

Clearinghouse Rule 07-067

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

1 The state of Wisconsin department of agriculture, trade and consumer protection  
2 proposes the following order *to repeal* ATCP 141.09, ch. ATCP 147, 148.06(2) and (3)  
3 and 148.09; *to amend* ATCP 140.13(1)(b)3.(intro.) and a., 140.14(2)(d), 140.19(4)(b)6.,  
4 (5)(a), (b)3., (c) and (e), and (6)(a) and (b)3., 140.20(2), and 148.01(1); and *to repeal and*  
5 *recreate* ATCP 148.06(1) and (5); *relating to* agricultural marketing orders and  
6 marketing boards.

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

This rule modifies current rules governing Wisconsin's agricultural marketing order program (ATCP 140). This rule also repeals the current mint marketing order (ATCP 147), and amends current marketing orders related to cherries (ATCP 141) and ginseng (ATCP 148).

***Statutory Authority***

Statutory authority: ss. 93.07(1), and 96.15, Stats.  
Statutes interpreted: Ch. 96, 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.

## ***Background***

The Department of Agriculture, Trade and Consumer Protection (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.

A marketing order imposes assessments on commodity producers. Affected producers elect a marketing board, which spends assessment revenues for purposes specified in the marketing order. Marketing orders may be used to finance market development, research and education. DATCP monitors marketing board activities for compliance with applicable law, including the marketing order.

DATCP has adopted general rules to govern the operation of marketing orders and marketing boards. DATCP must also adopt marketing orders as rules. Affected producers must approve (by referendum) the adoption, amendment or repeal of a marketing order. DATCP may bill a marketing board for administrative services provided to the marketing board.

## ***Rule Contents***

This rule does all of the following:

- Amends current rules (ATCP 140) governing all marketing order referenda and marketing board elections:
  - Authorizes, but does not require, DATCP to conduct referenda and elections by electronic mail.
  - As an alternative to mailing ballots to all eligible producers in a marketing board election (but not a marketing order referendum), authorizes DATCP to notify producers how they may obtain election ballots.
- Amends the cherry marketing order (ATCP 141) to eliminate the requirement of an advisory referendum every 4 years (non-binding advisory referendum asks producers whether they wish to continue the cherry marketing order). A marketing order may be repealed at any time, with or without a non-binding advisory referendum, if the repeal is approved in a formal binding referendum of affected producers.

- Repeals the mint marketing order (ATCP 147).
  
- Amends the ginseng marketing order (ATCP 148):
  - Eliminates the current annual producer assessment based on sales, and replaces it with an assessment based on acres in ginseng production.
  - The ginseng marketing board must annually determine the assessment rate, which may not exceed \$150 per acre in ginseng production. The ginseng board may require affected producers to report acreage in production.
  - The ginseng board may verify reported acreage by aerial photography or other reliable means.
  - The ginseng board must annually notify each producer of the assessment amount owed by that producer.
  - DATCP no longer determines assessment amounts, but may audit the ginseng board's determination of assessment amounts.
  - Eliminates the requirement of an advisory referendum every 5 years (advisory referendum asks producers whether they wish to continue the ginseng marketing order). A marketing order may be repealed at any time, with or without a non-binding advisory referendum, if the repeal is approved in a formal binding referendum of affected producers.
  
- Makes other minor changes to current rules.

The voting requirement for the amendments to the cherry, ginseng and mint marketing orders as provided in s. 96.08 (1) (b) 3., Stats., is that the applicable referendum must be approved by not less than 50% of the producers voting provided that 50% of the producers on the established list vote in the referendum. For each of the cherry, ginseng and mint marketing orders, the voting requirement identified in s. 96.08 (1) (b) 3., Stats., was used to adopt the original marketing order.

### ***Business Impact***

#### **Businesses Affected**

In a general sense, this rule affects producers of all agricultural commodities that are covered by an agricultural marketing order or that may be covered in the future. This rule more specifically affects cherry, mint and ginseng producers. Many of the affected

businesses are “small businesses.” The effects of this rule are generally insignificant. A complete Business Impact Analysis is attached.

### **Agricultural producers; general**

This rule gives DATCP more procedural flexibility related to the conduct of marketing order referenda and marketing board elections. Under this rule:

- DATCP may use electronic mail to conduct referenda and elections (DATCP is not required to use electronic mail).
- In a marketing board election (but not a marketing order referendum), DATCP may notify producers how to obtain ballots rather than actually mailing ballots to all producers.

DATCP may use these alternative procedures where appropriate. In appropriate circumstances, the alternative procedures may be at least as effective in encouraging producer participation, and may be substantially cheaper. Cost savings may be passed on to marketing boards and individual producers. Cost savings to individual producers will not be significant.

### **Mint Producers**

This rule repeals the current mint marketing order, and eliminates the producer assessments associated with that order. There may be some cost savings to individual mint producers, but the savings will be insignificant. Currently, there are only 14 mint producers in Wisconsin.

### **Cherry Producers**

This rule repeals a current marketing order provision that requires an advisory referendum of cherry producers every 4 years, to determine whether they support continuation of the marketing order. The repeal will save some costs for the marketing board and affected producers. The savings for individual producers will not be significant.

### **Ginseng Producers**

This rule requires ginseng marketing order assessments based on acres in production, rather than sales. Sales assessments are difficult to collect, because most buyers are outside the United States. This rule will charge assessments based on reported acres in production (verified by aerial photography or other reliable means). Assessments based on acres in production will be more fair and reliable. Some individual assessments will go up, but others will go down. Overall assessments will increase, but there will not be a major financial impact on ginseng producers.

This rule repeals a current marketing order provision that requires an advisory referendum of ginseng producers every 5 years, to determine whether they support continuation of the marketing order. The repeal will save some costs for the marketing board and affected producers. The savings for individual producers will not be significant.

### ***Federal Regulation***

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, corn, milk and soybeans). However, the state marketing orders do not directly duplicate or conflict with the federal marketing orders.

### ***Surrounding State Regulation***

Surrounding states have marketing orders for some, but not all, of the commodities covered by Wisconsin marketing orders. For example, Illinois, Iowa, Minnesota and Michigan have marketing orders for corn. Illinois and Iowa also have marketing orders for soybeans, milk and other commodities. Nearly all United States ginseng is grown in Wisconsin, so no other states have ginseng marketing orders.

### ***Fiscal Impact***

The proposed rules will not have a significant fiscal impact on DATCP and will have no fiscal effect on local government. A complete fiscal estimate is attached.

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- 1           **SECTION 1.** ATCP 140.13(1)(b)3.(intro.) and a. are amended to read:
- 2           ATCP 140.13(1)(b)3.(intro.) A specific statement describing how marketing
- 3           order assessments would be computed and paid under the marketing order. ~~The~~
- 4           description shall be illustrated by examples which are based on typical market
- 5           ~~transactions in the affected commodity.~~ The description shall indicate:

1 (1)(b)3.a. How the ~~volume~~ basis for assessments would be determined.

2 **SECTION 2.** ATCP 140.14(2)(d) is amended to read:

3 ATCP 140.14(2)(d) “Assessment due” means an assessment for which a  
4 producer, handler or producer-handler has incurred a specific legal obligation of payment  
5 under the marketing order. ~~An assessment becomes due when title to the affected~~  
6 ~~commodity transfers and the volume basis used to determine the assessment amount~~  
7 ~~becomes known.~~

8 **SECTION 3.** ATCP 140.19(4)(b)6. and (5)(a), (b)3., (c) and (e) are amended to  
9 read:

10 ATCP 140.19(4)(b)6. Balloting instructions, indicating whether the referendum is  
11 to be conducted by mail ~~ballots~~ or electronic mail, or at polling places under sub. (5)(e).  
12 If the referendum is to be conducted at polling places, rather than by mail ~~ballot~~ or  
13 electronic mail, the notice of announcement shall give the locations of polling places and  
14 the times during which votes may be cast at the polling places.

15 (5)(a) Referendum ballots and related materials shall be prepared and distributed  
16 by mail or electronic mail, or at polling places pursuant to par. (e). Every ballot shall be  
17 designed and handled so as to insure the secrecy of the producer’s or handler’s vote.  
18 Ballots shall be accompanied by the instructions required under par. (b). Every ballot  
19 shall be accompanied by a separate certificate, ~~to be signed by the producer or handler,~~  
20 certifying that the producer or handler is eligible to vote in the referendum. No vote is  
21 valid unless accompanied by a ~~signed~~ certificate of eligibility. Ballots and certificates  
22 shall be returned together, but shall be designed and handled so that the department

1 removes and separates the certificates from the ballots before any vote can be examined  
2 or counted, so that no vote when revealed can be identified with a certificate.

3 (5)(b)3. Instructions for entering a vote on the ballot and ~~signing~~ returning the  
4 certificate of eligibility which accompanies the ballot. Instructions shall state that no vote  
5 may be counted unless returned with a ~~signed~~ valid certificate of eligibility.

6 (5)(c) Except as provided in par. (e), the department shall mail or electronically  
7 mail a referendum ballot to every producer or handler who is included on the list of  
8 affected producers or handlers compiled by the department under s. ATCP 140.15. The  
9 department shall exclude from its mailing list those producers for whom an incorporated  
10 cooperative association has been authorized to cast a bloc vote, and who are listed by the  
11 cooperative as being represented in the bloc vote. A producer or handler who is not on  
12 the department's mailing list, or who did not receive a referendum ballot, may request a  
13 ballot from the department. A producer who desires to be excluded from a cooperative's  
14 bloc vote may request an individual ballot as provided in sub. (3)(e). The department  
15 may require documentation to verify that any person requesting a ballot is eligible to vote  
16 in the referendum.

17 (5)(e) If the secretary determines that it would be unreasonably costly or difficult  
18 to conduct a referendum by mail or electronic mail ~~ballot~~, the secretary may direct that  
19 ballots be cast at polling places announced by the secretary as provided in sub. (4)(b)6.  
20 The secretary may further direct that ballots be pre-distributed to producers by mail or  
21 electronic mail, rather than at the designated polling places.

22 **SECTION 4.** ATCP 140.19(6)(a) and (b)3. are amended to read:

1           ATCP 140.19(6)(a) Referendum ballots shall be tabulated by the department,  
2 according to procedures set forth in this subsection. Before tabulating ballots, the  
3 department shall examine voting certificates to determine the validity of each ballot cast.  
4 All referenda, including referenda conducted at polling places, shall be conducted so as to  
5 exclude ineligible voters and assure the secrecy of individual votes. ~~Signed certificates~~  
6 Certificates of eligibility shall be obtained from all voters in conjunction with the casting  
7 of ballots, but shall be separated from all ballots before any vote is examined or counted,  
8 so that no vote can be identified with a certificate of eligibility.

9           (6)(b)3. The certificate of eligibility required to accompany the ballot was not  
10 properly ~~signed or~~ returned.

11           **SECTION 5.** ATCP 140.20(2) is amended to read:

12           ATCP 140.20(2) ELECTION PROCEDURE: GENERAL. The election of marketing  
13 board members shall be conducted by the department according to applicable procedures  
14 set forth under s. ATCP 140.19 for marketing order referenda. In a marketing board  
15 election, as an alternative to sending a ballot to every producer and handler, the  
16 department may send to each producer or handler a notice by mail, electronic mail or  
17 other effective means explaining how the producer or handler may obtain a ballot. The  
18 department may also make other changes in the procedure under s. ATCP 140.19 ~~may be~~  
19 ~~modified by the department as that are~~ necessary to accommodate relevant differences  
20 between a marketing order referendum and an election of marketing board members.  
21 Supplementary procedures, not inconsistent with this chapter, may be set forth in the  
22 marketing order. A marketing board shall reimburse the department for its costs in



1 conducting an election of marketing board members. Bloc voting is not permitted in the  
2 election of marketing board members.

3 **SECTION 6.** ATCP 141.09 is repealed.

4 **SECTION 7.** Chapter ATCP 147 is repealed.

5 **SECTION 8.** ATCP 148.01(1) is amended to read:

6 ATCP 148.01(1) “Affected producer” means an individual, partnership,  
7 corporation or other business entity in Wisconsin engaged in the production ~~and sale~~ of  
8 ginseng.

9 **SECTION 9.** ATCP 148.06(1) is repealed and recreated to read:

10 ATCP 148.06(1) An affected producer shall pay, for each calendar year, an  
11 annual assessment for each acre of land that the producer has in ginseng production at  
12 any time during that calendar year. The ginseng board shall annually determine and  
13 publish the assessment rate per acre, which may not exceed \$150 per acre. The  
14 assessment for any fraction of an acre shall be proportionate to the assessment per acre.  
15 The ginseng board may require affected producers to report acreage in ginseng  
16 production, and may use aerial photography or other reliable methods to verify reported  
17 acreage.

18 **SECTION 10.** ATCP 148.06(2) and (3) are repealed.

19 **SECTION 11.** ATCP 148.06(5) is repealed and recreated to read:

20 ATCP 148.06(5) Prior to March 1 of each year, the ginseng board shall determine  
21 the assessment amount owed by each affected producer under sub. (1) for the last  
22 completed calendar year, and shall issue to each producer a written notice showing the  
23 assessment amount owed by that producer. The assessment is due and payable when the

1 producer receives the notice from the ginseng board. The ginseng board shall determine  
2 and record assessments in a manner that protects the confidentiality of producer  
3 information.

4 **SECTION 12.** ATCP 148.09 is repealed.

**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 under s. 227.22(2)(intro.), Stats.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By \_\_\_\_\_  
Rodney J. Nilsestuen,  
Secretary