

Clearinghouse Rule 97-127

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

Docket No. 97-R-7

CERTIFICATION:

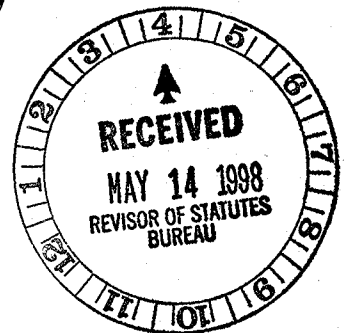
I, Ben Brancel, Secretary, State of Wisconsin, Department of Agriculture, Trade and Consumer Protection, and custodian of the official records of said Department, do hereby certify that the attached rulemaking order, Chapter ATCP 90, Wisconsin Administrative Code, relating to fair packaging and labeling, Chapter 91, Wisconsin Administrative Code, relating to selling commodities by weight, measure or count, and Chapter 92, Wisconsin Administrative Code, relating to weighing and measuring devices was signed and adopted by the Department on May 13, 1998.

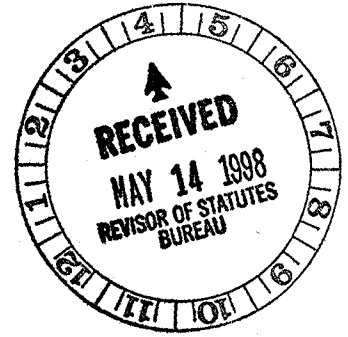
I further certify that said copy has been compared by me with the original on file in the Department and that the same is a true copy thereof, and of the whole of such original.

Ben Brancel

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 14 day of May, 1998.

Ben Brancel, Secretary





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

1 The state of Wisconsin department of agriculture, trade and consumer protection adopts the
2 following order to amend ATCP 90.09(4)(a); to repeal and recreate ATCP 90.09(2), 91(title)
3 and (note), 91.01(11), and 91.02 to 91.05; and to create ATCP 90.08(21) and (note),
4 91.01(12m) and (14), 91.015, 91.041, 91.042, 91.11 and (note) and 92.02(6) and (7);
5 relating to weighing and measuring devices, fair packaging and labeling, and selling
6 commodities by weight, measure or count.

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

Statutory authority: ss. 93.07(1), 97.09(1) and (4), 97.42(4)(j), 98.07(3) and (4),
98.26(1)(b) and 100.20(2), Stats.

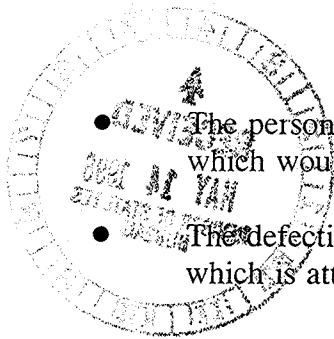
Statutes interpreted: ss. 98.06, 98.07 and 98.26(1)(b), Stats.

The Department of Agriculture, Trade and Consumer Protection ("DATCP") administers state laws related to weights and measures, fair packaging and labeling, and the methods by which commodities are sold. DATCP has adopted rules under chs. ATCP 90-92, Wis. Adm. Code, to interpret these laws. This rule modifies portions of those rules.

Weighing and Measuring Devices

Section 98.26(1)(b), Stats., currently prohibits any person from causing a weight or measure to be incorrect. This rule also prohibits any person from causing a weight or measure to be incorrect. A person who manufactures or distributes a weighing or measuring device violates this prohibition if all of the following apply:

- The person knows or reasonably should know that the weighing or measuring device has a defect that may cause an incorrect weight or measure.



- The person fails to take steps, which that person is reasonably capable of taking, which would prevent the defect from causing incorrect weights or measures.

- The defective weighing or measuring device causes an incorrect weight or measure which is attributable, at least in part, to the defect.

Fair Packaging and Labeling

Overview

Under current DATCP rules, consumer commodities sold in package form must bear declarations of seller identity, product identity and net quantity. The current rules also spell out sampling methods used to determine whether packages contain the full amounts claimed on the package labels.

This rule modifies current rules as follows:

- It establishes fair packaging and labeling standards for liquefied petroleum gas (LP gas) sold in portable refillable containers.
- It modifies current sampling procedures used to determine whether packages contain the full amounts claimed on the package labels.

Liquefied Petroleum Gas

DATCP's current fair packaging and labeling rules do not apply to the sale of LP gas in portable refillable containers (cylinders). This rule establishes fair packaging and labeling rules for LP gas sold in portable refillable containers. Under this rule:

- The tare weight of each container must appear on the outside of the container.
- The net quantity of LP gas in each container must be disclosed on the container label, or on a tag attached to the container.
- A declaration of responsibility (identifying the responsible seller) must be attached to the container or posted at the point of sale.

Enforcement Samples

Current DATCP rules spell out statistical sampling procedures and compliance standards used to determine whether packages contain the full amounts claimed on the package labels. This rule modifies the current standards to conform to current standards specified by the National

Institute of Standards and Technology (NIST) Handbook 133, "Checking the Net Contents of Packaged Goods."

Selling Commodities By Weight, Measure or Count

Overview

Under s. 98.06(1), Stats., liquid commodities must ordinarily be sold by liquid measure and nonliquid commodities must ordinarily be sold by weight. Other methods of sale may be used if they are in general use and provide accurate information as to the quantity of commodity sold. However, DATCP rules regulate methods of sale to prevent unfair competition and deception of consumers.

Current DATCP rules under ch. ATCP 91, Wis. Adm. Code, spell out uniform methods of sale for certain commodities. This rule modifies current rules as follows:

- It incorporates the general requirements of s. 98.06, Stats.
- It clarifies current standards related to the sale of bulk commodities by weight.
- It gives retailers greater flexibility to sell "ready-to-eat" foods by weight, measure or count, at the retailer's option.
- It defines "weight" to exclude packaging materials and other extraneous materials.
- It modifies current standards related to fresh fruits and vegetables, meat and poultry, seafood, cheese and pizza.
- It incorporates, without change, current statutory standards related to sales of petroleum products and motor fuel.
- It makes organizational and drafting changes to streamline and clarify the current rule.

Bulk Commodities Sold by Weight

This rule clarifies current rules related to the sale of bulk commodities by weight. Under this rule:

- Whenever a bulk or unpackaged commodity is offered for sale by weight, the price for that commodity must be declared per single whole unit of weight. The price may not be declared per fractional or multiple unit of weight.
- If a retailer displays more than one type of bulk or unpackaged commodity for sale by weight in the same retail display, the retailer must declare all of the prices of the displayed commodities per the same whole unit of weight.
- No person may sell a bulk or unpackaged commodity by weight at retail unless one of the following applies:
 - * The commodity is weighed at the time of sale.
 - * The weights of individual commodity units are accurately premarked on those units.
 - * A placard stating the guaranteed minimum individual weight of the individual commodity units displayed for sale is conspicuously posted at the display location.
- The weight of a bulk or unpackaged commodity sold by weight may not include the weight of the containers or wrappers, if any, in which those commodities are sold.
- Whenever a bulk commodity sold by weight is delivered by vehicle to an individual purchaser, the bulk delivery must comply with s. 98.22, Stats. Under s. 98.22, the seller must provide the purchaser with a delivery ticket that shows the seller's name and address, the name and address of the purchaser, the net weight of the delivery in pounds, and the gross and tare weights of the delivery if gross and tare weights are used in determining the net weight.

Fresh Fruits and Vegetables

Under current rules, fresh fruits and vegetables must be sold by weight unless exemptions authorize other methods of sale. The current rules exempt 29 fruits or vegetables that may be sold by weight or count, 15 that may be sold by weight or "bunch," 11 that may be sold by weight or specified dry measure (e.g., berries sold by 1/2 pint, pint or quart), and 2 that may be sold by weight, count or specified dry measure.

This rule modifies the current exemptions, adding or deleting certain fruits or vegetables in each exemption category. Under this rule, 33 fruits or vegetables may be sold by weight or count, 15 may be sold by weight or "bunch," 9 may be sold by weight or specified dry measure, and 4 may be sold by weight, count or specified dry measure.

Meat, Poultry and Cheese

Under current rules, meat, poultry, cheese, and foods made from meat, poultry or cheese must ordinarily be sold by weight. This rule maintains the current requirement, but creates an exemption for certain "ready to eat" foods (see below). This rule also provides that the declared weight of cheese coated with wax may not include the weight of the wax.

Seafood

Under current rules, seafood and seafood products must ordinarily be sold by weight, except that current rules authorize different methods of sale for mollusks, live fish and live shellfish. This rule maintains the current requirements, with minor modifications. This rule also creates an exemption for certain "ready to eat" foods (see below).

Pizza

This rule clarifies that pizza must be sold by weight, except that "made to order" pizzas may be sold by weight or count.

Ready-to-Eat Foods

Supermarkets and convenience stores are currently offering more restaurant-style or "ready-to-eat" foods for consumption on or off the premises. Current rules unnecessarily restrict the methods by which many of these foods may be sold (e.g., by requiring weight declarations on restaurant-style foods which the consumer does not expect to purchase by weight).

In recognition of current market trends, this rule gives retailers greater flexibility to sell certain "ready-to-eat" foods by weight, measure or count. Under this rule, for example, a grocery store could sell individual "ready to eat" sandwiches or salads without having to weigh them. The grocery store could sell these items by count -- e.g., \$2.00 per sandwich, or \$1.50 per individual salad. This treatment of "ready-to-eat" foods is consistent with allowed methods of sale in restaurants.

Under this rule, "ready-to-eat" food means food which is sold for immediate consumption without further washing, heating, thawing or other preparation. "Ready-to-eat food" does not include any of the following:

- Raw fruits or vegetables, except when sold as part of a ready-to-eat meal.

- Sliced meat or poultry, or other sliced luncheon products, except when sold as part of a ready-to-eat meal.
- Cheese, except when sold as part of a ready-to-eat meal.
- Candy or snack foods, except when sold as part of a ready-to-eat meal.
- Beverages in hermetically sealed containers.

Under this rule, the following foods may be sold by weight, measure or count (at the seller's option):

- Foods sold for immediate consumption on the premises where sold.
- Ready-to-eat foods sold from bulk.
- Ready-to-eat foods in single-serving packages that are sold as part of a meal.

This rule prohibits any person from misrepresenting the weight, measure or count of any ready-to-eat food. Weight declarations for cooked ready-to-eat foods are considered declarations of cooked weight unless they are identified as declarations of precooked weight.

1 **SECTION 1.** ATCP 90.08(21) and (note) are created to read:

2 ATCP 90.08(21) LIQUEFIED PETROLEUM GAS IN PORTABLE REFILLABLE
 3 CONTAINERS. No person may sell or exchange at retail, or offer for sale or exchange at
 4 retail, liquefied petroleum gas in a portable refillable container unless all of the following
 5 apply:

6 (a) The tare weight of the container is clearly and conspicuously disclosed on the
 7 container, as required under s. 98.245(2), Stats.

8 (b) The net quantity of liquefied petroleum gas in the container is clearly and
 9 conspicuously disclosed on the container, or on a tag attached to the container. The format
 10 of the declaration shall comply with s. ATCP 90.04.

1 (c) A declaration of responsibility is attached to the container, or conspicuously
2 posted at the location where the liquefied petroleum gas is offered or displayed for sale or
3 exchange. The declaration shall comply with s. ATCP 90.03, except as provided in this
4 paragraph.

5 NOTE: See also s. 98.245, Stats., and s. ATCP 92.05.

6 **SECTION 2.** ATCP 90.09(2) is repealed and recreated to read:

7 ATCP 90.09(2) ENFORCEMENT SAMPLE AND INSPECTION LOT. (a) The
8 department or a municipal sealer may determine the net contents of packaged commodities in
9 an inspection lot based on an enforcement sample collected from that inspection lot. The
10 enforcement sample shall be collected, tested and analyzed according to applicable provisions
11 of the national institute of standards and technology handbook 133, "Checking the Net
12 Contents of Packaged Goods." Unless otherwise specified by handbook 133, the inspection
13 lot shall be determined according to par. (b).

14 (b) The department or municipal sealer shall determine the scope of an inspection lot
15 before collecting an enforcement sample from that lot under par. (a). An inspection lot may
16 consist of any group of identically labeled packages found at the same manufacturing,
17 wholesale or retail premises. An inspection lot may include packages from different
18 manufacturing or production lots, and from different wholesale shipments or deliveries.

19 (c) For purposes of par. (b), packages are identically labeled if they are of the same
20 size and if they bear the same declaration of product identity under s. ATCP 90.02, the same
21 declaration of responsibility under s. ATCP 90.03, and the same declaration of net quantity

1 under s. ATCP 90.04, regardless of any other differences in label content or format.

2 NOTE: A copy of the national institute of standards and technology handbook 133,
3 "Checking the Net Contents of Packaged Goods," is on file with the department, the
4 secretary of state, and the revisor of statutes.

5

6 SECTION 3. ATCP 90.09(4)(a) is amended to read:

7 ATCP 90.09(4)(a) If, in any enforcement sample under sub. (2)(a), the number of
8 unreasonable shortages in individual packages exceeds the number specified ~~in table 2~~ for an
9 enforcement sample of that size in the national institute of standards and technology
10 handbook 133, the department or a municipal sealer shall issue an order prohibiting the sale
11 of the entire inspection lot from which that enforcement sample is collected.

12 SECTION 4. Ch. ATCP 91(title) and (note) are repealed and recreated to read:

13

CHAPTER ATCP 91

14

SELLING COMMODITIES BY WEIGHT, MEASURE OR COUNT

15 NOTE: This chapter is adopted under authority of ss. 93.07(1), 98.07(3) and (4),
16 Stats. Violations are subject to the penalties and remedy provided under s. 98.26, Stats. See
17 also chs. ATCP 90 (fair packaging and labeling) and ATCP 92 (weighing and measuring
18 devices).

19

20 SECTION 5. ATCP 91.01(11) is repealed and recreated to read:

21 ATCP 91.01(11) "Ready-to-eat food" means food which is sold for immediate
22 consumption without further washing, heating, thawing or other preparation. "Ready-to-eat
23 food" does not include any of the following:

24 (a) Raw fruits or vegetables, except when sold as part of a ready-to-eat meal.

25 (b) Sliced meat or poultry, or other sliced luncheon products, except when sold as
26 part of a ready-to-eat meal.

1 (c) Cheese, except when sold as part of a ready-to-eat meal.

2 (d) Candy or snack foods, except when sold as part of a ready-to-eat meal.

3 (e) Beverages in hermetically sealed containers.

4 **SECTION 6.** ATCP 91.01(12m) and (14) are created to read:

5 ATCP 91.01(12m) "Single serving" means an amount of food that is reasonably
6 designed to be consumed by one individual on one eating occasion.

7 (14) "Weight" means the weight of a commodity excluding any materials, substances
8 or items that are not part of the commodity.

9 **SECTION 7.** ATCP 91.015 is created to read:

10 **ATCP 91.015 METHODS OF SALE; GENERAL.** (1) Except as provided in sub.
11 (2) or (3), liquid commodities shall be sold by liquid measure and nonliquid commodities
12 shall be sold by weight.

13 (2) Liquid commodities may be sold by weight, and nonliquid commodities may be
14 sold by count or measure, if those methods of sale are in general use and give meaningful
15 and accurate information as to the quantity of the commodity sold.

16 (3) This section does not apply to either of the following:

17 (a) Commodities for which methods of sale are more specifically prescribed by this
18 chapter, or by other state or federal law.

19 (b) Commodities sold for immediate consumption on the premises where sold as
20 provided in ATCP 91.05.

21 NOTE: See s. 98.06, Stats.

22

1 VEGETABLES. (a) Except as provided in pars. (b) to (g), fresh fruits and vegetables shall
2 be sold at retail by weight.

3 (b) The following fresh fruits and vegetables may be sold at retail by weight or by
4 count: artichokes, avocados, cantaloupes, cauliflower, celery, corn on the cob, coconuts,
5 cucumbers, eggplant, garlic, grapefruit, head lettuce, kiwanos, kiwi fruit, lemons, limes,
6 loquats, mangoes, melons (whole), nectarines, oranges, papayas, peppers, persimmons,
7 pineapples, pomegranates, prickly pear, pumpkins, quince, squash, star fruit, tangerines and
8 ugli fruit.

9 (c) The following fresh vegetables may be sold at retail by weight or bunch: chard,
10 dill, endive, escarole, green or spring onions, greens, kale, kohlrabi, leaf lettuce, leeks,
11 parsley, root vegetables with green tops attached, spinach, thyme and watercress.

12 (d) The following fruits may be sold at retail by weight or by dry measure units of
13 one quart, one pint, or one-half pint: berries, cherries, cherry tomatoes, chokecherries,
14 currants, concord grapes and plum tomatoes.

15 NOTE: See s. 98.06(2), Stats.

16

17 (e) Plums and tomatoes may be sold by weight or by dry measure in units of not less
18 than one peck.

19 (f) Apples, cucumbers, peaches and pears may be sold by weight, by count or by dry
20 measure in units of not less than one peck.

21 (g) Mixed whole fresh fruits or vegetables gift wrapped in baskets or other reusable
22 containers may be sold at retail by weight or by count of the individual fruits or vegetables in

1 the container.

2 NOTE: Pre-packaged fresh fruits and vegetables, other than unprocessed fruits or
3 vegetables sold in transparent wrappings or containers, must comply with applicable
4 packaging and labeling requirements under ch. ATCP 90.

5
6 (2) PICKLED FRUITS AND VEGETABLES. (a) Except as provided in par. (b),
7 pickled fruits and vegetables shall be sold by drained weight.

8 (b) Pickled cucumbers and relishes shall be sold by fluid measure, except that 1 or 2
9 whole pickled cucumbers in transparent wrapping and pickled cucumbers sold from bulk
10 containers may be sold by count.

11 **ATCP 91.04 MEAT, POULTRY AND CHEESE.** Meat, poultry, cheese, and food
12 primarily composed of meat, poultry or cheese shall be sold by weight, except as otherwise
13 provided by this chapter or other state or federal law. The declared weight of cheese coated
14 with wax may not include the weight of the wax.

15 **SECTION 9.** ATCP 91.04(note) is created to read:

16 NOTE: See also ch. ATCP 109 related to freezer meat and foods service plans and
17 the sale of "wholesale cuts" to consumers.

18
19 **SECTION 10.** ATCP 91.041 and 91.042 are created to read:

20 **ATCP 91.041 SEAFOOD.** (1) Seafood and food primarily composed of seafood
21 shall be sold by weight, except as provided by this chapter or other state or federal law.

22 (2) Mollusks in the shell may be sold by weight, count or dry measure bushel.

23 (3) Mollusks removed from the shell shall be sold by weight, except as provided in
24 sub. (4).

25 (4) Shelled fresh mollusks packed in liquid shall be sold by drained weight or fluid

1 volume. The free liquid may not exceed 15 percent by weight of the package contents.

2 (5) Fresh and frozen processed mollusks on the half shell shall be sold by count or
3 by weight, excluding the weight of the shell.

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

6 (7) Live fish and live shellfish may be sold by weight or by count.

7 **ATCP 91.042 PIZZA.** (1) Pizza shall be sold by weight, except as provided under
8 sub. (2).

9 (2) Pizza made to order, other than dessert pizza, may be sold by weight or by
10 count.

11 **SECTION 11.** ATCP 91.05 is repealed and recreated to read:

12 **ATCP 91.05 READY-TO-EAT FOODS.** (1) The following foods may be sold by
13 weight, measure or count:

14 (a) Foods sold for immediate consumption on the premises where sold.

15 (b) Ready-to-eat foods sold from bulk.

16 (c) Ready-to-eat foods in single-serving packages that are sold as part of a meal.

17 (2) No person may misrepresent the weight, measure or count of any ready-to-eat
18 food under sub. (1). Weight declarations for cooked ready-to-eat foods shall be declarations
19 of cooked weight unless they are identified as declarations of precooked weight.

20 **SECTION 12.** ATCP 91.11 and (note) are created to read:

21 **ATCP 91.11 PETROLEUM PRODUCTS AND MOTOR FUEL.** A person

1 advertising, offering for sale or selling petroleum products or motor fuel shall comply with
2 applicable requirements under ss. 98.246 and 100.18(6) and (8), Stats.

3 NOTE: See also s. ATCP 92.04.

4 SECTION 13. ATCP 92.02(6) and (7) are created to read:

5 ATCP 92.02(6) No person may cause a weight or measure to be incorrect.

6 (7) A person who manufactures or distributes a commercial weighing or measuring
7 device violates sub. (6) if all of the following apply:

8 (a) The person knows or reasonably should know that the weighing or measuring
9 device has a latent or patent defect that may cause an incorrect weight or measure.

10 (b) The person fails to take steps, which that person is reasonably capable of
11 taking, which would prevent the defect from causing incorrect weights or measures.

12 (c) The defective weighing or measuring device causes an incorrect weight or
13 measure which is attributable, at least in part, to the defect in the device.

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15 EFFECTIVE DATE. The rules contained in this order shall take effect on July 1,
16 1998.

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18 Dated this 14 day of May, 1998.

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STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Ben Brancel
Ben Brancel, Secretary