



State of Wisconsin
Governor Scott Walker

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

DATE: December 4, 2012

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Ben Brancel, Secretary *Ben Brancel*
David Meany, Chief Legal Counsel *DM*

SUBJECT: **Discretion in Rule Violation Enforcement Against Small Business; Amending Ch. ATCP 1; Final Draft Rule**

TO BE PRESENTED BY: David Meany

REQUESTED ACTION:

At the December 18, 2012 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve a final draft rule (copy attached) to amend ch. ATCP 1 related to discretion in rule violation enforcement against small business.

Plain Language Analysis

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 of 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 considers the seriousness of the violation, the risk of harm to the public and the history of compliance when making enforcement determinations.

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. 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:

Agriculture generates \$59 billion for Wisconsin

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An equal opportunity employer

- 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.

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

DATCP made minor editorial changes suggested by the Legislative Council Rules Clearinghouse.

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.

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.

Next Steps

If the Board approves a final draft rule, DATCP will transmit that final draft rule to the Governor for his written approval and then to the Legislature for review by appropriate legislative committees. If the Legislature takes no action to stop the rule, the Secretary will sign the final rulemaking order and transmit it for publication.

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

- 1 The Wisconsin department of agriculture, trade and consumer protection proposes the following
2 rule *to repeal* s. ATCP 1.42 (2) (a), (e), (f), (g), (h) and (L); *to repeal and recreate* ATCP 1.41
3 and *to create* ATCP 1.42 (1) (c); relating to discretion in enforcement of rule violations by small
4 businesses and affecting small business.

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

This rule complies with the requirements of s. 227.04 (2) (b), Stats., created by 2011 Wisconsin Act 46, which requires each state agency to “establish by rule, reduced fines and alternative enforcement mechanisms for minor violations of administrative rules made by small businesses”, and which requires that the rule include a definition of “minor violation”.

Statutes Interpreted

Statutes Interpreted: ss. 227.04 (2) (b) and 895.59, Stats.

Statutory Authority

Statutory Authority: ss. 227.04 (2) (b) and 895.59 (2), Stats.

Explanation of Statutory Authority

Section 227.04 (2) (b), Stats., provides that each state agency shall “establish by rule, reduced fines and alternative enforcement mechanisms for minor violations of administrative rules made by small businesses”, and requires that the rule include a definition of “minor violation.” Section 895.59 (2), Stats., provides that “each state agency shall promulgate a rule that requires the agency to disclose in advance the discretion that the agency will follow in the enforcement of rules and guidelines against a small business.”

Related Statutes and Rules

In compliance with s. 895.59, Stats., which was created by 2003 Wisconsin Act 145, DATCP adopted ATCP Ch. 1, Subch. VII which identifies the discretion DATCP will use in enforcing rule violations against small businesses. Section 227.04, Stats. is closely related to s. 895.59, Stats. This rule making will make those changes necessary to comply with the new requirements created by s. 227.04 (2) (b), Stats., and will conform to the requirements of s. 895.59 (2), Stats.

Plain Language Analysis

Background

DATCP adopted Ch. ATCP 1, Subch. VII, in November, 2006, to comply with the requirements of s. 895.59, Stats. 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.

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.

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. A complete *business impact analysis* is attached.

Economic Impact

This rule will not have an economic impact upon the state, any business sector, citizens, utility rate payers or any geographical area in the state. A complete *economic impact analysis* is attached

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.

Data and Analytical Methodologies

Each DATCP division contributed to the analysis of the effect of the proposed rule.

DATCP Contact

Questions and comments related to this rule may be directed to:

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Madison, WI 53708-8911
Telephone (608) 224-5006
E-Mail: dennis.fay@wisconsin.gov

DATCP held one public hearing on this rule and accepted written and oral testimony.

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- 1 **SECTION 1.** ATCP 1.41 is repealed and recreated to read:
 - 2 ATCP 1.41 **Definitions.** In this subchapter:

1 (1) "Minor violation" means a violation of a department rule by a small business that is
2 not a serious violation because the violation does not cause serious harm to the public and either
3 the violation is not willful, the violation is not likely to be repeated, there is a history of
4 compliance by the violator or the small business has voluntarily disclosed the violation.

5 (2) "Small business" has the meaning given in s. 895.59 (1) (b), Stats.

6 **SECTION 2.** ATCP 1.42 (1) (c) is created to read:

7 ATCP 1.42 (1) (c) The rule violation committed by the small business is a minor
8 violation.

9 **SECTION 3.** ATCP 1.42 (2) (a), (e), (f), (g), (h) and (L) are repealed.

10 **SECTION 4. EFFECTIVE DATE:** This rule takes effect on the first day of the month
11 following publication in the Wisconsin administrative register, as provided in s. 227.22 (2)
12 (intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection

Business Impact Analysis¹

Rule Subject: Discretion in enforcement of rule violations by small businesses
Adm. Code Reference: Ch. ATCP 1
Rules Clearinghouse #: 12-043
DATCP Docket #: 12-R-03

Rule Summary

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.

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.

Accommodation for Small Business

The purpose of this rule is to accommodate the particular needs of small business by authorizing DATCP to forego formal sanctions or to seek reduced sanctions when a minor violation of department rules has been committed by a small business.

Conclusion

This rule will generally benefit “small businesses.” This rule will not have a significant adverse effect on “small business,” and is not subject to the delayed “small business” effective date provided in s. 227.22(2) (e), Stats.

¹ This analysis includes, but is not limited to, a small business analysis (“regulatory flexibility analysis”) under ss. 227.114 and 227.19(3) (e), Stats.

Dated this 4th day of December, 2012.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By David V. Meany
David V. Meany, Chief Legal Counsel

**ADMINISTRATIVE RULES
FISCAL ESTIMATE
AND ECONOMIC IMPACT ANALYSIS**

Type of Estimate and Analysis

Original Updated Corrected

Administrative Rule Chapter, Title and Number

Ch. ATCP 1, Subch. VII

Subject

Discretion in enforcement of rule violations by small businesses

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Chapter 20 , Stats. Appropriations Affected

None

Fiscal Effect of Implementing the Rule

No Fiscal Effect
 Indeterminate

Increase Existing Revenues
 Decrease Existing Revenues

Increase Costs
 Could Absorb Within Agency's Budget
 Decrease Costs

The Rule Will Impact the Following (Check All That Apply)

State's Economy
 Local Government Units

Specific Businesses/Sectors
 Public Utility Rate Payers

Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes No

Policy Problem Addressed by the Rule

This rule complies with the requirements of s. 227.04 (2) (b) created by 2011 Wis. Act 46, which requires each state agency to "establish by rule, reduced fines and alternative enforcement mechanisms for minor violations of administrative rules made by small businesses", and which requires that the rule include a definition of "minor violation".

Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

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.

Local Governments

This rule will not impact local governments. Local governments will not have any implementation or compliance costs.

Utility Rate Payers

The rule will have no impact on utility rate payers.

General Public

This rule will have no impact on the general public.

Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

Benefits

This rule may benefit small businesses that commit minor violations of DATCP rules.

Alternatives

Adoption of this rule is required by the provisions of s. 227.04 (2) (b).

Long Range Implications of Implementing the Rule

There are no long range implications.

Compare With Approaches Being Used by Federal Government

Federal agencies exercise similar enforcement discretion.

Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

Agencies in surrounding states exercise similar enforcement discretion.

Comments Received in Response to Web Posting and DATCP Response

No comments were received in response either to the posting on the DATCP external website or the statewide administrative rules website.