containing less than one ounce, and

SECTION 1. Ag 54.01 is repealed.

SECTION 2. Ag 54 (Prefatory Note) is created to read:

PREFATORY NOTE: Section 98.06(1), Stats., states the general requirement that commodities in liquid form be sold by liquid measure and that commodities not in liquid form be sold by weight, but further permits the sale of liquid and non-liquid commodities by other methods of weight, measure or count if the methods are in general use and give accurate information as to the quantity of commodity sold. Under this exception, differing methods of sale have been used in the sale of commodities of the same kind or class, with a significant lack of uniformity among sellers as to specific methods of sale under which such commodities may be sold. While such differing methods of sale may arguably have been in general use, some have not provided purchases with accurate or meaningful quantity information and proliferation of methods of sale among sellers deprives purchasers of the ability to readily compare offerings by competing sellers. This can result in consumer deception and confusion and unfair competition in the marketplace.

Section 98.07(4), Stats., charges the department of agriculture, trade and consumer protection with the responsibility of prescribing, by rule, standards for determining and declaring weight, measure or count in order to prevent consumer deception. The purpose of these rules is to achieve greater uniformity in methods of sale used in the state, increase the accuracy of quantity information, prevent consumer deception and confusion, and promote fair competition. Some of the other statutes regulating methods of sale are: ss. 97.18(3)(b) - oleomargarine; 98.12 - prepackaged frozen desserts; 98.21 - bread; 98.22 - bulk commodities; 98.245 - liquified petroleum gas; 98.246 - petroleum products, and 100.18(6) and (8), motor vehicle fuel. Some other rules regulating methods of sale are: ch. Ag 51 - retail motor fuel; s. Ag 71.03(3)(d) - yogurt, ch. Ag 109 - wholesale cuts of meat, and ch. Ag 115 - liquified petroleum gas. In addition, a number of method of sale requirements are expressed in the labeling requirements and exemptions set forth in ss. Ag 53.10 and 53.11.

This chapter is adopted under authority of ss. 93.07(1), 98.07(3) and 98.07(4), Stats. Violations are subject to the penalties and remedy provided under s. 98.26, Stats.

SECTION 3. Ag 54.02 (title), (1), (2), (3) and (4) are renumbered Ag 54.01 (title), (3), (6), (7) and (13), respectively, and Ag 54.01(3), (6) and (13), as renumbered, are amended to read:

Ag 54.01(3) "Department" means the ~~state of~~ Wisconsin department of agriculture, trade and consumer protection.

(6) "Food" means food as defined in s. 97.01 ~~(2)~~ (6), Stats., and includes all articles or components of any article used for ~~food or drink by man~~ human consumption.

(13) "~~Retail sale~~" "Sold at retail" means the any sale of commodities directly to the consumer ~~for use or consumption other than resale or further manufacturing or processing~~.

SECTION 4. Ag 54.01(1), (2), (4), (5), (8), (9), (10), (11), and (12) are created to read:

Ag 54.01(1) "Commodity" means any article of commerce.

(2) "Cord" means the amount of firewood that, when ranked and well stowed, occupies a space of 128 cubic feet, or a pile four feet by eight feet by four feet.

(4) "Face cord" means an amount of firewood composed of pieces of uniform length of less than four feet which, when ranked and well stowed, compose a pile eight feet wide and four feet high.

(5) "Firewood" means fireplace and stove wood sold for use as fuel.

(8) "Mollusks" means oysters, clams, mussels, and snails.

(9) "Potpourri" means any mixture, however denominated, consisting principally of dried herbs, spices, flowers or other vegetable matter which is intended to be used as an odorizer or for decorative purposes and not intended to be eaten by humans.

(10) "Ranked and well stowed" means that pieces of wood are placed in a line or row with individual pieces touching and parallel to each other and stacked in a compact manner.

(11) "Ready-to-eat" means, in the case of food normally intended to be eaten heated, that the food is heated at the time the consumer receives it.

(12) "Sell", "sale" or "sold" includes any advertising or offer to sell.

SECTION 5. Ag 54.02(2) and (3) are created to read:

Ag 54.02(2) If a retailer has more than one bulk commodity or commodity not in package form offered or displayed for sale in any advertisement or the same physical area of the retailer's premises, prices for all commodities sold by weight that are included in the advertisement or displayed in the area shall be declared in terms of the same whole unit of weight.

(3) If individual units of an unpackaged commodity are sold at retail with a weight declaration on a counter card or placard instead of either a weight declaration on each unit or with the commodity being weighed at time of sale, the actual weight of each

unit offered for sale shall equal or exceed the declared weight. The price per whole unit of weight of the commodity shall be stated on the placard.

SECTION 6. Ag 54.03(1) (intro.) is amended to read:

Ag 54.03(1) FRESH FRUITS AND VEGETABLES. (intro.) Fresh fruits and vegetables shall be sold at retail by weight, except that items identified under pars. (a) to (d)_T may be sold at retail by weight or other methods of sale as provided under pars. (a) to (d):

SECTION 7. Ag 54.03(1)(a) to (d) are repealed and recreated to read:

Ag 54.03(1)(a) The following fresh fruits and vegetables may be sold at retail by weight or by count, at the seller's discretion:

1. Apples coated with taffy or caramel.
2. Artichokes.
3. Avocadoes.
4. Cantaloupes.
5. Cauliflower.
6. Celery.
7. Citrus fruits.
8. Corn on the cob.
9. Coconuts.
10. Eggplant.
11. Garlic.
12. Head Lettuce.
13. Kiwanos.
14. Kiwi fruit.
15. Loquats.
16. Mangoes.
17. Melons (whole).
18. Papayas.
19. Peppers.
20. Persian Limes.
21. Persimmons.
22. Pineapples.
23. Pomegranates.
24. Prickly Pear.
25. Pumpkins.
26. Quince.
27. Squash.
28. Star Fruit.
29. Ugli fruit.

(b) The following fresh vegetables may be sold at retail by weight or bunch, at the seller's discretion:

1. Chard.
2. Dill.
3. Endive.
4. Escarole.
5. Green or spring onions.
6. Greens.
7. Kale.
8. Kohlrabi.
9. Leaf Lettuce.
10. Leeks.
11. Parsley.
12. Root vegetables with green tops attached.
13. Spinach.
14. Thyme.
15. Watercress.

(c) The following fruits may be sold at retail by weight or by dry measure units of one quart, one pint, or one-half pint, at the seller's option:

1. Berries.
2. Cherries.
3. Cherry Tomatoes.
4. Chokecherries.
5. Currants.
6. Plum Tomatoes.

NOTE: The container sizes permitted for berries and small fruits are established by s. 98.06(2), Stats.

(d) The following fruits may be sold by weight or by dry measure units of one bushel, one-half bushel or one peck at the seller's option:

1. Nectarines.
2. Peaches and similar products.
3. Pears.
4. Plums.
5. Tomatoes.

SECTION 8. Ag 54.03(1)(e) is created to read:

Ag 54.03(1)(e) The following fruits and vegetables may be sold by weight, by count or by dry measure units of one bushel, one-half bushel or one peck at the seller's option:

1. Apples.
2. Cucumbers.

SECTION 9. Ag 54.03(3) is created to read:

Ag 54.03(3) MIXED FRESH FRUITS OR VEGETABLES. Mixed fresh fruits or vegetables gift wrapped in baskets or other reusable containers shall be sold at retail by weight or count, at the seller's option.

NOTE: Combination packages containing fresh fruit and vegetables and other food or non-food commodities must be labeled in accordance with s. Ag 53.10(5), subject to the exception granted by s. Ag 53.01(6).

SECTION 10. Ag 54.04(1) is renumbered Ag 54.04 (intro.) and amended to read:

Ag 54.04 (intro.) Meat Except as otherwise provided in this chapter or other applicable state or federal law, meat, poultry, seafood, cheese, or products derived in whole or substantial part therefrom, shall be sold by weight, except that mollusks subject to the following:

(1) Mollusks in the shell may be sold by weight, by count or by dry measure units of one bushel. If removed from the shell, mollusks shall be sold by weight. ~~The term "mollusks" means shellfish such as oysters, clams, mussels and snails.~~

SECTION 11. Ag 54.04(2) is repealed and recreated to read:

Ag 54.02(2) Fresh or frozen processed mollusks on the half shell shall be sold by net weight excluding the weight of the shell.

SECTION 12. Ag 54.04(3) to (6) are created to read:

Ag 54.04 (3) Fresh oysters, clams or mussels removed from the shell and placed in a container shall be sold by drained weight or by fluid volume with a maximum of 15 percent free liquid by weight.

(4) Glazed, individually frozen pieces of seafood shall be sold by weight. No part of the declared weight may consist of ice.

(5) Live fish or live shellfish shall be sold by weight or by count.

(6) Cheese coated with wax shall be sold by net weight of the cheese excluding the weight of the wax.

SECTION 13. Ag 54.05 is renumbered Ag 54.05 (title) and (1) (intro.) and amended to read:

Ag 54.05 (title) READY-TO-EAT RESTAURANT FOODS AND CARRYOUT FOODS. (1) ~~Pre prepared ready-to-eat~~ Ready-to-eat restaurant foods and carryout foods ~~and delicatessen items~~ not in liquid form shall be sold at retail by weight, ~~except as otherwise provided under s. Ag 54.01(2)(c).~~ and ready-to-eat restaurant foods and carryout foods in liquid form shall be sold at retail by volume, except:

SECTION 14. Ag 54.05(1)(a) to (d) and (2) are created to read:

Ag 54.05(1)(a) Food and other commodities sold for immediate consumption on the premises.

(b) Ready-to-eat entrees and sandwiches and single service containers of ready-to-eat side dishes and desserts sold for consumption off the premises where sold.

(c) Single serving containers of beverages other than beverages sold in hermetically sealed cans or bottles.

(d) Ready-to-eat chicken, chicken parts and fish pieces prepared on the retailer's premises but not packaged in advance of sale.

(2) Notwithstanding sub. (1), if a retailer advertises or otherwise represents the weight, measure or count of a ready-to-eat

restaurant food or carryout food, that representation must be accurate. Weight declarations for cooked red meats shall be presumed to apply to the pre-cooked weight of the meat unless the advertisement or representation would lead a reasonable person to believe that it applies to the weight of the meat after cooking.

SECTION 15. Ag 54.06 is created to read:

Ag 54.06 FROZEN DESSERTS. Ice cream, custard, ice milk, frozen yogurt, sherbet, and other frozen desserts of a similar nature packaged at time of sale at retail shall be sold by weight.

NOTE: Section 98.12, Stats., requires that frozen desserts packaged prior to sale may be sold only by fluid measure in containers with capacities of one-half liquid pint, one liquid pint, one liquid quart or a multiple of one liquid quart.

SECTION 16. Ag 54.07 is renumbered Ag 54.02 (title) and (1).

SECTION 17. Ag 54.07 is created to read:

Ag 54.07 FIREWOOD. (1) Firewood in quantities greater than 4 cubic feet shall be sold by one of the following units of measure:

- (a) Weight.
- (b) Cord or fraction of a cord.
- (c) Face cord, if the measure "face cord" is qualified by a statement of the length of the pieces of wood in the face cord.

NOTE: For example, a quantity of firewood pieces 24 inches long sufficient when stacked and well stowed to make a pile 8 feet long and 4 feet high may be sold by the actual weight of the firewood, or as 1/2 cord, or as a 24" face cord.

(2) A seller of bulk firewood shall give to the buyer a delivery ticket or invoice for each delivery of firewood stating the name and address of the seller, the date of the delivery, the quantity of firewood delivered and the price of the firewood.

(3) Firewood bundled in quantities of less than 4 cubic feet shall be sold only by weight, volume or count.

SECTION 18. Ag 54.08 is created to read:

Ag 54.08 ROOFING, ROOFING MATERIAL AND SIDING. (1) Roofing, roofing material and siding shall be sold at retail by the square, by the square foot if sold in inch-pound units, or by the square meter if sold in metric units.

(2) In this section:

(a) "Square" means the quantity of roofing, roofing material or siding that, when applied according to directions of the manufacturer, will cover an area of 100 square feet exclusive of laps or joints.

(b) "Square foot" means the quantity of roofing, roofing material or siding that, when applied according to the directions of the manufacturer, will cover an area of one square foot exclusive of laps or joints.

(c) "Square meter" means the quantity of roofing, roofing material or siding that, when applied according to the directions of the manufacturer, will cover an area of one square meter exclusive of laps or joints.

SECTION 19. Ag 54.09 is created to read:

Ag 54.09 POLYETHYLENE. (1) Each sale of polyethylene sheeting and film, other than food wrap sold in packages for consumption in the home, shall include all of the following information:

- (a) Length and width.
- (b) Area in square feet or square meters.
- (c) Thickness in mils.
- (d) Weight of the polyethylene, for polyethylene packaged or cut to size prior to sale.

(2) Each sale of polyethylene food wrap sold in consumer size packages for consumption in the home shall include all of the following information:

- (a) Length and width.
- (b) Area in square feet or square meters.

SECTION 20. Ag 54.10 is created to read:

Ag 54.10 POTPOURRI. Potpourri shall be sold at retail by weight or by dry measure units of one dry pint or one dry quart, or fractions thereof, at the seller's option, except that no quantity declaration is required for:

(1) Potpourri sold in a package containing a vase, censer, bowl or similar article designed to be used in displaying potpourri or using potpourri as an odorizer.

(2) Potpourri sold as stuffing of a sachet or other cloth article.

(3) Potpourri sold in packages containing less than one ounce.

SECTION 21. EFFECTIVE DATE. The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22(2)(intro.), Stats.

Dated this 12th day of December, 1990.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Donald J. Soberg
Donald J. Soberg, Administrator
TRADE & CONSUMER PROTECTION DIVISION

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