

Weights and Measures Inspections

Evidence, Search and Seizure and Due Process

LEGAL METROLOGY TRAINING
FOR
STATE AND LOCAL WEIGHTS AND MEASURES OFFICIALS

W&M inspections and evidence 2023



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NIST National Institute of
Standards and Technology
U.S. Department of Commerce



Physical Measurement Laboratory
Office of Weights and Measures
Laws and Metric Program

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NOTICE

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This presentation is intended to provide a general overview on the topics presented. It should not be considered legal advice. For additional information contact your supervisor. In some cases, your agency's legal department can provide further information and guidance.



Weights and Measures Inspection of a Home
Heating Fuel Delivery Meter
NIST Photo

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- Any mention of commercial products is for information only: it does not imply recommendation or endorsement by NIST.
- The regulations and test procedures presented are from the latest editions of the NIST Handbooks. Officials must ensure that they enforce the laws and regulations in effect in their jurisdiction, which may differ, if they are from earlier editions.
- NIST Handbooks and Other Publications:

<https://www.nist.gov/pml/weights-and-measures/publications/nist-handbooks>

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Learning Objectives

- Recognize and identify how the U.S. Constitution, the Bill of Rights, Laws, and Court decisions control how weights and measures inspections must be conducted.
- Define evidence and describe suggestions on collecting, protecting and using it to support enforcement actions.
- Define and explain “Inform-Warn-Action” procedures that help provide due process and which promote voluntary compliance.

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Weights and Measures Inspections are “Searches” under the 4th Amendment to the U.S. Constitution



The 4th Amendment protects people from “unreasonable searches and seizures” of “their persons, houses, papers, and effects” by agents of the U.S. or State government. Every search is unreasonable unless it is conducted pursuant to a search warrant or it falls under a recognized exception. The term “search” is important because it dictates when weights and measures inspectors must obtain a search warrant. The U.S. Supreme Court has defined “search” in two ways.

- Inspectors engage in a searches if they physically **intrude on a constitutionally protected area (place) to obtain information,** and
- Inspectors also engage in searches if they **intrude on a person’s reasonable expectation of privacy.**

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What is a reasonable “Expectation of Privacy” test?

The test came from a 1967 U.S. Supreme Court case called *Katz v. U.S.* which involved the warrantless wiretapping of a suspect by an FBI agent who had observed Mr. Katz going to the same telephone booth everyday to make calls (which the agent suspected were gambling wagers). The following test determines if a government agent has violated an individual's reasonable expectation of privacy.

If a person has exhibited an actual expectation of privacy, and, the expectation is one that society is prepared to recognize as reasonable,

If both expectations exist, the government violates the individual's 4th Amendment rights if an inspector conducts a warrantless search.



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What if someone's 4th Amendment Rights are violated?

Violating the rights of business owners can lead to, among other things, the following:

- Any evidence you collect for use in court will be disallowed and the case may be dismissed.
- You and your agency may be sued and could be required to pay damages and/or the defendant's legal fees.
- Your agency could be exposed to negative media coverage and the agency's reputation may be damaged by word of mouth in the business community and through industry and social networks.
- Increased legislative oversight.
- The court may impose procedures that could affect inspections through-out the country.
- Result in increased supervision or restrictions being placed on your independence.

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Administrative (Weights and Measures) Inspections

The inspections that weights and measures inspectors conduct are typically classified as "Administrative Inspections." They are valid exceptions to the 4th Amendment requirement for search warrants in part because the "protection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power..."¹; is one of the "historic police powers of the States..."².



1. Swift and Co. v. Wickham, General Mills, Inc. v. Furness; 2. Florida Lime and Avocado Growers, Inc. v. Paul.

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Inspections must be performed according to the State's Constitution and the 4th Amendment of the U.S. Constitution:

4th Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

- For most weights and measures inspections "search warrants" are not required because these inspections fall under the "Administrative Inspection" exception to the 4th Amendment.
- This exception came from court cases where the government "closely and routinely" regulates businesses and where establishing probable cause and obtaining warrants is impractical.
- Although the expectation of privacy is lower for closely regulated industries, they are still protected by the 4th Amendment, and warrantless searches are unreasonable if they are conducted arbitrarily.

Questions courts use to determine if an inspection falls under the exception

- Is the business closely or pervasively regulated?
 - Is the regulatory program carrying out a "substantial" government interest?
 - Are unannounced inspections necessary to further the law enforcement program and detect violations?
 - Does the enabling weights and measures law procedures limit the time, place, and scope of inspections to provide a Constitutionally adequate notice and substitute for a search warrant?
 - Does the weights and measures law/process protect the privacy rights of the business owner, if they refuse to consent to an inspection?
 - Is the owner provided due process and an opportunity for appeal and early judicial review?
- Together, these requirements provide business and people with a reasonable expectation of privacy and allows them to avoid self incrimination.

NIST Handbook 130 - Uniform Weights and Measures Law

Section 13. Special Police Powers



When necessary for the enforcement of this Act or regulations promulgated pursuant hereto, the Director is:

- a. Authorized to enter any commercial premises during normal business hours, except that in the event such premises are not open to the public, he/she shall first present his/her credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained.
- b. Empowered to issue stop use, hold, and removal orders with respect to any weights and measures commercially used; and issue stop sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale.
- c. Empowered to seize, for use as evidence, without formal warrant, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of the provisions of this Act or regulations promulgated pursuant thereto.

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- d. Empowered to stop any commercial vehicle and, after presentation of their credentials, inspect the contents, require the person in charge of that vehicle to produce any documents in his possession concerning the contents, and require him to proceed with the vehicle to some specified place for inspection.
- e. With respect to the enforcement of this Act, the Director is hereby vested with **special police powers**, and is authorized to arrest, without formal warrant, any violator of this Act.

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Section 13 - The Uniform Weights & Measures Law



Limits Discretion: The law authorizes reasonable warrantless administrative inspections during normal business hours but, does not commit the conduct of the inspection to the unbridled discretion of the inspector; rather, the law limits the discretion of the inspector (e.g., specifications, tolerances and other technical requirements for devices and sampling plans and test procedure for packaged goods prescribed in NIST Handbooks).

Substitutes as a Search Warrant: A court would likely find the warrantless search provision provides a constitutionally adequate substitute for a search warrant. The law advises the owner of the premises that a search is pursuant to the law, and also limits inspections to the business site, at reasonable hours, and for the purposes of enforcing compliance with specific laws and regulations.

Restricts access to the public areas of the business: Without elaborate enforcement schemes and unannounced inspections, the regulation of industry would be ineffective. Thus, for closely regulated businesses, warrantless administrative searches of commercial premises do not per se violate the 4th Amendment.

However, entry into areas of commercial premises outside of normal business hours or into areas not open to the public may only be made with the prior consent of the business owner when compelled through prosecution or with a search warrant.

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Section 13 – Uniform Weights & Measures Law Notice and Uniformity

Section 13 also notifies business owners:

- About the authority and the powers inspectors have to inspect devices and goods and remove them from use or sale.
- About the test procedures, tolerances and user requirements for devices and labeling requirements and reasonable variations that apply to packages.

By following NIST Handbooks 44, the Examination Procedure Outlines, and Handbooks 130 and 133 you provide due process:

- Because they are the laws and regulations of your state, and they reflect nationally recognized uniform requirements.
- Generally, the requirements are “identical” to Federal laws and regulations so interstate commerce is enabled.
- They are developed through a transparent and cooperative process involving industry and other stakeholders.

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Consent

- The U.S. Supreme Court says that obtaining **CONSENT** to perform the inspection and enter non-public areas of a business from an owner is one of the specifically established exceptions to the requirements for a warrant and probable cause.
- The person giving consent must have actual or apparent authority to do so.
- The consent must be freely given.



Best Practice: Ask if the manager or person in charge is available. If the employee you contact is not confident, they have authority to consent to an inspection (which, for example, could involve giving the inspector access to the keys to fuel storage tanks to the fuel tank storage level indicators located in private areas of store) ask them to contact their supervisor.

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Opening Inspections

- ✓ Contact the manager/person in charge.
- ✓ Present your credentials and a Notice of Inspection (if available).
- ✓ Announce the purpose and scope of the inspection.
- ✓ Respect confidentiality and privacy (e.g., if you are investigating a complaint exercise care in announcing the purpose in a public setting)
- ✓ Answer questions/provide information. Be as transparent as possible in describing test procedures and legal requirements.
- ✓ Obtain information on specific health or safety requirements for the environment.
- ✓ **Obtain positive consent** (it must be freely given.)
- ✓ If you need to enter non-public areas of business obtain additional consent.
- ✓ Invite representative to participate in inspection.

Keywords: "Notice," "Consent,"
"Transparency," "Reasonable"

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Consent does not give you unlimited access to the business premises

If an inspector obtains consent to inspect and test a vehicle scale at a coal mine does that:

- Allow him or her to search the paperwork or open the drawers on a desk in the scale house used by the weighmaster?
- Go into and inspect the scale pit?
- Enter a room in the scale house if the room's door is unlocked and there is no sign stating that the room is "private"?

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What should the inspector do if a store employee says "no" or "do I have to let you inspect?"

Do you inspect anyway and charge the owners with obstruction if they interfere?

Threaten to shut the business down (e.g., "I'll cut those pumps down!") until the owner consents?

Come back later to see you can get in by asking a different employee?



- This can be avoided by providing a written Notice of Inspection and the inspector should provide a copy of the law and encourage the employee to check with his/her supervisor. Sometimes young people are left in charge with limited authority or guidance. The inspector must exercise patience and common sense in resolving these situations to avoid escalating a simple misunderstanding into a problem.
- If access is still refused the inspector should contact his/her supervisor for guidance on how to handle the situation.
- If justified, it may be appropriate to obtain a search warrant.
- A few Supreme Court Cases say fines can not be imposed but state courts have upheld fines in cases where the regulatory agency has provided due process. If state law makes refusal to allow an inspection a criminal offense, punishable by a fine, you can take legal action, but you must still obtain the owner's consent or a search warrant to enter the premises.

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Administrative Inspection Warrants

- If someone refuses to allow an inspection (and you or your supervisor cannot persuade them to change their mind) most state laws allow regulatory officials to obtain an “Administrative Inspection” Warrant. To obtain this warrant the inspector must submit a sworn affidavit to a court indicating, for example, that there is a reasonable justification for the inspection of a certain place of business or vehicle and that an attempt to make the inspection was made but access was denied by the business owner or his or her agent.*
- A warrant is typically issued upon a showing of cause, unless a of state law makes another standard applicable (such as the requirements in Section 13. Special Police Powers in the UWML). The inspector’s affidavit should either explain that access to make the inspection was sought and refused or that facts (e.g., previous inspection history where, when the inspector uncovered violations the store owner told the inspector to leave the premises) or other circumstances reasonably justify the inspector not seeking such consent.
- Cause will likely be found if either reasonable legislative or administrative standards are satisfied with respect to a business or vehicle, or there is reason to believe that violations of the weights and measures law exist (e.g., an unsealed or illegal device is in use).

ADMINISTRATIVE INSPECTION WARRANT

State of Tennessee
City of _____

To Building Official of _____ City, State of Tennessee

Proof by:

(1) Affidavit having been made before me by _____ (name of city and building official) _____ that there is probable cause, pursuant to Tennessee Code Annotated § 68-120-117, to believe that violations of the _____ (rule numbers) exist at the _____ (site or vehicle number) _____ of the city exist;

(2) Tennessee Code Annotated § 68-120-117 authorizes city building officials to conduct inspections;

(3) Description of the property and items to be inspected: _____

(4) Purpose(s) of the inspection: _____

(5) Other facts pertinent to the inspection: _____


You are therefore hereby commanded to make immediate inspection of said premises, the same being located in _____ (city), and I hereby certify that I signed and delivered this inspection warrant for execution to _____ at _____ o'clock, _____ m., on this the _____ day of _____, 20____.

Judge, Municipal Court
City of _____, Tennessee

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Administrative Inspection Warrant

- An “inspection” warrant is issued by a magistrate or judge, directed to a state or local official, commanding him or her to conduct an inspection at a certain place of business or on a vehicle required or authorized by state or local law or regulation.
- An inspection warrant is typically effective for 14 days and must be executed within the times specified (e.g., between 8 AM to 6 PM). It can be extended by the judge who signed and issued the original warrant if he or she is convinced that the renewal is in the public interest (e.g., to conduct follow-up inspections on packaged goods or to retest rejected weighing or measuring devices).
- These warrants usually require that the owner, or his or her agent, be present during the inspection and often require, where prior consent has been sought and refused, that notice that a warrant has been issued be given the business owner at least 24 -hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary.
- Any person who willfully refuses to permit an inspection authorized by an administrative inspection warrant is guilty of a misdemeanor.

Notice of Inspection			
		State Department Weights and Measures Division 110 North Laboratory Street Capital City, State, ZIP	
		Contact Information Telephone: Email: Fax: Hours:	
Business Name:		ID:	Date:
Location:		Time:	
City:	State:	Zip:	Inspector:
Telephone:		Email:	
Person Contacted:		Title:	
NOTICE OF INSPECTION PURSUANT TO SECTION XX OF CHAPTER XX STATE WEIGHTS AND MEASURES LAW			
_____The purpose of this inspection is to inspect and test commercial weighing and measuring devices to verify they comply with (cite section of law or regulation) which incorporates the requirements in the latest edition of the National Institute of Standards and Technology (NIST) Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices."			
The following User Requirements from NIST Handbook 44 also apply:			
G-UR.2.3. Accessibility for Inspection, Testing, and Sealing Purposes. – A device shall be located, or such facilities for normal access thereto shall be provided, to permit: (a) inspecting and testing the device; (b) inspecting and applying security seals to the device; and (c) readily bringing the testing equipment of the weights and measures official to the device by customary means and in the amount and size deemed necessary by such official for the proper conduct of the test. Otherwise, it shall be the responsibility of the device owner or operator to supply such special facilities, including such labor as may be needed to inspect, test, and seal the device, and to transport the testing equipment to and from the device, as required by the weights and measures official.			
G-UR.4.4. Assistance in Testing Operations. – If the design, construction, or location of any device is such as to require a testing procedure involving special equipment or accessories or an abnormal amount of labor, such equipment, accessories, and labor shall be supplied by the owner or operator of the device as required by the weights and measures official.			
_____ The purpose of this inspection is to verify advertised prices, price representations, and point-of-sale systems, as required in (cite section of law or regulation) to determine: (1) the accuracy of prices and computations and the correct use of the equipment; and (2) if such system utilizes scanning or coding means in lieu of manual entry, the accuracy of prices printed or recalled from a database. This inspection employs the latest edition of the "Examination Procedures for Price Verification" in National Institute of Standards and Technology Handbook 130, Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality.			
_____ The purpose of this inspection is to inspect marketing practices, advertising, and package labeling to verify these comply with the packaging and labeling and method of sale of commodities in (cite section of law or regulation) which incorporates the requirements in the Uniform Packaging and Labeling Regulation and the Uniform Method of Sale of Commodities Regulation in in National Institute			
of Standards and Technology Handbook 130, Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality. In addition, the net quantity of contents will be verified using the test procedures, maximum allowable variations, package requirements and sampling methods in NIST Handbook 133 "Checking the Net Contents of Packaged Goods as required in (cite of law or regulation).			
AUTHORIZED INSPECTION AND ENFORCEMENT ACTIONS			
When necessary for the enforcement of this Act or regulations promulgated pursuant thereto, the Inspector is: (a) Authorized to enter any commercial premises during normal business hours, except that in the event such premises are not open to the public, he/she shall first present his/her credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained. (b) Empowered to issue stop use, hold, and removal orders with respect to any weights and measures commercially used, stop sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale. (c) Empowered to seize, for use as evidence, without formal warrant, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of the provisions of this Act or regulations promulgated pursuant thereto. (d) Empowered to stop any commercial vehicle and, after presentation of his or her credentials, inspect the contents, require the person in charge of that vehicle to produce any documents in his or her possession concerning the contents, and require him or her to proceed with the vehicle to some specified place for inspection. (e) With respect to the enforcement of this Act, the Inspector is hereby vested with special police powers, and is authorized to arrest, without formal warrant, any violator of this Act. The Inspector is authorized to apply to any court of competent jurisdiction for a restraining order, or a temporary or permanent injunction, restraining any person from violating any provision of this Act.			
SECTION XX PROHIBITED ACTS			
No person shall: use or have in possession for use in commerce any incorrect weight or measure; sell or offer for sale for use in commerce any incorrect weight or measure; remove any tag, seal, or mark from any weight or measure without specific written authorization from the proper authority; hinder or obstruct any weights and measures official in the performance of his or her duties; or violate any provisions of (cite section of law) state weights and measures law or regulations promulgated under it.			
NOTICE: YOU HAVE THE RIGHT TO REFUSE TO ALLOW TO THIS INSPECTION(S). IF YOU HAVE CONCERNS OR QUESTIONS PLEASE ATTEMPT TO RESOLVE THEM WITH THE INSPECTOR OR CONTACT THE DIRECTOR OF THE WEIGHTS AND MEASURES DIVISION AT THE CONTACTS LISTED ABOVE.			
NOTICE: IF YOU CONSENT TO THE INSPECTION(S) YOU HAVE THE RIGHT TO EXPRESS YOUR CONCERNS; ASK QUESTIONS; REQUEST A HEARING OR PRESENT ADDITIONAL INFORMATION TO CHALLENGE THE FINDINGS OF THE INSPECTIONS, AND ANY ACTIONS TAKEN BY THE INSPECTOR(S), BY CONTACTING THE DIRECTOR OF THE WEIGHTS AND MEASURES DIVISION AT THE CONTACTS LISTED ABOVE			
6102020 – Model Notification of Inspection Form for State Weights and Measures Programs			

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Search and Seizure



PROBABLE CAUSE requires you to have a reasonable belief, based on a reliable source or other information, that evidence of a crime may be located in the place searched. It is more than a mere suspicion or "educated" guess, but it does not mean that you have enough information (evidence) to prove guilt.

PROBABLE CAUSE

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Search and Seizure Scenario

PROBABLE CAUSE requires you to have a reasonable belief, based on a reliable source or other information, that evidence of a crime may be located in the place searched. It is more than a mere suspicion or “educated” guess, but it does not mean that you have enough information (evidence) to prove guilt.

Based on numerous consumer complaints an inspector believes a meat manager in a supermarket may be intentionally underweighing packages on weekends when inspections normally don't occur. On a Sunday the inspector goes into the store and checks several meat packages using an estimating scale hanging in the produce department and finds they are underweight. Because there is no one in the meat department at the time, and without obtaining consent or a warrant, the inspector enters a cooler in the back of the meat department and tests dozens of packages labeled for sale (that they were ready for sale was confirmed by store employee who cleans the meat department). The inspector finds 100% of the packages in the cooler underweight and that 100% of the errors exceed the MAV's in NIST HB133. A stop-sale order and citation are issued for the underweight packages found in the cooler.

- **The search is invalid, and the evidence will be excluded since the inspector did not obtain consent or a search warrant before going into the non-public area of the store.**
- **An illegal search cannot be justified even when the inspector finds evidence of a violation.**

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How is a reasonable belief for probable cause developed?

- Personal observation (senses) of inspector provides a firm basis and inferences are allowed.
- Inspector's specialized training and experience (understanding what may cause something to happen).
- Past inspection history.
- Complaints (especially from multiple consumers).
- Confidential Informants (prior cases and past reliability).
- Corroboration of complaints by investigation (test purchase).
- Observation (reasonable expectation of privacy).
- Reliable and physical evidence (e.g., load cell with signs of tampering).
- Your intuition and experience with similar situations.

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Example of a Search Warrant

Typically, the inspector will submit a separate written affidavit and provide, among other information, a description of the place or thing (e.g., truck) to be searched, the things that need to be found, a reason for why they need to be seized; and what their seizure will prove.

STATE DISTRICT COURT For the State of XXXXX	
In the Matter of the Search of: <i>Name of Owner and Business</i> 26578 Copasumtown Pike Anytown, America 21776 Including all out-buildings, vehicles and grounds located on lot 9831 Hyde Park Subdivision Liber 57, Pages 23 and 24 of Plats in County Land Records.	Case Number:
SEARCH AND SEIZURE WARRANT	
To: Any Authorized Law Enforcement Officer	DATE: June 12, 2020
An application by a weights and measures inspector for the government requests the search of the property located at the location described above which is in the County of Frederick. I command that you search the described property, including all out-buildings and vehicles and seize, secure, and inventory, if found and make a return, according to law, the following property and things: ANY AND ALL UNSEALED OR ILLEGAL WEIGHING AND MEASURING DEVICES PROHIBITED UNDER 19 STATE CODE SEC. 200 (STATE WEIGHTS & MEASURES LAW), AND ANY UNLAWFULLY LABELED PACKAGED GOODS AND ANY PACKAGING OR LABELS THAT BEAR INFORMATION THAT IS PROHIBITED UNDER THE STATE PACKAGING AND LABELING LAW AT 19 STATE CODE SEC. 237, (STATE PACKAGING AND LABELING ACT); ALL PERSONAL COMPUTERS, LAPTOPS AND OR DATA STORAGE MEDIA AND ACCESSORIES; ANY AND ALL MANUALS, DOCUMENTS, PRINTED MATERIALS OR OTHER INFORMATION DESCRIBING THE PROCEDURES TO BE USED TO PACKAGE, WEIGH, OR MEASURE AND LABEL PACKAGED GOODS; BUSINESS RECORDS, INCLUDING THOSE WITH CUSTOMER, ORDER OR DELIVERY INFORMATION, QUANTITIES OF PACKAGED GOODS SHIPPED OR TO BE SHIPPED AND RELATED INFORMATION INCLUDING, BUT NOT LIMITED TO, PRICING AND ADVERTISEMENTS.	
I find that the affidavit(s), or recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal that: Business owner did unlawfully use unsealed or illegal weighing and measuring devices to weigh or measure goods for packaging in violation of 19 State Code Sec. 200 and that packaged goods were unlawfully labeled and sold in violation of 19 State Code Sec. 237.	
Signature of Judge: <i>Honorable Judge Mason</i>	Time and Date of Issue: 8:20 A.M., June 12, 2020
You are commanded to execute this warrant on or before June 24, 2020, in the daytime between 8:00 A.M. and 5:00 P.M. You must give a copy of this warrant and receipt for property taken to the person from whom, or from whose premises, the property was taken, or leave a copy and receipt at the place where the property was taken. This warrant and an inventory of the property seized must be returned to this court within fourteen (14) days of execution.	

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Types of Evidence

Direct Evidence – proves the point without any inference – “Test results from package inspections or obtained by testing weighing and measuring devices. Watching the defendant weigh the package without deducting tare.”

Indirect or Circumstantial – “the security seal was broken, and the meter delivered less fuel than indicated.”

Testimonial, Documentary or Real.

- Given under oath or in the form of writing.
- Real or firsthand impression to the trier of fact (test measure with damage, weight missing a lead seal and adjustment)

You must have evidence to prove every element of the violation and you may have evidence admitted that proves one element but not another. Guilt must be proven **beyond a reasonable doubt.**

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Examples of Evidence

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- | | |
|--|---|
| <ul style="list-style-type: none"> • Audio, Video, and Photographs (time and date critical). • Interviews, admissions, and statements. • Other records of repair, inspection, and investigation. • Observations (good documentation critical). • Prior Similar Acts (inspection history). • Evidence is collected with your senses. Be alert to what you see and hear. • Plain View: what people knowingly expose to the public in their places of business is not subject to 4th Amendment protection if your presence is legal and the seizure is reasonable. | <ul style="list-style-type: none"> • Detailed reports of device or package test results. • Devices, packages, and other artifacts. • Engine fuel and motor oil samples. • Business documents, receipts. • Habits (instinctively, automatically) • Business Routine is relevant to show that a particular event occurred. • Testimony – (requires personal knowledge and truthfulness). • Seizing evidence: If items are seized they must be clearly marked with an identity, date/time of collection and inspector name. Also, establish a chain of evidence and protect it. |
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Relevant Evidence is information obtained from inspection and testing activities.

Federal Rule 602. “Need for Personal Knowledge” - A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence supporting inspection findings, conclusions and actions should be relevant, sufficient and must be collected using recognized procedures and scientifically valid test methods.

Relevant Evidence

Means “evidence having any tendency to make the existence of any fact that is of consequence to make the determination of the action more probable or less probable than it would be without the evidence.”

Admissibility

- Relevant Evidence is always admissible.
- It must always relate to the time, event or defendant.
- Evidence that is not relevant, or that is prejudicial, confusing, cumulative or if it was obtained illegally is not admissible.

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Evidence

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Exclusionary Rule

Evidence, no matter how important it is to your case, may be excluded if it was obtained in any way that violates the Constitutional rights of the defendant.

Evidence is usually authenticated with testimony, but many public documents are self-authenticating (e.g., certified copies of public or business records; official publications; documents, and newspapers).

The reasonableness of a seizure, under the 4th Amendment, depends on when or why the seizure was made and how it was accomplished. It is measured in objective terms by examining all of the circumstances.

Preservation

Evidence that appears favorable to a defendant or that he or she would be unable to replace should never be discarded or destroyed.

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Hearsay

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Statement

Is an out of court statement, ... offered into evidence to prove the truth of the matter asserted.

Generally considered unreliable but there are exceptions.

Defined

An oral or written statement (e.g., inspection report) or nonverbal conduct (e.g., pointing to a thing or person) of a person if it is intended as a statement of fact or belief.



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Hearsay - Possible Exceptions:

- A statement by:
 - the defendant, or a person authorized by the defendant to make the statement.
 - an employee made within the scope of employment or agency.
 - a co-conspirator (if the VP of a Paving Co and the Weighmaster weighing the asphalt agree to shortweight deliveries and they take action to do just that they are conspiring to commit a crime so they are co-conspirators).
- Present sense impression describing an event or condition made with the declarant was perceiving the event or condition or immediately thereafter. (“I noticed the scale was off-zero but didn’t adjust it”).
- A statement of the declarant’s state of mind, emotion, intent or plan.
- Records of regularly conducted business activities, made at or near the time of occurrence, by a person with knowledge of the activity, and the record was made in the course of regular business practice.

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Hearsay - Other Exceptions: Scope of Official Duties

(8) Public records and reports.

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth:

- (i) the activities of the agency; and, (ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report;

Example: *in a NJ case the certificate of correctness of lobster gauge was admissible under evidentiary rule providing for admissibility of written statement of act done or act, condition or event observed by public official within scope of his duty to perform act reported or to observe, condition or event reported and to make written statement; Superintendent of Weights and Measures was a public official and certification was made as part of his official duties. [NJEP v. Duran 251 N.J. Super. 55 (1991)]*

Lobster Gauge



Photo courtesy of the California Department of Fish and Wildlife

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Chain of Custody


When evidence is seized, a record of the action should be created that provides:

- Time and place where found and by whom.
- Sufficient description of item to distinguish it from other items.
- Location where collected and the location where it was stored and conditions of storage.

Protect Evidence: All evidence should be considered fragile so any mishandling (e.g., temperature, humidity) could destroy its value in the investigation. If the evidence is tampered with or not in the same condition as when it was first taken near the time of a suspected violation, the evidence may still be used, however, its value as evidence to prove the violation could be diminished.

Transfer: A record must be kept documenting the transfer of evidence from one person to another. It is the responsibility of each person in the chain to ensure that a complete and accurate record is maintained, including: the name of the person from whom he/she obtained the evidence; Date and time he/she came into possession of the evidence; Where and how it was stored, and what steps were taken to protect the evidence; and, if transferred again, the name of the person to whom it was transferred and the date and time of that transfer.





National Institute of Standards and Technology
U.S. Department of Commerce

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Property Record Number: _____

Weights and Measures Department
EVIDENCE CHAIN OF CUSTODY TRACKING FORM

Case Number: _____ Offense: _____
 Submitting Inspector: (Name/ID#) _____
 Business Name: _____
 Location: _____
 Contact: _____
 Date/Time Seized: _____ Location of Seizure: _____

Description of Evidence		
Item #	Quantity	Description of Item (Model, Serial #, Condition, Marks, Scratches)

Chain of Custody				
Item #	Date/Time	Released by (Signature & ID#)	Received by (Signature & ID#)	Comments/Location

Page 1 of 2 pages (See back)

EVIDENCE CHAIN-OF-CUSTODY TRACKING FORM
(Continued)

Chain of Custody				
Item #	Date/Time	Released by (Signature & ID#)	Received by (Signature & ID#)	Comments/Location

Final Disposal Authority

Authorization for Disposal
 Item(s) #: _____ on this document pertaining to (suspect); _____ (Name); no longer needed as evidence and is/are authorized for disposal by (check appropriate disposal method)
 Return to Owner Auction/Destroy/Divert
 Name & ID# of Authorizing Inspector: _____ Signature: _____ Date: _____
 Notice of Scheduled Disposal sent to Lawful Owner: _____
 Deadline for Response from Lawful Owner: _____
 Action taken based on response/no response from Lawful Owner: _____

Witness to Destruction of Evidence
 Item(s) #: _____ on this document were destroyed by Evidence Custodian _____ (ID#); _____ in my presence on (date) _____; Signature: _____ Date: _____
 Name & ID# of Witness to destruction: _____

Release to Lawful Owner
 Item(s) #: _____ on this document was/were released by Evidence Custodian _____ (ID#); _____ to _____
 Name: _____ City: _____ State: _____ Zip Code: _____
 Telephone Number: (____) _____
 Under penalty of law, I certify that I am the lawful owner of the above item(s).
 Signature: _____ Date: _____
 Copy of Government-issued photo identification is attached: Yes No

This Evidence Chain-of-Custody form is to be retained as a permanent record by the Weights and Measures Program.

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Other Provisions of the Uniform Weights and Measures Law - Section 26. Presumptive Evidence

Whenever there shall exist a weight or measure or weighing or measuring device in or about any place in which or from which buying or selling is commonly carried on, there shall be a **rebuttable** presumption that such weight or measure or weighing or measuring device is regularly used for the business purposes of that place.

Even if a State's law does not include the term (rebuttable) understand that courts are finders of fact and facts are refutable at trial so provide due process in all enforcement actions.

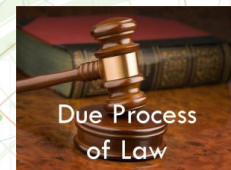
Due Process and Other Rights – the 5th & 14th Amendments to the U.S. Constitution

“No person shall be...compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

- After taking action give “notice” and provide an opportunity for a “meaningful” hearing that results in a “reasonable” outcome.
- This requires patience, listening, and careful judgment to ensure equity between the owners’ property interest and the governments’ police powers.

U.S. Constitution <https://constitution.congress.gov/constitution/>

Constitution of the States: <http://www.stateconstitutions.umd.edu/index.aspx>



Enforcement Actions – “Depriving” a Business of its Property and ability to continue to operate.

- Removing a commercial device from use.
- Seizing a device that was not or could not be repaired.
- Issuing a stop-sale or stop-removal order on packaged goods.
- Destroying packages for testing.
- Seizing packages for evidence.
- Holding a device or vehicle out of service for testing or inspection.

Note: Courts consider 3 factors: (1) the privacy interest affected; (2) the risk and cost of erroneous deprivation of that interest through the procedures used, and the probable value, if any, of substitute procedures; and (3) the government's interest, including the enforcement function involved and the burdens of using alternative procedures.

Other Examples of Enforcement Action

- Increased Inspection Frequency
- Warning Letter
- Citations
- Administrative Hearings
- Injunction
- Civil or Criminal Penalties
- Suspend them from obtaining government contracts (if state or county vendor).



- Most inspectors will never encounter a due process issue, if they receive proper training and supervision.
- An agency may be held accountable* if improper actions, (e.g., not following prescribed test procedures or tolerances, shortcuts that don't provide results that are equivalent in accuracy to the adopted procedure); not allowing moisture loss; enforcing labeling requirements on exempted packages; or incorrectly taking a device out of service.
 - *Inspectors used an "undefined discretionary moisture loss allowance failed to provide fair notice to plaintiff. Plaintiff has been denied its right to due process."*
 - *Void-for-Vagueness – "any regulation that fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" (Morales) - "Just Chilling" in Baltimore, MD.*

* monetary damages, legal fees, damage to working relationship with the business, negative publicity or legislative restrictions.

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Closing Inspections

- ✓ Contact the manager/person in charge.
- ✓ Respect privacy and confidentiality (especially when discussing violations found during inspection.)
- ✓ Document violations, issue stop-sale orders and issue written notices of corrective actions.
- ✓ Present inspection findings.
- ✓ Describe follow-up actions required (e.g., device repairs, disposition of product).
- ✓ Answer questions and be as transparent as possible in describing what violations were found and in identifying the specific sections of the law or regulations violated to help the person in charge understand their responsibilities.
- ✓ Provide copies of Inspection Reports/Notices of Non-Compliance/Review right to appeal on Notice of Inspection
- ✓ Also provide information on the process to obtain administrative review or reconsideration.
- ✓ Explain what, if any, follow-up actions you will take (e.g., reinspection within 10 days)

Keywords: "Trust,"
"Transparency," and
"Understanding"

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Destroying Seized Property

Section 12. Powers and Duties of the Director

(l) ... Weights and measures that have been rejected may be seized if not corrected within the time specified or if used or disposed of in a manner not specifically authorized. The Director shall remove from service and may seize the weights and measures found to be incorrect that are not capable of being made correct; ...

*(b) Disposition of incorrect apparatus. -- The Director shall condemn and may seize **and destroy** weights and measures found to be incorrect which he or she determines cannot be repaired satisfactorily.*



This photo from the NIST Historical Collection

Recommended Compliance Procedures

Due Process in Three Steps = Inform – Warn – Action

1st Inspection – **INFORM**

- The inspection report documents findings and provides details of the violations provided.
- Devices are “rejected” if out of tolerance, if they do not meet a user requirement or specification. Time is allowed for repair (e.g., 10 days) and the owner is warned that the device will be removed from use. Devices may be removed from service immediately depending on the amount of error (e.g., $3 \times \text{Tolerance?}$) (must be uniform throughout the your program and be public.)
- Store packed items are ordered off-sale while packages put-up elsewhere are placed off-sale and notice is given to the retailer.
- The owner is provided with information on how to resolve violations and how appeal any action.
- Education takes place at every opportunity (this is critical in cases where there may have been lax enforcement in the past.)

Follow-up Inspection

2nd Inspection - **WARN**

- Were the corrections to devices or packages made?
- Depending on the results judgment of whether the business operator made an effort or ignored the notice need to be made before further action taken.
- Devices not repaired are removed from service or packages found incorrect during the first inspection are reinspected and appropriate action taken depending on the results.
- If the violations are found a “warning” and that legal action may be taken if violations continue on future inspections (only for repeat violations.) In some situations, it is best to compartmentalize the violations (e.g., problems in one department corrected but in another they were not fully corrected).
- The owner is provided with information on how to appeal any action.
- Was the scale company at fault? Did the scale owner tell the scale technician to only do what it takes to get it to pass? Are store employees determining and rounding tare correctly?

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What if there is some improvement found but not full compliance on 3rd inspection?

Field or Office Hearing

- A supervisor reviews case history and participates in the field hearing to ensure that expectations are understood and that there have not been any miscommunications.
- Assistance is provided and a final warning is issued.

Final Notice

Warning Letter to President of company or corporation sent to the official corporate address by First Class or Certified Mail.* The letter details inspection history and require the business owner provide a written response indicating the actions they intend to take to correct the violations and prevent their reoccurrence within 10 days receipt.

* Obtain from state tax or other records or business license.

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3rd or Subsequent Inspection

ACTION

Field or Office Hearings and Final Notices

Often raise issues to a higher level in the company and can lead to resolution. They can also improve communications and help you review your case. This may enable you to identify other alternatives before proceeding with further legal action.

NIST Handbook 130 – Interpretations and Guidelines

2.6.10. Model Guidelines for the Administrative Review Process

Purpose

- To provide guidance to state and local weights and measures agencies on establishing an administrative review process.
- The guidelines are not intended to be the only process an agency may use or to supersede existing processes.
- To help ensure that persons affected by “inspection findings” (e.g., price misrepresentations or shortweight packages), or who are deprived of the use of their property (devices or packages placed under “stop-sale” or “off-sale” orders), are provided a timely-independent review of the action.
- To allow affected persons to provide evidence which could be relevant in determining whether the enforcement action was proper and necessary.
- To ensure that a person’s ability to conduct business is not hindered by unnecessary or unjustified enforcement actions.

- A notice of the right to administrative review should be included on all orders or reports of findings or violations and should be communicated to the responsible firm.
- The firm responsible for the product, or the retailer, may introduce any record or other relevant evidence. For example:
 - Commodities subject to the off-sale action or other findings were produced, processed, packaged, priced, or labeled in accordance with applicable laws, regulations or requirements.
 - Devices subject to the “stop-use” order or “condemnation” were maintained in accordance with applicable laws, regulations or requirements.
 - Prescribed test procedures or sampling plans were not followed by the inspector, or mitigating circumstances existed which should be considered.

2.6.10. Model Guidelines for the Administrative Review Process

Sample Notice

You have the right to an Administrative Review of this order finding. To obtain a review, contact the Director of Weights and Measures by telephone or send a written request (either postmarked, faxed, or hand delivered) to:

(Name, Address, or Fax Number of the Director or other Designated Official)

Your request should reference any information that you believe supports the withdrawal or modification of the order or finding.

2.6.10. Model Guidelines for the Administrative Review Process

- The reviewer must consider the inspector’s report, findings, and actions as well as any evidence introduced by the owner, distributor, packager, or retailer as part of the review process.
- The reviewer must provide a timely written recommendation following review unless additional time is agreed to by the department and the petitioner.
- The reviewer may recommend to the Department that an order be upheld, withdrawn or modified. If justified the reviewer may recommend other action including a reinspection of the device or commodity based upon information presented during the review.
- All actions should be documented, and all parties advised in writing of the results of the review. The report of action should be detailed in that it provides the clear and understandable reasons for the decision.

“Rockland County” - Notice (2003)

1. Rockland County's citations and fines are issued to the retailer who immediately receives from the inspector notice of a hearing, stating where and when the citation may be disputed. Such notice satisfies due process. See also: *Chalfy v. Turoff*, 804 F.2d 20, 22 (2d Cir. 1986) (affirming adequate notice where summons stated time and place of hearing to contest fine).
2. The fact that the retailer may ultimately pass along a fine and charge a "business interruption fee" to a manufacturer is between those two parties and does not violate due process.

See: Kraft Foods North America, Inc. v. Rockland County Dept. of Weights and Measures, United States District Court, S.D. New York. | February 26, 2003 | Not Reported in F.Supp.2d | 2003 WL 554796

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Weights and Measures Inspectors – Credibility, Professionalism

- Represent the State or local governments to the public and business community, and **must** exercise their police powers with in accordance with the policies and procedures issued by their agencies.
- Their work is **essential** to ensuring equity and fair competition in their local marketplace and it **impacts** the quality of life of each and every person in their jurisdiction. In addition, their work helps maintain consumer and business **confidence** in the commercial measurement system which is **essential** to economic growth.
- Their **reputation, credibility, professionalism** and **common sense** come from education, training and real-world experience.
 - Inspectors should participate in NIST legal metrology training; read the NIST Handbooks and other weights and measures related papers and reports; and technical literature from device manufacturers and packagers. Participate in the Regional Weights and Measures Associations and other Weights and Measures Organizations.
- **They must CONDUCT each inspection as if it is to be reviewed the highest court in their state.**

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Other Resources

NIST

- OWM Weights and Measures Connection - <https://www.nist.gov/pml/weights-and-measures/publications/measurement-matters-newsletter>
- NIST Handbooks and Other Publications: <https://www.nist.gov/pml/weights-and-measures/publications/nist-handbooks>
- NIST Special Publications: <https://www.nist.gov/pml/weights-and-measures/publications/nist-special-publications>
- The International Bureau of Weights and Measures (BIPM) <https://www.bipm.org/en/about-us/>
- The International Organization of Legal Metrology (OIML) <https://oiml.org/en>
- “Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations” www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf
- “Investigations Involving the Internet and Computer Networks” www.ncjrs.gov/pdffiles1/nij/210798.pdf

(URL links verified 2/2022)

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Contacts

Uniform Weights and Measures Law and NIST Handbooks 130 & 133

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Metric System Resources & Information

Elizabeth Benham – elizabeth.benham@nist.gov or 301-975-3690

<https://www.nist.gov/pml/weights-and-measures/laws-and-regulations>
www.nist.gov/metric

Main Office: (301) 975-4004 or email to owm@nist.gov
Office of Weights and Measures: <https://www.nist.gov/pml/weights-and-measures/about-owm>

NIST National Institute of Standards and Technology
 U.S. Department of Commerce

 Physical Measurement Laboratory
 Office of Weights and Measures
 Laws and Metric Program

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