



1997 SENATE BILL 277

August 26, 1997 – Introduced by Senators C. POTTER, WELCH, ROESSLER, CLAUSING, DRZEWIECKI, FITZGERALD, JAUCH, PLACHE, RUDE, SCHULTZ and WINEKE, cosponsored by Representatives M. LEHMAN, HUBER, AINSWORTH, BRANDEMUEHL, COGGS, DOBYNS, FREESE, GARD, GOETSCH, GROTHMAN, GUNDERSON, HAHN, HARS DORF, HASENOHRL, HUEBSCH, JOHNSRUD, KAUFERT, F. LASEE, MEYER, MUSSER, OLSEN, OTT, OTTE, OURADA, PORTER, REYNOLDS, SERATTI, SPRINGER, STASKUNAS and ZIEGELBAUER. Referred to Committee on Economic Development, Housing and Government Operations.

1 **AN ACT** *to renumber and amend* 100.30 (2) (a); *to amend* 100.30 (2) (b), 100.30
2 (2) (c) 1. a., 100.30 (2) (d), 100.30 (2) (f), 100.30 (2) (L) (intro.), 100.30 (2m) (a),
3 100.30 (2m) (b), 100.30 (3), 100.30 (5) (a), 100.30 (6) (a) 7. and 814.04 (intro.);
4 **to repeal and recreate** 100.33 (1) (h); and **to create** 100.30 (2) (a), 100.30 (2)
5 (am) 1m., 100.30 (2) (cb), 100.30 (2) (cg), 100.30 (2) (cm), 100.30 (2) (j), 100.30
6 (2) (m), 100.30 (4m), 100.30 (5m), 100.30 (6) (a) 9. and 100.30 (6) (a) 10. of the
7 statutes; **relating to:** the regulation of the sale of merchandise below cost and
8 providing a penalty.

Analysis by the Legislative Reference Bureau

Currently, with certain exceptions, the state unfair sales or “minimum markup” law requires a wholesaler of cigarettes, other tobacco products, fermented malt beverages, intoxicating liquor, wine or motor vehicle fuel to sell that merchandise for at least 3% more than the cost of the merchandise to the wholesaler. The law requires a retailer of cigarettes, other tobacco products, fermented malt beverages, intoxicating liquor, wine or motor vehicle fuel to sell that merchandise for at least 6% more than the cost of the merchandise to the retailer. Finally, the law requires a retailer or wholesaler of other merchandise to sell that merchandise for at least its cost to the retailer or wholesaler. Generally, under the unfair sales law,

cost is computed as the lesser of the invoice cost or the replacement cost of the merchandise, plus excise taxes and overhead costs, and minus certain trade discounts.

The unfair sales law prohibits offering loss leaders. A loss leader is the sale of an item of merchandise at less than cost in order to induce the purchase of other merchandise or to unfairly divert trade from a competitor.

This bill creates different minimum markup requirements for sellers of motor vehicle fuel from those in current law. The minimum markup requirements under the bill for retail sales of motor vehicle fuel vary depending on various factors, including whether the retail seller is owned or operated by a refiner or wholesaler of motor vehicle fuel. Depending on those factors, the minimum markup under the bill for retail motor vehicle fuel sales is generally 6% over the cost of the motor vehicle fuel to the retail seller, 6% or 9.18% over the retail seller's lowest selling price or 9.18% over the average posted terminal price. The average posted terminal price is the average posted price at which motor vehicle fuel is sold at a motor vehicle storage and distribution facility that is supplied by a pipeline or marine vessel, from which facility motor vehicle fuel may be removed at rack and from which facility 5 or more refiners sell motor vehicle fuel.

The minimum markup requirements under the bill for a wholesaler of motor vehicle fuel are generally 3% over the wholesaler's cost or 3% over the average posted terminal price, whichever is greater.

The bill also provides that a person may be liable for a violation of the minimum markup law if the person is a partner, officer or director of a person who commits a violation. The bill permits a person who is liable for a violation to obtain contribution from any other person who may also be liable for the violation.

Under current law, the department of agriculture, trade and consumer protection (DATCP) or a district attorney may bring an action on behalf of the state to recover a forfeiture against a person who violates the minimum markup law. DATCP may also issue an order requiring certain retailers or wholesalers to cease and desist from violating the minimum markup law. Finally, under current law, DATCP or a district attorney may bring an action to enjoin a violation of the minimum markup law. This bill permits a person who is injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel in violation of the minimum markup law to bring an action against the violator for an injunction, or for the recovery of 3 times the amount of any monetary loss sustained or an amount equal to \$2,000 multiplied by each day of continued violation, whichever is greater, plus costs and reasonable attorney fees.

Current law contains certain exceptions to the minimum markup requirements. One of those exceptions provides that the minimum markup requirements do not apply if merchandise is priced in good faith to meet the existing price of a competitor. This bill provides that the exception applies only if the price of motor vehicle fuel is identical to the price of the same motor vehicle fuel sold by a direct competitor at not less than the competitor's cost on the same day and is established in good faith to meet the competitor's price.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 100.30 (2) (a) of the statutes is renumbered 100.30 (2) (am), and
2 100.30 (2) (am) 1., as renumbered, is amended to read:

3 100.30 **(2)** (am) 1. With respect to the sale of cigarettes or other tobacco
4 products, fermented malt beverages, or intoxicating liquor or wine, ~~or motor vehicle~~
5 fuel, “cost to retailer” means the invoice cost of the merchandise to the retailer within
6 30 days prior to the date of sale, or replacement cost of the merchandise to the
7 retailer, whichever is lower, less all trade discounts except customary discounts for
8 cash, plus any excise taxes imposed on such merchandise or the sale thereof other
9 than excise taxes collected by the retailer, and any cost incurred for transportation
10 and any other charges not otherwise included in the invoice cost or the replacement
11 cost of the merchandise as herein set forth, to which shall be added a markup to cover
12 a proportionate part of the cost of doing business, which markup, in the absence of
13 proof of a lesser cost, shall be 6% of the cost to the retailer as herein set forth.

14 **SECTION 2.** 100.30 (2) (a) of the statutes is created to read:

15 100.30 **(2)** (a) “Average posted terminal price” means the average posted rack
16 price at which motor vehicle fuel is sold at the close of business on the determination
17 date by all refiners at a terminal plus any excise taxes imposed on the motor vehicle
18 fuel or its sale and any cost incurred for transportation and any other fees or charges.
19 In this paragraph, “average” means the arithmetic mean.

20 **SECTION 3.** 100.30 (2) (am) 1m. of the statutes is created to read:

1 100.30 (2) (am) 1m. With respect to the sale of motor vehicle fuel, “cost to
2 retailer” means the following:

3 a. In the case of a retailer who is not owned or operated, either directly or
4 indirectly, by a refiner or by a wholesaler of motor vehicle fuel and who purchases
5 motor vehicle fuel from a refiner or wholesaler of motor vehicle fuel for retail sale at
6 a retail station, the invoice cost of the motor vehicle fuel to the retailer within 10 days
7 prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever
8 is lower, less all trade discounts except customary discounts for cash, plus any excise,
9 sales or use taxes imposed on the motor vehicle fuel or on the sale of the motor vehicle
10 fuel and any cost incurred for transportation and any other charges not otherwise
11 included in the invoice cost or the replacement cost of the motor vehicle fuel, plus a
12 markup of 6% of that amount to cover a proportionate part of the cost of doing
13 business; or the average posted terminal price at the terminal located closest to the
14 retailer plus a markup of 9.18% of the average posted terminal price to cover a
15 proportionate part of the cost of doing business; whichever is greater.

16 b. In the case of the retail sale of motor vehicle fuel by a refiner at a retail station
17 owned or operated either directly or indirectly by the refiner, the refiner’s lowest
18 selling price to other retailers or to wholesalers of motor vehicle fuel on the date of
19 the refiner’s retail sale, less all trade discounts except customary discounts for cash,
20 plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and
21 any cost incurred for transportation and any other charges not otherwise included
22 in the invoice cost of the motor vehicle fuel, plus a markup of 9.18% of that amount
23 to cover a proportionate part of the cost of doing business; or the average posted
24 terminal price at the terminal located closest to the retail station plus a markup of

1 9.18% of the average posted terminal price to cover a proportionate part of the cost
2 of doing business; whichever is greater.

3 c. In the case of the retail sale of motor vehicle fuel by a wholesaler of motor
4 vehicle fuel at a retail station owned or operated either directly or indirectly by the
5 wholesaler of motor vehicle fuel, the wholesaler of motor vehicle fuel's lowest selling
6 price to other retailers on the date of the wholesaler of motor vehicle fuel's retail sale
7 less all trade discounts except customary discounts for cash, plus any excise, sales
8 or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred
9 for transportation and any other charges not otherwise included in the invoice cost
10 of the motor vehicle fuel, plus a markup of 6% of that amount to cover a proportionate
11 part of the cost of doing business; or the average posted terminal price at the terminal
12 located closest to the retail station plus a markup of 9.18% of the average posted
13 terminal price to cover a proportionate part of the cost of doing business; whichever
14 is greater.

15 d. In the case of a retail sale of motor vehicle fuel at a retail station by a person
16 not described in subd. 1. a. to c., the average posted terminal price at the terminal
17 located closest to the retail station plus a markup of 9.18% of the average posted
18 terminal price to cover a proportionate part of the cost of doing business.

19 e. In the case of a retail sale of motor vehicle fuel at a place other than a retail
20 station, the invoice cost of the motor vehicle fuel to the retailer within 10 days prior
21 to the date of the sale, or the replacement cost of the motor vehicle fuel, whichever
22 is lower, less all trade discounts except customary discounts for cash, plus any excise,
23 sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost
24 incurred for transportation and any other charges not otherwise included in the
25 invoice cost or the replacement cost of the motor vehicle fuel, plus a markup of 3%

1 of that amount to cover a proportionate part of the cost of doing business; or the
2 average posted terminal price at the terminal located closest to the place of delivery
3 plus a markup of 3% of the average posted terminal price to cover a proportionate
4 part of the cost of doing business; whichever is greater.

5 **SECTION 4.** 100.30 (2) (b) of the statutes is amended to read:

6 100.30 (2) (b) “Cost to retailer” ~~and~~, “cost to wholesaler” and “cost to wholesaler
7 of motor vehicle fuel” as defined in pars. (a) ~~and (am)~~, (c) and (cb) mean bona fide
8 costs; and purchases made by retailers ~~and~~, wholesalers and wholesalers of motor
9 vehicle fuel at prices which cannot be justified by prevailing market conditions
10 within this state shall not be used in determining cost to the retailer ~~and~~, cost to the
11 wholesaler and cost to the wholesaler of motor vehicle fuel. Prices at which
12 purchases of merchandise other than motor vehicle fuel are made by retailers or
13 wholesalers cannot be justified by prevailing market conditions in this state when
14 they are below the lowest prices at which the manufacturer or producer of such
15 merchandise sells to other retailers or wholesalers in this state. Prices at which
16 purchases of motor vehicle fuel are made by retailers and wholesalers of motor
17 vehicle fuel cannot be justified by prevailing market conditions in this state when
18 they are below the average posted terminal price.

19 **SECTION 5.** 100.30 (2) (c) 1. a. of the statutes is amended to read:

20 100.30 (2) (c) 1. a. With respect to the sale of cigarettes or other tobacco
21 products, fermented malt beverages, or intoxicating liquor or wine, or motor vehicle
22 fuel, “cost to wholesaler” means, except as provided in subd. 1. b., the invoice cost of
23 the merchandise to the wholesaler within 30 days prior to the date of sale, or the
24 replacement cost of the merchandise to the wholesaler, whichever is lower, less all
25 trade discounts except customary discounts for cash, plus any excise taxes imposed

1 on the sale thereof prior to the sale at retail, and any cost incurred for transportation
2 and any other charges not otherwise included in the invoice cost or the replacement
3 cost of the merchandise as herein set forth, to which shall be added, except for sales
4 at wholesale between wholesalers, a markup to cover a proportionate part of the cost
5 of doing business, which markup, in the absence of proof of a lesser cost, shall be 3%
6 of the cost to the wholesaler as herein set forth.

7 **SECTION 6.** 100.30 (2) (cb) of the statutes is created to read:

8 100.30 (2) (cb) With respect to the sale of motor vehicle fuel, “cost to wholesaler
9 of motor vehicle fuel” means the invoice cost of the motor vehicle fuel to the
10 wholesaler of motor vehicle fuel within 10 days prior to the date of the sale or the
11 replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts
12 except customary discounts for cash, plus any excise, sales or use taxes imposed on
13 the motor vehicle fuel or on its sale and any cost incurred for transportation and any
14 other charges not otherwise included in the invoice cost or the replacement cost of
15 the motor vehicle fuel, plus a markup of 3% of that amount to cover a proportionate
16 part of the cost of doing business; or the average posted terminal price at the terminal
17 located closest to the place of delivery plus a markup of 3% of the average posted
18 terminal price to cover a proportionate part of the cost of doing business; whichever
19 is greater.

20 **SECTION 7.** 100.30 (2) (cg) of the statutes is created to read:

21 100.30 (2) (cg) 1. Except as provided in subd. 2., “determination date” is the day
22 preceding the day of the sale of motor vehicle fuel by a retailer or wholesaler of motor
23 vehicle fuel.

24 2. If a retailer or a wholesaler of motor vehicle fuel sells motor vehicle fuel on
25 a day other than the day on which the retailer or wholesaler of motor vehicle fuel last

1 purchased any motor vehicle fuel and the sale of the motor vehicle fuel by the retailer
2 or wholesaler of motor vehicle fuel occurs no later than 10 days after its last purchase
3 by the retailer or wholesaler of motor vehicle fuel, “determination date” means any
4 of the following dates selected by the retailer or the wholesaler of motor vehicle fuel:

5 a. The day preceding the day of the sale of motor vehicle fuel by the retailer or
6 wholesaler of motor vehicle fuel.

7 b. The day on which motor vehicle fuel was last purchased by the retailer or
8 wholesaler of motor vehicle fuel.

9 **SECTION 8.** 100.30 (2) (cm) of the statutes is created to read:

10 100.30 (2) (cm) “Refiner” means a manufacturer, producer or refiner of motor
11 vehicle fuel or a person who purchases motor vehicle fuel for sale to wholesalers of
12 motor vehicle fuel.

13 **SECTION 9.** 100.30 (2) (d) of the statutes is amended to read:

14 100.30 (2) (d) “Replacement cost” means the cost computed as specified in par.
15 ~~(a) or (am)~~, (c) ~~or (cb)~~ at which the merchandise sold could have been bought by the
16 retailer ~~or, wholesaler~~ or wholesaler of motor vehicle fuel at any time if bought in the
17 same quantity as the retailer’s ~~or, wholesaler’s~~ or wholesaler of motor vehicle fuel’s
18 last purchase of the said merchandise.

19 **SECTION 10.** 100.30 (2) (f) of the statutes is amended to read:

20 100.30 (2) (f) “Retailer” and “wholesaler” shall both be applied to any merchant
21 who buys merchandise for resale at retail from the manufacturer or producer thereof
22 and to any wholesaler under par. (L) 2. and, as to that merchandise or that
23 wholesaler, the terms “cost to retailer” and “cost to wholesaler” as defined in pars.
24 ~~(a) (am)~~ and (c) shall both be applied, including the markup requirements.

25 **SECTION 11.** 100.30 (2) (j) of the statutes is created to read:

1 100.30 (2) (j) “Terminal” means a motor vehicle fuel storage and distribution
2 facility that is supplied by a pipeline or marine vessel, from which facility motor
3 vehicle fuel may be removed at a rack and from which facility at least 5 refiners sell
4 motor vehicle fuel

5 **SECTION 12.** 100.30 (2) (L) (intro.) of the statutes is amended to read:

6 100.30 (2) (L) (intro.) “Wholesaler” includes every person holding a permit as
7 a multiple retailer under s. 139.30 (8) and every person engaged in the business of
8 making sales at wholesale, other than sales of motor vehicle fuel at wholesale, within
9 this state except as follows:

10 **SECTION 13.** 100.30 (2) (m) of the statutes is created to read:

11 100.30 (2) (m) “Wholesaler of motor vehicle fuel” includes all of the following:

12 1. Every person who acquires motor vehicle fuel from a refiner, stores the motor
13 vehicle fuel and sells it through 5 or more retail outlets that the person owns or
14 operates.

15 2. Every person who acquires motor vehicle fuel from a refiner and stores it in
16 a bulk storage facility other than a retail station for further sale and distribution.

17 3. Every person engaged in the business of making sales of motor vehicle fuel
18 at wholesale within this state.

19 4. Every person engaged in the business of selling diesel fuel if that person’s
20 sales of diesel fuel accounted for at least 60% of that person’s total sales of motor
21 vehicle fuel in the previous year or, if that person did not engage in the business of
22 selling diesel fuel in the previous year, if that person reasonably anticipates that
23 sales of diesel fuel will account for at least 60% of that person’s total sales of motor
24 vehicle fuel in the current year.

25 **SECTION 14.** 100.30 (2m) (a) of the statutes is amended to read:

1 100.30 **(2m)** (a) When one or more items of merchandise are furnished or sold
2 in combination with or on condition of the purchase of one or more other items, or are
3 so advertised, all items shall be included in determining cost under sub. (2) ~~(a) or~~
4 (am), (c) or (cb); and if any of the items included therein are separately priced, such
5 separate price shall be subject to the requirements of this section.

6 **SECTION 15.** 100.30 (2m) (b) of the statutes is amended to read:

7 100.30 **(2m)** (b) Any retailer who also sells to other retailers shall use the
8 invoice cost to other retailers in computing the selling price at retail under sub. (2)
9 ~~(a) (am) 1. and 2.~~; and if that retailer is a manufacturer or producer, both sub. (2) ~~(a)~~
10 (am) 1. and 2. and (c) 1. and 2. shall be used in computing the selling price at retail.
11 In the absence of sales to other retailers, the manufacturer's or producer's invoice
12 cost to wholesalers shall be used in computing the manufacturer's or producer's
13 selling price at retail as provided in sub. (2) ~~(a) (am) 1. and 2.~~ and (c) 1. and 2.

14 **SECTION 16.** 100.30 (3) of the statutes is amended to read:

15 100.30 **(3)** ILLEGALITY OF LOSS LEADERS. Any sale of any item of merchandise
16 either by a retailer ~~or~~, wholesaler, wholesaler of motor vehicle fuel or refiner, at less
17 than cost as defined in this section with the intent or effect of inducing the purchase
18 of other merchandise or of unfairly diverting trade from a competitor, impairs and
19 prevents fair competition, injures public welfare and is unfair competition and
20 contrary to public policy and the policy of this section. Such sales are prohibited.
21 Evidence of any sale of any item of merchandise by any retailer or wholesaler at less
22 than cost as defined in this section shall be prima facie evidence of intent or effect
23 to induce the purchase of other merchandise, or to unfairly divert trade from a
24 competitor, or to otherwise injure a competitor.

25 **SECTION 17.** 100.30 (4m) of the statutes is created to read:

1 100.30 **(4m)** LIABILITY. Any person who violates this section is liable, and every
2 partner, officer or director of the person is liable jointly and severally with and to the
3 same extent as the person, unless the person liable under this subsection proves that
4 he or she did not know, and in the exercise of reasonable care could not have known,
5 of the existence of the facts by reason of which the liability is alleged to exist. A
6 person who is liable under this subsection may obtain contribution as in cases of
7 contract from any other person who is liable under this subsection.

8 **SECTION 18.** 100.30 (5) (a) of the statutes is amended to read:

9 100.30 **(5)** (a) The department may issue a special order as provided in s. 93.18
10 against a retailer ~~or~~, wholesaler, wholesaler of motor vehicle fuel or refiner requiring
11 the ~~retailer or wholesaler~~ person to cease and desist from violating this section in the
12 sale of cigarettes or other tobacco products, fermented malt beverages, intoxicating
13 liquor or wine or motor vehicle fuel. The department or a district attorney may
14 commence an action on behalf of the state against a retailer ~~or~~, wholesaler,
15 wholesaler of motor vehicle fuel or refiner who violates a special order issued under
16 this paragraph to recover a forfeiture of not less than \$200 nor more than \$5,000 for
17 each violation.

18 **SECTION 19.** 100.30 (5m) of the statutes is created to read:

19 100.30 **(5m)** PRIVATE CAUSE OF ACTION. Any person who is injured or threatened
20 with injury as a result of a sale or purchase of motor vehicle fuel in violation of sub.
21 (3) may bring an action against the person who violated sub. (3) for temporary or
22 permanent injunctive relief or an action against the person for 3 times the amount
23 of any monetary loss sustained or an amount equal to \$2,000, whichever is greater,
24 multiplied by each day of continued violation, together with costs, including
25 accounting fees and reasonable attorney fees, notwithstanding s. 814.04 (1). An

1 action under this subsection may not be brought after 180 days after the date of a
2 violation of sub. (3).

3 **SECTION 20.** 100.30 (6) (a) 7. of the statutes is amended to read:

4 100.30 (6) (a) 7. The price of merchandise, other than motor vehicle fuel, is
5 made in good faith to meet an existing price of a competitor and is based on evidence
6 in the possession of the retailer or wholesaler in the form of an advertisement, proof
7 of sale or receipted purchase.

8 **SECTION 21.** 100.30 (6) (a) 9. of the statutes is created to read:

9 100.30 (6) (a) 9. Motor vehicle fuel is sold by a refiner to a wholesaler of motor
10 vehicle fuel, who may sell the motor vehicle fuel at either retail or wholesale.

11 **SECTION 22.** 100.30 (6) (a) 10. of the statutes is created to read:

12 100.30 (6) (a) 10. The price of motor vehicle fuel is identical to the price of the
13 same merchandise sold by a direct competitor at not less than the competitor's cost
14 to retailer or cost to wholesaler of motor vehicle fuel, whichever is applicable, on the
15 same day, is established in good faith to meet the competitor's price and is based on
16 evidence in the possession of the retailer or wholesaler of motor vehicle fuel in the
17 form of an advertisement, proof of sale or receipted purchase.

18 **SECTION 23.** 100.33 (1) (h) of the statutes is repealed and recreated to read:

19 100.33 (1) (h) "Sales at wholesale" includes any transfer, for a valuable
20 consideration made in ordinary course of trade or the usual conduct of the
21 wholesaler's business, of title to tangible personal property to the purchaser for
22 purposes of resale or further processing or manufacturing.

23 **SECTION 24.** 814.04 (intro.) of the statutes is amended to read:

24 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m),
25 106.04 (6) (i) and (6m) (a), 769.313, 814.025, 814.245, 895.035 (4), 895.75 (3), 895.77

1 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when
2 allowed costs shall be as follows:

3 **SECTION 25. Initial applicability.**

4 (1) This act first applies to violations of section 100.30 (3) of the statutes that
5 occur on the effective date of this subsection.

6 (END)