

Paying for Commodities Opened for Testing or Seized

Last Revision: January 30, 2014

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 [Wis. Stats. 93.08](#)

 [Wis. Stats. 97.12](#)

Question/Issue

What form of payment should be offered for:

- 1) Packages opened for testing purposes?
- 2) Packages seized for evidence?

Policy

Audit testing is the preferred method to narrow the scope of an inspection sample. Therefore, upon the result of an audit of any given commodity lot, an inspector decides to collect an enforcement sample per NIST Handbook 133, the following actions should be taken:

1. An enforcement sample fails and is ordered off sale. Sample was packaged from outside the store.

Discussion - The inspector should suggest the store first attempt to get reimbursement for destroyed product from the responsible distributor. If a distributor fails to reimburse the store, the store manager should send a letter requesting reimbursement to their Supervisor, or in the case of a statewide survey, to the person coordinating the survey. They should not send a bill or invoice.

2. An enforcement sample fails and is ordered off sale. Sample was packed on site.

Discussion - In this circumstance, the inspector should ask the store to send a letter requesting payment to their Supervisor, or in the case of a statewide survey, to the person coordinating the survey.

3. An enforcement sample passes and is not ordered off sale.

Discussion - In this circumstance, the inspector should offer to pay for the packages destroyed.

Memorandum

TO: All Weights and Measures Staff

FROM: Teel Haas, Assistant Legal Counsel

DATE: March 17, 1998

SUBJECT: W&M Inspectors and Paying for Opened Packages

I have been asked to provide a legal opinion on the following question:

Question: Are W&M Inspectors obligated to pay for & to offer to pay for packages they open in order to determine the tare weight of a package?

Response: I found three provisions which indicate that the department's policy is to pay or to offer to pay the market value of a product when samples of the product are being taken for inspection or enforcement purposes.

The three provisions are secs. 93.08(2) and 97.12(1), Wis. Stats. and Section 4.5 of the DATCP COMPLIANCE MANUAL.

Sec. 93.08(2), Stats., provides as follows:

93.08 **Access for law enforcement.** In performing their duties or in enforcing the laws entrusted to their administration, the department and its authorized agents may do all of the following:

* * *

- (2) Open any box, canon, parcel, package or other receptacle, inspects the contents thereof, and upon payment or tender of the market value take samples of any product or material contained therein.

(Emphasis added.)

In Ch. 97, Food Regulation, sec. 97.12, Stats., provides as follows:

97.12 Enforcement (1) . . . The department and its agents may also secure samples or specimens of food and any product or substance that may affect food,... and other evidence needed to enforce this chapter. The department shall examine any samples secured and shall conduct other inspections and examinations needed to determine whether there is a violation of this chapter. The department shall pay or offer to pay the market value of samples taken.

(Emphasis added.)

In addition to these two statutory provisions, the departments Compliance Manual, provides in Chapter 4, “Sample Collection, Lab Analysis and Chain of Custody” in sec. 4.5 “COLLECTING SAMPLES” as follows:

When collecting product samples, always offer to pay for the samples.

(Emphasis added.)

Based on these provisions, if for example, a W&M Inspector cuts open a bag of grass seed to determine the tare weight of the bag, the Inspector should pay for or offer to pay for the bag of grass seed that was opened.

Although the inspector is not taking a sample of the grass seed per se, the inspector has destroyed a bag of seed for enforcement purposes and is taking the bag itself as a “sample” to be tested -- that is, to be weighed. Unless the product in the package is not contaminated, harmed or destroyed by opening the bag or package and the product can be re-packaged to be sold to the public, then the merchant or owner has lost the ability to sell that package, and the spirit of the law is to protect the owner from that kind of financial loss.

Therefore, Inspectors should pay or offer to pay the market price of any packages which they open in the process of conducting a weights and measures inspection or as part of an enforcement action.

If you have any questions about this memo, please contact your supervisor.