

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

- 1 The Wisconsin Department of Agriculture, Trade and Consumer Protection hereby proposes the
- 2 following rule *to repeal* ATCP 83.02 (7) (d) 3. and *to amend* ATCP 83.02 (7) (a), *relating to*
- 3 dairy product advertising and labeling.

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

Under Wis. Admin. Code ch. ATCP 83 (Dairy Product Advertising and Labeling), the Wisconsin Department of Agriculture, Trade and Consumer Protection (Department) spells out requirements for labeling and advertising dairy products as being made from milk produced without the use of synthetic bovine somatotropin (also known as recombinant bovine somatotropin, rBST, synthetic bovine growth hormone, recombinant bovine growth hormone, or rBGH). The labeling requirements are to be based upon affidavits from milk producers stating that the milk producers do not use synthetic bovine growth hormone for the production of milk. Affidavits must be signed before a notary and renewed every year. The objective of the proposed rule is to eliminate the annual renewal requirement for a milk producer's affidavit.

Statutes Interpreted

Statute Interpreted: Wis. Stat. §§ 97.03, 97.09 (4), 97.10 (1), 97.25 (3), 100.18 (1), 100.183 (1), and 100.20 (2).

Statutory Authority

Statutory Authority: Wis. Stat. §§ 93.07 (1), 97.09 (4), and 97.25 (3).

Explanation of Statutory Authority

The sale of misbranded food, as defined in Wis. Stat. § 97.03, is prohibited in Wis. Stat. § 97.10 (1). Fraudulent representation of products for sale is generally prohibited in Wis. Stat. § 100.18 (1) and misrepresentation of food for sale is prohibited in Wis. Stat. § 100.183 (1). The Department has authority in Wis. Stat. § 100.20 (2) to issue general orders to prevent unfair trade practices. The Department has stated authority in Wis. Stat. § 97.09 (4) to establish and enforce standards, governing the production, processing, packaging, labeling, transportation, storage, handling, display, sale, including retail sale, and distribution of foods, needed to protect the public from the sale of adulterated or misbranded foods. The Department also has specific authority under Wis.

Stat. § 97.25 (3) to promulgate rules that authorize operators of certain licensed food businesses in Wisconsin to label dairy products as “Farmer-certified rBGH free,” or an equivalent statement that is not false or misleading. Additionally, the Department has general authority, under Wis. Stat. § 93.07 (1), to adopt rules to implement programs under its jurisdiction.

Related Statutes and Rules

- Wis. Stat. §. 97.03 (Standards; misbranding)
- Wis. Stat. §. 97.25 (Use of synthetic bovine growth hormone; labeling of dairy products)
- Wis. Stat. §. 100.18 (Fraudulent representations)
- Wis. Stat. §. 100.183 (Fraud, advertising foods)
- Wis. Stat. §. 100.20 (Methods of competition and trade practices)
- Wis. Admin. Code ch. ATCP 65 (Milk and Milk Products)

Plain Language Analysis

In revising Wis. Admin. Code ch. ATCP 83 (Dairy Product Advertising and Labeling), the Department seeks to eliminate the redundant effort necessary for milk producers to comply with the requirement to provide a yearly signed and notarized affidavit indicating non-use of rBST.

The Department held one public hearing on this rule on December 17, 2019 at the Department of Agriculture, Trade and Consumer Protection – Hall of Fame Room 172 in Madison, WI.

Public hearing notices were posted at the State Legislature’s Active Rules Clearinghouse website and in the Administrative Register. Notices were e-mailed to all Department licensed dairy plant facilities as well as affected industry groups. A total of ten persons/organizations attended the hearing and/or submitted comments. Attendees included representatives from Foremost Farms, the Wisconsin Dairy Products Association, and the Wisconsin Independent Businesses. Comments were also received from industry groups including the Wisconsin Cheese Makers Association, Family Dairies USA, and the Cooperative Network.

Feedback received from industry groups and organization representatives indicated strong support for the proposed rule change. Industry representatives indicated that the proposed change would eliminate an undue burden for the dairy industry, citing significant cost and time savings. Commenters also stated that the proposed rule would better align Wisconsin with the regulations found in surrounding states.

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

The Food and Drug Administration (FDA) issued a guidance statement on rBST-free label claim wording, and initially approved administration of rBST to cows producing milk for human consumption. Otherwise, FDA has not promulgated any regulation specific to rBST-free label claims.

Comparison with Rules in Adjacent States

The states of Michigan, Iowa, Minnesota, and Illinois do not mandate milk producers in rule to comply with rBST-free labeling and affidavit requirements.

Summary of Factual Data and Analytical Methodologies

The Department surveyed various industry groups and dairy plants asking for their input on a proposed change removing the annual affidavit renewal requirement.

Analysis and Supporting Documents used to Determine Effect on Small Business

The survey results indicated strong industry support for the proposed change. Industry representatives also appeared before the Department Board at its December 2017 meeting asking for the revision, citing the unnecessary cost and effort in meeting the annual affidavit renewal requirement, particularly when existing market pressures have largely precluded the use of rBST.

Effect on Small Business

The Department expects the proposed rule to have a positive impact on dairy businesses because it will reduce the annual regulatory burden while maintaining the same level of protection against mislabeled dairy products.

Changes from the Hearing Draft

The Legislative Council Rules Clearinghouse reviewed the proposed rule and did not identify any technical corrections to address. No changes were made based on feedback from the public hearings. Comments sent to the Department are discussed above under “Plain Language Analysis” section.

Next Steps

If the Board approves this final draft rule, the Department will submit the final draft rule to the Governor for written approval. If the Governor approves the final rule, the Department will then submit the rule to the Legislature for legislative committee review. If the Legislature has no objection to the rule, the Department Secretary will sign the final rulemaking order and transmit it for publication. The rule will take effect on the first day of the month following publication.

4 **SECTION 1.** ATCP 83.02 (7) (a) is amended to read:

5 **ATCP 83.02 (7) (a)** A milk producer affidavit under sub. (5) (c) shall be a written statement,
6 signed by the milk producer, which certifies to the person receiving the affidavit that the milk

1 producer does not use synthetic bovine somatotropin in the production of milk shipped to that
2 person. All affidavits ~~in effect after January 1, 1996~~ shall be sworn and notarized.

3 **SECTION 2.** ATCP 83.02 (7) (d) 3. is repealed.

Dated this _____ day of _____, 2020.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Randy J. Romanski, Interim, Secretary