



State of Wisconsin  
Governor Scott Walker

**Department of Agriculture, Trade and Consumer Protection**  
Ben Brancel, Secretary

DATE: January 28, 2013

TO: The Honorable Michael Ellis  
President, Wisconsin State Senate  
Room 130 South, State Capitol  
PO Box 7882  
Madison, WI 53707-7882

The Honorable Robin Vos  
Speaker, Wisconsin State Assembly  
Room 211, West, State Capitol  
PO Box 8952  
Madison, WI 53708-895

FROM: Ben Brancel, Secretary  
Department of Agriculture, Trade and Consumer Protection

SUBJECT: **Discretion in Rule Violation Enforcement Against Small Business; Ch. ATCP 1; (Clearinghouse Rule # 12-043)**

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in s. 227.24(1)(e)1g. DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in s. 227.24(1)(c).

### ***Background***

In compliance with s. 895.59, Stats., which was created by 2003 Wisconsin Act 145, DATCP adopted Ch. ATCP 1, Subch. VII, which identifies the discretion DATCP will use in enforcing rule violations against small businesses. Prior to the creation of s. 895.59, Stats., and the DATCP rules subchapter, DATCP exercised much the same discretion as is provided in the statute and rule when determining if and how to enforce regulation violations committed by small businesses. For example, DATCP has always considered the seriousness of the violation, the risk of harm to the public and the history of compliance when making enforcement determinations.

### ***Plain Language Analysis***

2011 Wisconsin Act 46, created s. 227.04, Stats., which makes changes related to the discretion that an agency must use regarding minor violations by small businesses and requires adoption of rules to implement those changes. Section 227.04, Stats. is closely related to s. 895.59, Stats.

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This rule making will make those changes necessary to comply with the new requirements created by s. 227.04 (2) (b), Stats., and to conform to the requirements of s. 895.59 (2), Stats.

## **Rule Content**

### **General**

This rule does all of the following:

- Creates a definition of “minor violation” for certain violations of department rules by small businesses.
- Provides that the department may exercise the discretion to forego formal sanctions or to seek reduced sanctions when a minor violation of department rules has been committed by a small business.

### ***Data and Analytical Methodologies***

DATCP regulatory staff was consulted to determine current practice related to discretion in enforcement.

### ***Public Hearings***

DATCP held one hearing on this rule on November 13, 2012. There were no appearances and DATCP received neither oral nor written testimony.

### ***Changes from Hearing Draft***

The only changes DATCP made to the hearing draft are minor editorial changes suggested by the Legislative Council Rules Clearinghouse.

### ***Small Business Regulatory Review Board Report***

The Small Business Regulatory Review board did not submit a report on this proposed rule.

### ***Fiscal Impact***

This rule will not have a significant fiscal impact on state government. DATCP enforcement practice has exercised much the same discretion as is directed by s. 227.04 (2) (b), Stats., both before and after adopting the current rule as required by s. 895.59 (2), Stats., when determining if and how to enforce regulation violations committed by small businesses. For example, DATCP

has always considered the seriousness of the violation, the risk of harm to the public and the history of compliance when making enforcement determinations. This rule will have no fiscal effect on local governments. A complete *fiscal estimate* is attached.

### ***Business Impact***

This rule will not increase any costs for businesses. The rule may produce an economic benefit for small businesses that commit minor violations of DATCP regulations when discretion is exercised to forego formal sanctions or to seek reduced sanctions.

### ***Analysis and Supporting Documents to Determine Effect on Small Business***

Neither analysis nor supporting documents are needed to determine that the proposed rule will impose no cost or other obligation on small business.

### ***Environmental Impact***

This rule will not have any environmental impact.

### ***Federal and Surrounding State Programs***

#### **Federal Programs**

Federal agencies exercise similar enforcement discretion.

#### **Surrounding State Programs**

Agencies in the surrounding states exercise similar enforcement discretion.