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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 12-033

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated November 2011.]**

As a general note, the Department of Agriculture, Trade, and Consumer Protection (DATCP) and the Department of Health Services (DHS) each administer a separate but virtually identical Wisconsin Food Code (Food Code), contained respectively in an Appendix to ch. ATCP 75 for retail food establishments and an Appendix to ch. DHS 196 for restaurants. The rule analysis indicates that the two agencies collaborated on revisions to the Food Code in this rule and the corresponding DHS rule (Clearinghouse Rule 12-038), in order to maintain consistency between the two Food Codes. However, this coordinative planning did not result in the two rules being submitted together to the Rules Clearinghouse, rather one was submitted roughly two weeks after the other. In the future, DATCP and DHS are encouraged to make a joint submission of the Food Code updates to the Clearinghouse, to facilitate a more efficient and coordinated review process. The Clearinghouse is submitting its report on Clearinghouse Rule 12-038 to DHS at the same time as this report is submitted to DATCP. The two agencies are urged to work in concert to address the issues noted in these reports.

#### **2. Form, Style and Placement in Administrative Code**

a. Following are a number of general format comments. The entire rule should be reviewed for other occurrences of items noted.

- (1) There are a number of differences between the DATCP version and the DHS version of the rule that should be reconciled, if the two rules are to mirror each other. For example, in s. 4-603.15 (B), the word “(scraped)” is shown in

parentheses in the DATCP rule, but not in the DHS rule. In s. 6-404.11, "LICENSE" is not underscored in the DATCP rule, but should be, as it is in the DHS rule. The two rules should be carefully reviewed, side-by-side, to correct these and numerous other inconsistencies.

- (2) There are some significant differences between the text of the proposed Appendix to ch. ATCP 75 and the current version of the Appendix. For example, in s. 6-501.111, the current rule text uses the word "minimize", not "eliminate", as is shown in the proposed rule text. Also, the references in the current rule to the now-defunct Department of Commerce should be changed to the Department of Safety and Professional Services in the proposed rule by striking through the former and underscoring the latter. It is incorrect to simply refer to the new department without showing the wording change in the prescribed manner. The current and proposed versions of the rule should be carefully reviewed, side-by-side, to correct these and numerous other inconsistencies.
- (3) Throughout the proposed rule, numbers should be expressed using Arabic numerals, except that the number "one" and numbers at the beginning of a sentence are spelled out. [s. 1.01 (5), Manual.]
- (4) There are a number of incorrect methods used to amend the text. There are some instances in which the current text or punctuation is underscored and it should not be. See, for example, s. 4-703.11 (C) (1), where the comma following the inserted phrase is in the current rule text and, therefore, should not be underscored. In other instances, new text is being created and should be underscored but is not. See, for example, s. 4-603.16 (D), in which "of this section" should be underscored because it is new language. In addition, there are instances in which the striking and underscoring are out of order; the underscored text always immediately follows the stricken text. [s. 1.06 (1), Manual.]

b. The rule analysis should include the same detailed listing of changes to the Wisconsin Food Code as provided by DHS in its analysis of Clearinghouse Rule 12-038, to allow a reader to readily identify the specific changes made in each section of the Code.

c. The DHS rule contains four provisions not found in this rule (see SECTIONS 1 to 4 of Clearinghouse Rule 12-038), yet the analysis to this rule makes no mention of that fact. Among other changes, the DHS rule moves certain definitions from the Food Code Appendix to the body of ch. DHS 196. In contrast, this rule simply eliminates the definitions. The department should review the DHS provisions to make sure that none of them need to be included in this rule. For example, should those deleted definitions be retained in the text of ch. ATCP 75? Or were they deleted in this rule because they pertain only to restaurants? Also, should ch. ATCP 75 have a corresponding provision to s. DHS 196.12, relating to adoption of the Wisconsin Food Code? The differences between the two rules in this respect, and the rationale for the differences, should be explained in the analysis.

d. In the Preface to the Code, under the heading Priority Items, Priority Foundation Items, and Core Items, it is suggested that the inserted language describing "priority item", "priority foundation item", and "core item" be split out in a list or some other more readable form.

e. In its explanation of the rule's potential effect on small business, the department indicates that the rule is not expected to have a major impact on business, including small business. However, as a result of statutory changes enacted in 2011 Wisconsin Act 46, an agency must now assess whether a rule *may have an effect* on small business (rather than whether it will have a *major* effect). If the rule "may have an effect" on small business, the agency must insert the phrase "and affecting small business" at the end of the relating clause and explain in the rule analysis the consideration the agency has given to methods for reducing the impact on small business (specified in s. 227.114 (2), Stats.). DHS did both of these things in Clearinghouse Rule 12-038. [See page 14 of the prefatory materials to that rule for DHS' discussion of small business considerations.] Note also that if the rule *may have an economic impact* on small businesses, the agency must refer the rule to the Small Business Regulatory Review Board at the same time the rule is referred to the Rules Clearinghouse, and if the rule *will have any effect* on small business, the agency must also prepare an initial regulatory flexibility analysis for submission with the notice of hearing. [See s. 1.02 (1) (c) and (6), Manual, and ss. 227.114 (2) and (4), 227.14 (2g), 227.15 (1m) (intro.), and 227.17 (3) (f), Stats.]

f. The rule's introductory clause should be rewritten as follows: "The Wisconsin Department of Agriculture, Trade, and Consumer Protection proposes an order to amend ch. ATCP 75 Appendix, relating to retail food establishments and affecting small business."

g. The treatment clause to SECTION 1 of the rule should be rewritten to read:

"SECTION 1. Chapter ATCP 75 Appendix is amended to read:".

h. The effective date provision should be in a separate numbered SECTION at the end of the rule. [s. 1.02 (4) (d), Manual.]

i. Section 227.14 (1s), Stats., authorizes DATCP and DHS to draft the Wisconsin Food Code in the format of the federal Food and Drug Administration's (FDA's) Model Food Code, rather than in standard rule drafting format. The prefatory discussion of the "structural nomenclature" of the Model Food Code states that the system of numbering for a Code chapter and its subunits uses a format that includes paragraphs (denoted as (A), (B), etc.) and subparagraphs (denoted as (1), (2), etc.). However, in the definitions section, the department proposes to delete the paragraph letters, thus deviating from the prescribed lettering/numbering system and resulting in the repetition of subparagraph numbers without the intervention of any paragraph letters, which the numbering system would appear to require. This change seems unnecessary and illogical because eliminating the letters makes it impossible (or cumbersome, at the least) to cite the definitions with specificity and difficult to revise individual definitions in the future, since the definitions will no longer be identifiable by discrete letters and numbers. It is strongly suggested that the department retain the lettering of paragraphs, along with the numbering of subparagraphs, in the definitions. Further, it is suggested that the two sentences at the beginning of s. 1-201.10 be combined to read: "In this Appendix, the following terms have the meaning specified:". Once the paragraph lettering is restored, all cross-references to the definitions should be checked to make sure the citations are correct.

j. In s. 1-201.10, to maintain proper alphabetical order, the definition of "CIP" should come before the definition of "CFR". It is suggested that the defined terms be written as: "Cleaned in Place (CIP)" means... and "Code of Federal Regulations (CFR)" means...". [s. 1.01 (7) (a), Manual.]

k. The acronym “(HSP)” should be inserted after the definition of “highly susceptible population” in s. 1-201.10 (45), because it is used in the rule text.

l. The definition of “law” in s. 1-201.10 (50) should also refer to rules, the state counterpart to federal regulations.

m. In s. 1-104.12 (B), the partial capitalization of the word “disAPPROVAL” is unusual. Is it intended to read like this? The second boxed provision under Font Style on page 4 of the preface to the Code indicates that use of small caps denotes defined provisions. “APPROVAL” is not a defined term. Is it necessary to write the word in this manner? There are a number of other instances of partial-word capitalization throughout the rule that should be reviewed. See, for example, the word “nonSEWAGE” in s. 5-403.12.

n. In the left margin adjacent to s. 2-201.11, it appears that the notation “health status” should be omitted. Also, “reportable symptoms” should be adjacent to the list of symptoms. On page 31, the material in the left margin also does not appear to align with the corresponding rule text. On page 32, “reportable history of exposure” is listed twice in the left margin. The left-margin entries for the entire rule should be reviewed to ensure proper wording and placement.

o. In the left margin adjacent to s. 2-201.13 (G), “sore” and “uncovered” should be capitalized. In the left margin adjacent to s. 2-201.13 (I) (2), “Shigella spp., EHEC, or STEC” should be underscored.

p. In the left margin adjacent to s. 3-304.11, the strikethrough of “utensils” should also strike the comma following the word. Also, in s. 3-401.11 (A) (3), a defined term, “ratites”, is not capitalized. The rule should be reviewed in its entirety for other, similar occurrences.

q. In s. 3-501.17 (F) (1) to (8), references to titles of CFR sections should be omitted or set off from the CFR citation as a comma-separated clause or by a parenthetical reference (e.g., “Cultured dairy products, as defined in 21 CFR 131, Milk and cream, such as yogurt, sour cream, and buttermilk” or “Cultured dairy products, as defined in 21 CFR 131 (Milk and cream), such as yogurt, sour cream, and buttermilk”). The rule should be reviewed in its entirety for other, similar occurrences.

r. In s. 3-501.19 (E), the format of the reference to “eggs” should match the reference of other defined terms in the Appendix.

s. In s. 3-502.12 (B) (3) (a), the degree symbol should be inserted for the Fahrenheit temperature reference.

t. In s. 4-501.114 (C) (2), the reference to s. 7-204.11 should be preceded by the section symbol.

u. In s. 5-203.13, “(A) Except as in (C) of this section, at” should be replaced with “At (A) Except as in (C) of this section, at”. [s. 1.06 (3), Manual.]

v. In s. 9-5, the table of contents that lists the subparts should read as follows:

9-501 ~~Restrictions~~ Bottled or Liquefied Gas

9-502 ~~Bottled or Liquefied Gas~~ Toilet Facilities

9-503 ~~Toilet Facilities~~

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

- a. In the recitation of related statutes and rules, reference should also be made to the DHS statutes and rules relating to the Food Code.
- b. A number of definitions cite the corresponding CFR definition of a term. Where the defined term has a corresponding state *statutory* definition, it is suggested that the statutory definition be cited instead. For example, the definition of “food additive” on page 7 could refer to the statutory definition of that term in s. 97.01 (7), Stats. All of the definitions should be reviewed for corresponding statutory definitions that could be cited.
- c. In amending s. 3-202.13, the rule replaces a specific citation with the generically defined term, “Law.” The rule should specify what laws are intended, with specific citations (preferably even more specific than “ch. ATCP 88, Wis. Adm. Code”). [s. 1.07 (1) (a), Manual.]
- d. The rule repeatedly references the Wisconsin Commercial Building Code as chs. SPS 361 to 365, but ch. SPS 366, relating to existing buildings, is also part of the building code. Should the reference also include ch. SPS 366?
- e. In s. 5-402.13, “SPS 382-384” should be replaced with “chs. SPS 382 to 384” and “NR 113” should be replaced with “ch. NR 113.” [s. 1.07, Manual.]
- f. In s. 5-501.116, “5-402.134” is referenced, but that section does not appear to exist.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

- a. As noted in comment 2. i., above, DATCP and DHS are *authorized* to use the format of the Model Food Code in drafting these rules. However, in doing so, they are not *required* to adhere to the wording of Model Code provisions that are awkwardly worded and difficult to understand, as a number of these provisions are. In order for persons affected by the rules to understand and comply with them, rules must be drafted in plain English that can be easily understood. [s. 1.01 (1), Manual.] This is all the more important when rules are drafted using a nonstandard format. One of many examples of unclear language is the second part of the definition of “easily cleanable” on page 10, which states that “easily cleanable” includes a “tiered application of the criteria that qualify the surface as easily cleanable...”. What does “tiered application” mean? Which criteria are to be applied first? Section 2-201.13 provides a good example of a *current* rule section that is much more readable, and has much clearer numbering, than the revised version proposed in this rule. The entire rule should be reviewed and language simplified and clarified as needed.
- b. In the definition of “employee” in s. 1-201.10 (27), “person” is changed to “individual”. However, that same change is not made in the definition of “exclude” in s. 1-201.10 (30). If the department generally intends to use “individual” in place of “person”, it should do so consistently throughout the rule. Note that “person” is currently defined, while “individual” is not. The analysis to the DHS rule indicates that the word “person” is replaced with the word “individual” throughout the Wisconsin Food Code. A similar statement should be included in the analysis to this rule.
- c. In the definition of “equipment” in s. 1-201.10 (29) and elsewhere, “apparatuses” should be changed to “an apparatus.”

d. The DHS rule has a note following the definition of “Grade A standards” on page 14, indicating where to get a copy of the standards. For consistency, the same note should be inserted in the corresponding provision on page 13 of this rule.

e. There seem to be excessive quotation marks in the two definitions of “potentially hazardous food” on page 18.

f. In s. 1-201.10 (66), for consistency with the current rule, “**salmonellae**” should be capitalized.

g. In s. 2-301.13, does “reserved” mean that the space is reserved because there are no special handwashing procedures at this time?

h. In s. 2-402.11, should the section be titled “Hair Restraints” rather than “Effectiveness”?

i. In s. 2-403.11, the title “Service Animal Handling” would be more descriptive than “Handling Prohibition”.

j. In s. 3-502.11 (I), “molluscan” is misspelled.