



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Bradley M. Pfaff, Secretary

DATE: October 24, 2019

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Brad Pfaff, Secretary *Bradley M. Pfaff*
Steve Ingham, Division of Food and Recreational Safety Administrator *Steve Ingham*

SUBJECT: ATCP 83, Dairy Product Advertising and Labeling

PRESENTED BY: Steve Ingham

REQUESTED ACTION:

At the November 7, 2019, Board meeting, the Department will request approval of a Hearing Draft for revision of ch. ATCP 83 (Dairy Product Advertising and Labeling). This chapter of rules 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). Due to industry concerns about unnecessary redundant effort, the Department seeks to delete the requirement for yearly renewal of producer notarized affidavits of rBST non-use.

SUMMARY:

Wisconsin statute s. 97.25 charges the Department with promulgating 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. The labeling statements 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. The Department met this mandate by creating Wisconsin Administrative Code ch. ATCP 83.

This rule chapter defines terms including "bovine somatotropin" or "BST", "synthetic bovine somatotropin" or "rBST", and "rBST-free claim". The rule specifies limitations on advertising and label rBST-free claims for dairy products. When such a claim is made, by rule it must be accompanied by a clarifying statement indicating that no significant difference has been shown between milk derived from cows treated with synthetic bovine somatotropin and milk derived from untreated cows, and formatting requirements must be met. Any rBST-free claim made in labeling and advertising must ultimately be substantiated at the dairy plant by milk producer affidavits indicating that each milk producer does not administer synthetic bovine somatotropin to their herd. In the current rule, affidavits must be signed before a notary and renewed every year.

Most major dairy states do not have statutory or rule requirements analogous to ch. ATCP 83, with the notable exception of Vermont. Vermont has most of the same requirements but does not require renewal of the milk

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producer affidavit. The US Food and Drug Administration last issued guidance on labeling claims related to synthetic bovine somatotropin in 1994.

Industry representatives appeared before the Board at its December, 2017 meeting and asked for revision of ATCP 83 to eliminate the requirement for annual renewal of the milk producer affidavit, citing the unnecessary cost and effort, and existing market pressures against use of rBST.

On July 29, 2019, the Governor approved a Scope Statement allowing consideration of revising ATCP 83 to eliminate the annual renewal requirement for the milk producer affidavit indicating that the producer does not treat their milking cows with rBST. At its September 19, 2019 meeting, the Board approved the Scope Statement.

The Hearing Draft removes a starting date for the affidavit signing and notarizing requirement that was made obsolete in 1997 by the requirement for annual renewal, and also deletes the annual renewal requirement.

**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, 97.10 (1), 97.09 (4), 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. s. 97.03 (Standards; misbranding)
- Wis. Stat. s. 97.25 (Use of synthetic bovine growth hormone; labeling of dairy products)
- Wis. Stat. s. 100.18 (Fraudulent representations)
- Wis. Stat. s. 100.183 (Fraud, advertising foods)
- Wis. Stat. s. 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.

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 businesses because it will reduce the annual regulatory burden while maintaining the same level of protection against mislabeled dairy products.

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

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

Dated this 24 day of October, 2019.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Bradley M. Pfaff
Bradley M. Pfaff, Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection

Initial Regulatory Flexibility Analysis

Rule Subject: Dairy Product Advertising and Labeling
Adm. Code Reference: ATCP 83
Rules Clearinghouse #: Not yet assigned
DATCP Docket #: 19-R-01

Rule Summary

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 somatotropin for the production of milk. Affidavits must be renewed and signed before a notary every year. The objective of the proposed rule is to eliminate the annual renewal requirement for a milk producer’s affidavit.

Small Business Affected

The Department expects the proposed rule to have a positive impact on businesses in general because it will reduce the annual regulatory burden while maintaining the same level of protection against mislabeled dairy products. Dairy plant field representatives report spending a significant amount of time collecting affidavit renewals. In some cases, milk producers must take time away from their work to update the affidavit and have it notarized. The time costs will be dramatically reduced by the proposed rule change.

Recordkeeping requirements

The recordkeeping burden on dairy plants will be dramatically reduced by the proposed rule. The recordkeeping requirements for the Department will also be reduced as field sanitarians will no longer be required to annually verify the milk producer’s affidavit.

Accommodation for Small Business

This rule does not make special exceptions for small businesses because it applies to dairy plants and milk producers of all sizes.

Conclusion

This rule will have little if any effect on “small business” and is not subject to the delayed “small business” effective date provided in Wis. Stat. § 227.22(2)(e).

DATCP will, to the maximum extent feasible, seek voluntary compliance with this rule.

Dated this 24th day of October, 2019.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Steven C. Ingham
Steven C. Ingham, Ph.D., Administrator
Division of Food and Recreational Safety

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

<p>1. Type of Estimate and Analysis <input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected</p>	<p>2. Date October 9, 2019</p>
<p>3. Administrative Rule Chapter, Title and Number (and Clearinghouse Number if applicable) Wis. Admin. Code ch. ATCP 83, Dairy Product Advertising and Labeling</p>	
<p>4. Subject Removing the annual renewal and notarization requirement for a milk producer rBST-free affidavit.</p>	
<p>5. Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S</p>	<p>6. Chapter 20, Stats. Appropriations Affected</p>
<p>7. Fiscal Effect of Implementing the Rule <input checked="" type="checkbox"/> No Fiscal Effect <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Increase Costs <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Indeterminate <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Could Absorb Within Agency's Budget</p>	
<p>8. The Rule Will Impact the Following (Check All That Apply) <input type="checkbox"/> State's Economy <input checked="" type="checkbox"/> Specific Businesses/Sectors <input type="checkbox"/> Local Government Units <input type="checkbox"/> Public Utility Rate Payers <input type="checkbox"/> Small Businesses (if checked, complete Attachment A)</p>	
<p>9. Estimate of Implementation and Compliance to Businesses, Local Governmental Units and Individuals, per s. 227.137(3)(b)(1). \$0</p>	
<p>10. Would Implementation and Compliance Costs Businesses, Local Governmental Units and Individuals Be \$10 Million or more Over Any 2-year Period, per s. 227.137(3)(b)(2)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>	
<p>11. Policy Problem Addressed by the Rule The policy problem addressed by the proposed rule revision is the redundant effort and cost incurred by dairy plants and milk producers to renew milk producer affidavits for not administering recombinant bovine somatotropin (rBST) to milking cattle.</p>	
<p>12. Summary of the Businesses, Business Sectors, Associations Representing Business, Local Governmental Units, and Individuals that may be Affected by the Proposed Rule that were Contacted for Comments. Various industry groups and dairy plants were surveyed asking for their opinion on the desirability of the proposed removal of the annual milk producer affidavit renewal requirement. The survey results indicated strong industry support for the proposed rule change.</p>	
<p>13. Identify the Local Governmental Units that Participated in the Development of this EIA. The proposed rule does not affect local governmental units; no local governmental units were asked to participate.</p>	
<p>14. 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) The rule will have a direct positive impact on all Wisconsin dairy plants making rBST-free claims and the Wisconsin milk producers supplying milk to these dairy plants. Dairy plant field representatives report spending a significant amount of time collecting affidavit renewals. In some cases, milk producers must take time away from their work to update the affidavit and have it notarized. These time costs will be dramatically reduced by the proposed rule change.</p>	
<p>15. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule The Department expects the proposed rule revision to have a positive impact on businesses because it will reduce the annual regulatory burden while maintaining the same level of protection against mislabeled dairy products. The alternative to implementing the proposed rule is to maintain the requirement.</p>	
<p>16. Long Range Implications of Implementing the Rule Eliminating the annual renewal requirement removes an unnecessary regulatory burden on Wisconsin dairy plants and milk producers, thereby allowing them to focus on other issues.</p>	

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

17. Compare With Approaches Being Used by Federal Government

The Food and Drug Administration (FDA) issued a guidance document 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.

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

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

19. Contact Name

Caitlin Jeidy, Program & Policy Analyst - Advanced, Division of Food and Recreational Safety

20. Contact Phone Number

(608) 224-4696

This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
 - Less Stringent Schedules or Deadlines for Compliance or Reporting
 - Consolidation or Simplification of Reporting Requirements
 - Establishment of performance standards in lieu of Design or Operational Standards
 - Exemption of Small Businesses from some or all requirements
 - Other, describe:
-

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

5. Describe the Rule's Enforcement Provisions

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes No
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State of Wisconsin
Department of Agriculture, Trade and Consumer Protection

NOTICE OF HEARING

The Wisconsin Department of Agriculture, Trade and Consumer Protection (Department) announces that it will hold a public hearing on the proposed permanent rule relating to ATCP 83 Dairy Product Advertising and Labeling. The Department will hold a public hearing at the time and place below.

Hearing Date and Location:

Hearing testimony or comments will be taken on a first-come, first-served basis after the opening statements are read into the record. There will be one hearing throughout the state, and the venue is listed below. Written comments will be accepted until January 6, 2020.

Tuesday, December 17, 2019

Department of Agriculture, Trade and Consumer Protection – Hall of Fame Room 172

2811 Agriculture Dr.

Madison, WI 53718

10:00 a.m.

The Department invites the public to attend the hearing and comment on the proposed rule. Following the public hearing, the hearing record will remain open until January 6, 2020, for additional public comments. Comments may be sent to the Department at the address below, to Caitlin.Jeidy@wisconsin.gov, or to <http://docs.legis.wisconsin.gov/code/chr/comment>. You can obtain a free copy of the hearing draft and related documents, including the economic impact analysis, by contacting the Department using the information below. Copies will also be available at the hearing. To view the hearing draft rules online, go to <http://docs.legis.wisconsin.gov/code/chr/comment>.

Initial Regulatory Flexibility Analysis

Under Wis. Admin. Code ch. ATCP 83 (Dairy Product Advertising and Labeling), the 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 somatotropin for the production of milk. Affidavits must be renewed and signed before a notary every year. The objective of the proposed rule is to eliminate the annual renewal requirement for a milk producer's affidavit.

Comments or concerns relating to small business may be addressed to DATCP's small business regulatory coordinator Bradford Steine by emailing Bradford.Steine1@wisconsin.gov, or by telephone at (608) 224-5024.

Accommodations

Hearing impaired persons may request an interpreter for this hearing. Please make reservations for a hearing interpreter by contacting Caitlin Jeidy using the information below. The hearing facilities are handicap accessible.

Department Contact:

Caitlin Jeidy

Division of Food and Recreational Safety

Department of Agriculture, Trade, and Consumer Protection

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