

State of Wisconsin



1997 Assembly Bill 283

Date of enactment: **December 19, 1997**

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1997 WISCONSIN ACT 55

AN ACT to renumber and amend 100.30 (2) (a); **to amend** 100.30 (2) (b), 100.30 (2) (c) 1. a., 100.30 (2) (d), 100.30 (2) (f), 100.30 (2) (g), 100.30 (2) (L) (intro.), 100.30 (2m) (a), 100.30 (2m) (b), 100.30 (3), 100.30 (5) (a), 100.30 (6) (a) 7. and 814.04 (intro.); and **to create** 100.26 (9), 100.30 (2) (a), 100.30 (2) (am) 1m., 100.30 (2) (c) 1g., 100.30 (2) (c) 1r., 100.30 (2) (cg), 100.30 (2) (cj), 100.30 (2) (cL), 100.30 (2) (cm), 100.30 (2) (j), 100.30 (2) (m), 100.30 (2m) (c), 100.30 (5m), 100.30 (6) (a) 9. and 100.30 (7) of the statutes; **relating to:** the regulation of the sale of merchandise below cost and providing penalties.

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

SECTION 1. 100.26 (9) of the statutes is created to read:

100.26 (9) Any person who violates s. 100.30 (7) (a) is subject to a forfeiture of not less than \$50 nor more than \$200 for each violation.

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

100.30 (2) (am) 1. With respect to the sale of cigarettes or other tobacco products, fermented malt beverages, or intoxicating liquor or wine, ~~or motor vehicle fuel,~~ "cost to retailer" means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on such merchandise or the sale thereof other than excise taxes collected by the retailer, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, to which shall be added

a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 6% of the cost to the retailer as herein set forth.

SECTION 3. 100.30 (2) (a) of the statutes is created to read:

100.30 (2) (a) "Average posted terminal price" means the average posted rack price, as published by a petroleum price reporting service, at which motor vehicle fuel is offered for sale at the close of business on the determination date by all refiners and wholesalers of motor vehicle fuel at a terminal plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale, any cost incurred for transportation and any other charges that are not otherwise included in the average posted rack price. In this paragraph, "average" means the arithmetic mean.

SECTION 4. 100.30 (2) (am) 1m. of the statutes is created to read:

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

a. In the case of the retail sale of motor vehicle fuel by a refiner at a retail station owned or operated either directly or indirectly by the refiner, the refiner's lowest sel-

* Section 991.11, WISCONSIN STATUTES 1995-96: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

ling price to other retailers or to wholesalers of motor vehicle fuel on the date of the refiner's retail sale, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost of the motor vehicle fuel, plus a markup of 9.18% of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retail station plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.

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

c. In the case of the retail sale of motor vehicle fuel by a person other than a refiner or a wholesaler of motor vehicle fuel at a retail station, the invoice cost of the motor vehicle fuel to the retailer within 10 days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel, plus a markup of 6% of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.

d. In the case of a retail sale of motor vehicle fuel by a refiner at a place other than a retail station, the refiner's lowest selling price to other retailers or to wholesalers of motor vehicle fuel on the date of the refiner's retail sale, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for

transportation and any other charges not otherwise included in the invoice cost of the motor vehicle fuel to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the retailer as set forth in this subd. 1m. d.

e. In the case of a retail sale of motor vehicle fuel by a person other than a refiner at a place other than a retail station, the invoice cost of the motor vehicle fuel to the retailer within 10 days prior to the date of the sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the retailer as set forth in this subd. 1m. e.

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

100.30 (2) (b) "Cost to retailer" and "cost to wholesaler" as defined in pars. ~~(a)-(am)~~ and (c) mean bona fide costs; and purchases made by retailers ~~and~~ wholesalers, wholesalers of motor vehicle fuel and refiners at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler. Prices at which purchases of merchandise other than motor vehicle fuel are made by retailers or wholesalers cannot be justified by prevailing market conditions in this state when they are below the lowest prices at which the manufacturer or producer of such merchandise sells to other retailers or wholesalers in this state. Prices at which sales of motor vehicle fuel are made by retailers, wholesalers, wholesalers of motor vehicle fuel and refiners cannot be justified by prevailing market conditions in this state when they are below the applicable cost to retailers and cost to wholesalers specified under pars. (am) and (c).

SECTION 6. 100.30 (2) (c) 1. a. of the statutes is amended to read:

100.30 (2) (c) 1. a. With respect to the sale of cigarettes or other tobacco products, fermented malt beverages, ~~or~~ intoxicating liquor or wine, ~~or motor vehicle fuel~~, "cost to wholesaler" means, except as provided in subd. 1. b., the invoice cost of the merchandise to the wholesaler within 30 days prior to the date of sale, or the replacement cost of the merchandise to the wholesaler, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on the sale thereof prior to the sale at retail, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost

of the merchandise as herein set forth, to which shall be added, except for sales at wholesale between wholesalers, a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the wholesaler as herein set forth.

SECTION 7. 100.30 (2) (c) 1g. of the statutes is created to read:

100.30 (2) (c) 1g. With respect to the wholesale sale of motor vehicle fuel by a refiner, "cost to wholesaler" means the refiner's lowest selling price to other retailers or to wholesalers of motor vehicle fuel on the date of the refiner's wholesale sale, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost of the motor vehicle fuel, to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the wholesaler as set forth in this subdivision.

SECTION 8. 100.30 (2) (c) 1r. of the statutes is created to read:

100.30 (2) (c) 1r. With respect to the wholesale sale of motor vehicle fuel by a person other than a refiner, "cost to wholesaler" means the invoice cost of the motor vehicle fuel to the wholesaler of motor vehicle fuel within 10 days prior to the date of the sale or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the wholesaler as set forth in this subdivision.

SECTION 9. 100.30 (2) (cg) of the statutes is created to read:

100.30 (2) (cg) 1. Except as provided in subd. 2., "determination date" is the day preceding the day of the sale at retail of motor vehicle fuel.

2. If a retailer sells motor vehicle fuel on a day other than the day on which the retailer last purchased any motor vehicle fuel and the sale of the motor vehicle fuel by the retailer occurs no later than 10 days after its last purchase by the retailer, "determination date" means any of the following dates selected by the retailer:

a. The day preceding the day of the sale of motor vehicle fuel by the retailer.

b. The day on which motor vehicle fuel was last purchased by the retailer.

SECTION 10. 100.30 (2) (cj) of the statutes is created to read:

100.30 (2) (cj) "Existing price of a competitor" means a price being simultaneously offered to a buyer for merchandise of like quality and quantity by a person who is a direct competitor of the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner and from whom the buyer can practicably purchase the merchandise.

SECTION 11. 100.30 (2) (cL) of the statutes is created to read:

100.30 (2) (cL) "Petroleum price reporting service" means a wholesale petroleum product price reporting service that is recognized nationwide.

SECTION 12. 100.30 (2) (cm) of the statutes is created to read:

100.30 (2) (cm) "Refiner" means a manufacturer, producer or refiner of motor vehicle fuel.

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

100.30 (2) (d) "Replacement cost" means the cost computed as specified in par. ~~(a)~~ (am) or (c) at which the merchandise sold could have been bought by the retailer ~~or wholesaler~~ or wholesaler of motor vehicle fuel at any time if bought in the same quantity as the retailer's ~~or wholesaler's~~ or wholesaler of motor vehicle fuel's last purchase of the said merchandise.

SECTION 14. 100.30 (2) (f) of the statutes is amended to read:

100.30 (2) (f) "~~Retailer~~" With respect to the sale of merchandise other than motor vehicle fuel, "retailer" and "wholesaler" shall both be applied to any merchant who buys merchandise for resale at retail from the manufacturer or producer thereof and to any wholesaler under par. (L) 2. and, as to that merchandise or that wholesaler, the terms "cost to retailer" and "cost to wholesaler" as defined in pars. ~~(a)~~ (am) and (c) shall both be applied, including the markup requirements.

SECTION 15. 100.30 (2) (g) of the statutes is amended to read:

100.30 (2) (g) "Sell", "sale" or "sold" includes any advertising or offer to sell or any transfer of merchandise where title is retained by the retailer ~~or wholesaler,~~ wholesaler of motor vehicle fuel or refiner as security for the payment of the purchase price. In determining the selling price of merchandise by wholesalers ~~and wholesalers of motor vehicle fuel,~~ retailers and refiners under this section, all fractions of a cent shall be carried to the next full cent.

SECTION 16. 100.30 (2) (j) of the statutes is created to read:

100.30 (2) (j) "Terminal" means a motor vehicle fuel storage and distribution facility that is supplied by a pipeline or marine vessel, from which facility motor vehicle fuel may be removed at a rack and from which facility at

least 3 refiners or wholesalers of motor vehicle fuel sell motor vehicle fuel.

SECTION 17. 100.30 (2) (L) (intro.) of the statutes is amended to read:

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

SECTION 18. 100.30 (2) (m) of the statutes is created to read:

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

1. A person who stores motor vehicle fuel and sells it through 5 or more retail outlets that the person owns or operates.

2. A person who acquires motor vehicle fuel from a refiner or as a sale at wholesale and stores it in a bulk storage facility other than a retail station for further sale and distribution.

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

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

SECTION 19. 100.30 (2m) (a) of the statutes is amended to read:

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

SECTION 20. 100.30 (2m) (b) of the statutes is amended to read:

100.30 (2m) (b) ~~Any~~ With respect to the sale of merchandise other than motor vehicle fuel, any retailer who also sells to other retailers shall use the invoice cost to other retailers in computing the selling price at retail under sub. (2) ~~(a)~~ (am); and if that retailer is a manufacturer or producer, both sub. (2) ~~(a)~~ (am) and (c) shall be used in computing the selling price at retail. In the absence of sales to other retailers, the manufacturer’s or producer’s invoice cost to wholesalers shall be used in computing the manufacturer’s or producer’s selling price at retail as provided in sub. (2) ~~(a)~~ (am) and (c).

SECTION 21. 100.30 (2m) (c) of the statutes is created to read:

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100.30 (2m) (c) When 2 or more terminals are included in the same geographic area by a petroleum price reporting service, they shall be considered one terminal for purposes of sub. (2) (am) 1m. a., b. and c.

SECTION 22. 100.30 (3) of the statutes is amended to read:

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

SECTION 23. 100.30 (5) (a) of the statutes is amended to read:

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

SECTION 24. 100.30 (5m) of the statutes is created to read:

100.30 (5m) **PRIVATE CAUSE OF ACTION.** Any person who is injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel in violation of sub. (3) may bring an action against the person who violated sub. (3) for temporary or permanent injunctive relief or an action against the person for 3 times the amount of any monetary loss sustained or an amount equal to \$2,000, whichever is greater, multiplied by each day of continued violation, together with costs, including accounting fees and reasonable attorney fees, notwithstanding s. 814.04 (1). An action under this subsection may not be brought after 180 days after the date of a violation of sub. (3).

SECTION 25. 100.30 (6) (a) 7. of the statutes is amended to read:

100.30 (6) (a) 7. The price of merchandise is made in good faith to meet an existing price of a competitor and is based on evidence in the possession of the retailer ~~or~~ wholesaler, wholesaler of motor vehicle fuel or refiner in

the form of an advertisement, proof of sale or receipted purchase, price survey or other business record maintained by the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner in the ordinary course of trade or the usual conduct of business.

SECTION 26. 100.30 (6) (a) 9. of the statutes is created to read:

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

SECTION 27. 100.30 (7) of the statutes is created to read:

100.30 (7) NOTIFICATION REQUIREMENTS. (a) If a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner lowers in good faith the price of motor vehicle fuel below the applicable price specified under sub. (2) (am) 1m. to meet an existing price of a competitor, the person shall submit to the department notification of the lower price before the close of business on the day on which the price was lowered in the form and the manner required by the department.

(b) Failure to comply with par. (a) creates a rebuttable presumption that the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner did not lower the price to meet the existing price of a competitor.

(c) If a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner complies with par. (a), all of the following apply:

1. The department may not proceed under sub. (5) against the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner.

2. The retailer, wholesaler, wholesaler of motor vehicle fuel or refiner is immune from liability under sub. (5m).

SECTION 28. 814.04 (intro.) of the statutes is amended to read:

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.04 (6) (i) and (6m) (a), 769.313, 814.025, 814.245, 895.035 (4), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

SECTION 29. Initial applicability.

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

SECTION 30. Effective date.

(1) This act takes effect on the first day of the 7th month beginning after publication.