

98-097 ATCP 105 - GAS PERIODS

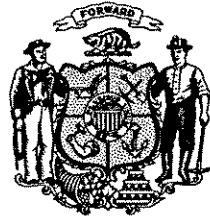
WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 98-097

AN ORDER to repeal ATCP 105.007 (2) and Note; to renumber ATCP 102.21 (2); to amend ATCP 105.003 and 105.005 (1) and (2); to repeal and recreate ATCP 102.21 (1); and to create ATCP 102.21 (5), (6) and (8), 105.001 (4m), (6) and (7), and subchapter III of chapter ATCP 105, relating to motor fuel pricing.

Submitted by **DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION**

07-07-98 RECEIVED BY LEGISLATIVE COUNCIL.
07-30-98 REPORT SENT TO AGENCY.

RS:PS;jt;kjf

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

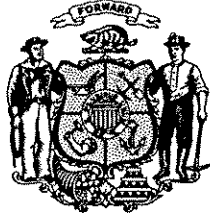
Comment Attached YES NO

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CLEARINGHOUSE RULE 98-097

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

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

In s. ATCP 105.003, is it the department's intent to strike the word "directly"? If so, should the word also be removed from the section title?

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

1 The state of Wisconsin department of agriculture, trade and consumer protection
2 proposes an order to repeal ATCP 105.007(2) and (note); to renumber ATCP
3 102.21(2); to amend ATCP 105.003 and 105.005(1) and (2); to repeal and recreate
4 ATCP 102.21(1); and to create ATCP 102.21(5), (6) and (8), 105.001(4m), (6) and (7),
5 and subchapter III of chapter ATCP 105; relating to motor fuel pricing.

7 **Analysis Prepared by the Department of**
8 **Agriculture, Trade and Consumer Protection**

9
10 Statutory Authority: s. 93.07(1), Stats. (ATCP 102 and 105),
11 s. 100.20(2), Stats. (ATCP 102), and
12 and 100.30(7), Stats.(ATCP 105)

13
14 Statutes Interpreted: s. 100.20, Stats. (ATCP 102) and
15 s. 100.30, Stats. (ATCP 105)

16
17 This rule implements legislation enacted as 1997 Wis. Act 55, related to the pricing of
18 motor fuel. The legislation modified s. 100.30, Stats., which prohibits sales of motor
19 fuel and other commodities below cost.

20
21 **Background**

22
23 The department administers s. 100.30, Stats., known as the "Unfair Sales Act." The
24 Unfair Sales Act prohibits sales below "cost" as defined in the law. The Unfair Sales
25 Act applies to sales of motor fuel and other commodities. The department has adopted
26 rules, under ch. ATCP 105, Wis. Adm. Code, to interpret the Unfair Sales Act.

27
28 1997 Wis. Act 55 made several changes to the Unfair Sales Act as it applies to sales of
29 motor fuel. These changes take effect on August 1, 1998:

- 30 • **"Cost" of motor fuel.** The Unfair Sales Act previously defined the "cost" of motor
31 fuel to mean the seller's invoice cost, less trade discounts, plus excise taxes and a

1 presumptive 3% wholesale and 6% retail markup. Under Act 55, the “cost” of motor
2 vehicle fuel is redefined to mean the greater of the following:

3 * “Cost” as previously defined (with minor changes).

4 * The “average posted terminal price” for the motor fuel terminal located nearest to
5 the retail location, plus a markup of 9.18%. The “average posted terminal price”
6 is a price published by a nationally recognized “petroleum price reporting
7 service” based on sales information collected by that service.

8 • **“Meeting competition” notice.** The Unfair Sales Act prohibits sales of motor fuel
9 below “cost” as defined in the act. However, a seller may claim, as a defense, that
10 the seller sold motor fuel below cost in order to meet the existing price of a
11 competitor. Under Act 55, a seller of motor fuel who wishes to establish a
12 presumptive “meeting competition” defense must notify the department on the
13 same day that the seller initiates the below-cost selling price in response to a
14 competitor’s price. The seller must give the notice in the “form and manner
15 required by the department.”

16
17 • **Private remedy.** The department may prosecute violations of the Unfair Sales Act.
18 Act 55 also creates a private remedy for competing sellers of motor vehicle fuel who
19 are injured by illegal sales below cost.

20 Rule Contents

21 **Definitions**

22 This rule clarifies terms used in Act 55 including “close of business on the determination
23 date,” “retail station,” “terminal” and “terminal closest to the retail station.”

24 **“Meeting Competition” Notice**

25 This rule prescribes the form and content of the notice which a motor fuel seller must
26 file with the department in order to claim the “meeting competition” defense under the
27 Unfair Sales Act.

28
29 Under Act 55 and this rule, a person who files a “meeting competition” notice with the
30 department to justify a below-cost selling price must send that notice before the “close
31 of business” on the day that the person begins selling at the price. This rule clarifies
32 that the “close of business” means the seller’s actual close of business or, if the
33 business is open for 24 hours a day, the time at which the business day ends for
34 accounting purposes.

35
36 Under this rule, a person must give a “meeting competition” notice in writing, by one of
37 the following methods:

38

- 1 • By telefax. A seller is rebuttably presumed to have sent a telefax notice “before the
2 close of business” if the department receives it by midnight on the same day.
3
- 4 • By electronic mail. A seller is rebuttably presumed to have sent an e-mail notice
5 “before the close of business” if the department receives it by midnight on the same
6 day.
7
- 8 • By United States mail. A seller is rebuttably presumed to have sent a mail notice
9 “before the close of business” if the notice is postmarked by midnight of the same
10 day.
11
- 12 • By commercial courier. A seller is rebuttably presumed to have sent notice “before
13 the close of business” if the commercial courier takes custody of the notice by
14 midnight of the same day.
15
- 16 • By personal delivery. A seller is rebuttably presumed to have sent a notice “before
17 the close of business” if the notice is personally delivered to the department by 4:30
18 PM of the same day.
19

20 Under this rule, a person giving a “meeting competition” notice must include all of the
21 following in the notice:
22

- 23 • The person’s name, including any trade name under which the person sells motor
24 fuel at the price which the notice purports to justify.
25
- 26 • The address and telephone number of each business location at which the person is
27 offering motor fuel at the price which the notice purports to justify.
28
- 29 • The motor fuel selling price which the notice purports to justify, the effective date of
30 that selling price, and the identity and grade of motor fuel to which that selling price
31 applies.
32
- 33 • The name of the competitor whose price the person is purporting to meet, and the
34 address at which that competitor is offering that price.
35
- 36 • The competitor’s price which the person is purporting to meet, the relevant dates on
37 which the competitor offered that price, and the identity and grade of motor fuel to
38 which that price applies.
39

40 A person giving a “meeting competition” notice may not falsify any of the information
41 contained in that notice. The person may not claim that a competitor offered a motor
42 fuel selling price on a specified date at a specified address if the competitor was not
43 open for business on that date at that address.
44

1 **Technical and Editorial Changes**

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4
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8

This rule makes other technical and editorial changes to make the department's current rules consistent with the Unfair Sales Act as amended by 1997 Wis. Act 55.

SECTION 1. ATCP 102.21(1) is repealed and recreated to read:

ATCP 102.21(1) "Retailer" has the meaning given in s. 100.30(2)(e), Stats.

9
10 **SECTION 2.** ATCP 102.21(2) is renumbered (7).

11 **SECTION 3.** ATCP 102.21(5), (6) and (8) are created to read:

12 ATCP 102.21(5) "Sell at retail" has the meaning given in s. 100.30(2)(h), Stats.

13 (6) "Sell at wholesale" has the meaning given in s. 100.30(2)(i), Stats.

14 (8) "Wholesaler of motor fuel" has the meaning given in s. 100.30(2)(m), Stats.

15 **SECTION 4.** ATCP 105.001(4m), (6) and (7) are created to read:

16 ATCP 105.001(4m) "Petroleum price reporting service" has the meaning given
17 in s. 100.30(2)(cL).

18 (6) "Retail station" means a location from which motor vehicle fuel is sold to the
19 general public.

20 (7) "Terminal" means, for purposes of subchapter III, a terminal under s.
21 100.30(2)(j), Stats., for which a petroleum price reporting service lists, on most days,
22 prices offered by at least 3 refiners or wholesalers of motor vehicle fuel.

23 **SECTION 5.** ATCP 105.003 is amended to read:

24 **ATCP 105.003 RETAILERS PURCHASING DIRECTLY FROM**

25 **MANUFACTURERS OR PRODUCERS.** A retailer who purchases cigarettes and other
26 tobacco products, fermented malt beverages, intoxicating liquor, or wine or motor

1 ~~vehicle fuel~~ directly from a manufacturer or producer shall compound the wholesaler [?]
2 markup with the retailer markup to determine the total markup on the merchandise.

3 **SECTION 6.** ATCP 105.005(1) and (2) are amended to read:

4 ATCP 105.005(1) **NON-MANUFACTURERS AND NON-PRODUCERS.** In order
5 to determine the selling price to its own retail customers, a non-manufacturing or non-
6 producing retailer of cigarettes and other tobacco products, fermented malt beverages,
7 intoxicating liquor, ~~or wine or motor vehicle fuel~~ who sells to other retailers shall use the
8 selling price for the sales to other retailers plus at least the minimum retailer markup.

9 (2) **MANUFACTURERS AND PRODUCERS.** In order to determine the selling
10 price to its own retail customers, a manufacturer or producer of cigarettes and other
11 tobacco products, fermented malt beverages, intoxicating liquor, or wine ~~or motor~~
12 ~~vehicle fuel~~ who acts as both a wholesaler and a retailer shall use its selling price to
13 other retailers plus the wholesaler markup compounded with the retailer markup.

14 **SECTION 7.** ATCP 105.007(2) and (note) are repealed.

15 **SECTION 8.** Subchapter III of ch. ATCP 105 is created to read:

16 **SUBCHAPTER III**

17 **MOTOR FUEL PRICING**

18 **ATCP 105.21 CALCULATING COST OF MOTOR FUEL.** For the purpose of
19 calculating the cost of motor fuel under s. 100.30, Stats., the following terms have the
20 following meanings:

1 (1) "At the close of business on the determination date," as used in s.
2 100.30(2)(a), Stats., means the time at which the petroleum price reporting service no
3 longer posts new price data.

4 NOTE: As of May, 1998, this time was 4:00 p.m. eastern time for the largest
5 petroleum price reporting service.
6

7 (2) "Terminal located closest to the retail station" or "terminal located closest to
8 the retailer," as used in s. 100.30(2), Stats., means the closest terminal based on
9 straight line distance, not road distance.

10
11 **ATCP 105.22 NOTICE OF PRICE OFFERED TO MEET COMPETITION. (1)**

12 TIME OF NOTICE. A person who purports to justify a motor fuel selling price by giving
13 notice to the department under s. 100.30(7), Stats., shall send that notice on the same
14 day that the person lowers the price of motor fuel to that price. The person shall send
15 the notice before the actual close of the person's motor fuel selling business at the
16 relevant location on that day or, if that business remains open for 24 hours a day,
17 before the time at which the business day ends for accounting purposes.

18 (2) METHOD OF GIVING NOTICE. A person giving notice to the department
19 under s. 100.30(7), Stats., shall give that notice in writing. The person shall give the
20 written notice in one of the following ways:

21 (a) Electronically, by transmitting a facsimile to a receiving number specified by
22 the department. Notice under this paragraph is rebuttably presumed to be timely under
23 sub. (1) if the department receives it by midnight of the day on which the person is
24 required to give the notice.

1 (b) Electronically, by transmitting an e-mail message to an e-mail address
2 specified by the department. Notice under this paragraph is rebuttably presumed to be
3 timely under sub. (1) if the department receives it by midnight of the day on which the
4 person is required to give the notice.

5 (c) By United States mail, to a post office box number specified by the
6 department. Notice under this paragraph is rebuttably presumed to be timely under
7 sub. (1) if it is postmarked by midnight of the day on which the person is required to
8 give the notice.

9 (d) By commercial courier delivery to the department's headquarters. Notice
10 under this paragraph is rebuttably presumed to be timely under sub. (1) if the
11 commercial courier takes custody of the notice by midnight of the day on which the
12 person is required to give the notice.

13 (e) By personal delivery to the department's headquarters. Notice under this
14 paragraph is rebuttably presumed to be timely under sub. (1) if it is delivered to the
15 department's headquarters by 4:30 PM of the day on which the person is required to
16 give the notice.

17 (2) NOTICE CONTENTS. A person giving notice under s. 100.30(7), Stats.,
18 shall include all of the following in that notice:

19 (a) The person's name, including any trade name under which the person sells
20 motor fuel at the price which the notice purports to justify.

21 (b) The address and telephone number of each business location at which the
22 person is offering motor fuel at the price which the notice purports to justify.

1 (c) The motor fuel selling price which the notice purports to justify, the effective
2 date of that selling price, and the identity and grade of motor fuel to which that selling
3 price applies.

4 (d) The name of the competitor whose price the person is purporting to meet,
5 and the address at which that competitor is offering that price.

6 (e) The competitor's price which the person is purporting to meet, the relevant
7 dates on which the competitor offered that price, and the identity and grade of motor
8 fuel to which that price applies.

9 (3) FALSIFIED NOTICE. A person giving notice under this section may not
10 falsify any of the information contained in that notice. The person may not claim that a
11 competitor offered a motor fuel selling price on a specified date at a specified address if
12 the competitor was not open for business on that date at that address.

13 NOTE: Section 100.30, Stats., prohibits sales of motor fuel below "cost" as
14 defined in the statute. A seller may claim, as a defense, that the seller
15 sold motor fuel below cost in order to meet the existing price of a
16 competitor. Under s. 100.30(7), Stats., a seller who wishes to establish a
17 presumptive "meeting competition" defense must notify the department of
18 the below-cost selling price on the day the seller offers that price to
19 meet a competitor's price. The seller must give notice "in the form and
20 manner required by the department. Section ATCP 105.22 spells out the
21 "form and manner" in which a seller must give the required notice.
22 Section ATCP 105.22 does not affect or replace s. ATCP 105.009.
23

1 **EFFECTIVE DATE.** The rules contained in this order shall take effect on the first
2 day of the month following publication in the Wisconsin administrative register, as
3 provided under s. 227.22(2), Stats.

4

5 Dated this _____ day of _____, 1998.

6

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE
AND CONSUMER PROTECTION

7

8

9

10

By _____.

11

Ben Brancel, Secretary

FISCAL ESTIMATE

DOA-2048 (R 10/94)

- ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No. / Adm. Rule No. Ch. ATCP 105
Amendment No. (If Applicable)

Subject
Amendments to the Unfair Sales Act -- (a prohibition against selling merchandise below cost.)

<p>Fiscal Effect State: <input type="checkbox"/> No State Fiscal Effect Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation</p> <p> <input type="checkbox"/> Increase Existing Appropriation <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Decrease Existing Appropriation <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Create New Appropriation </p>	<p> <input checked="" type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Decrease Costs </p>
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<p>Local: <input checked="" type="checkbox"/> No local government costs</p> <p> 1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory </p>	<p> 3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory </p>	<p>5. Types of Local Governmental Unit Affected:</p> <p> <input type="checkbox"/> Towns <input type="checkbox"/> Villages <input type="checkbox"/> Cities <input type="checkbox"/> Counties <input type="checkbox"/> Others _____ <input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts </p>
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<p>Fund Source Affected</p> <p> <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input checked="" type="checkbox"/> SEG <input type="checkbox"/> SEG-S </p>	<p>Affected Ch. 20 Appropriations 20.115(1r)</p>
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Assumptions Used in Arriving at Fiscal Estimate

The proposed revisions to Ch. ATCP 105 are in response to 1997 Wis. Act. 55, which was a set of amendments s. 100.30, Wis. Stats., "The Unfair Sales Act." Act 55 will go into effect on August 1, 1998.

Two provisions of the act will present a material fiscal effect for the department.

First, "cost" to sellers of motor vehicle fuel is now based on the "average posted terminal price." This is an index published by a nationally recognized oil pricing service. This is valuable, proprietary data that is somewhat expensive to obtain. The Department currently subscribes to a service called "Petroscan" by a company called Oil Price Information Service. This service is currently used occasionally to double check information submitted by complainants and respondents. However, under the new provisions of the statute, the department will need to use this service much more often because it will be essential for determining whether or not petroleum sellers are in compliance with the statute. Staff estimates that spending on this service will go from roughly \$2,400 per year to roughly \$6,000 per year.

The second fiscal effect is from a provision of the revised statute that states sellers must "notify the department" before lowering their price to meet the existing price of a competitor. The statute grants immunity for private and state enforcement actions to sellers of motor vehicle fuel who provide this notification. Because of the immunity, the department estimates that it will receive up to 500 notices per day, most of these via fax. If this estimate is correct, the department would need to significantly increase spending on items such as fax supplies (paper, toner & drums) phone lines, fax overflow voice-mail system and document storage. Staff estimates that these items will cost roughly \$2,000 per year.

Long - Range Fiscal Implications

Staff expects the annual increases listed above to continue indefinitely

<p>Agency/prepared by: (Name & Phone No.)</p> <p>DATCP Kevin LeRoy 224-4928</p>	<p>Authorized Signature/Telephone No.</p> <p><i>Barbara Knapp</i> Barbara Knapp (608) 224-4746</p>	<p>Date</p> <p>6/4/98</p>
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FISCAL ESTIMATE WORKSHEET

1997 SESSION

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R10/94)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No/Adm.Rule No.
Ch. ATCP 105

Amendment No.

Subject Amendments to the Unfair Sales Act -- (a prohibition against selling merchandise below costs)		
I. One-time Cost or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):		
II. Annualized Cost:		Annualized Fiscal Impact on State funds from:
A. State Costs by Category	Increased Costs	Decreased Costs
State Operations - Salaries and Fringes	\$	\$ -
(FTE Position Changes)	(FTE)	(- FTE)
State Operations - Other Costs	5,600	- /
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs by Category	\$ 5,600	\$ -
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S	5,600	-
III. State Revenues - <small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>	Increased Rev.	Decreased Rev.
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues	\$	\$ -

NET ANNUALIZED FISCAL IMPACT

	<u>STATE</u>	<u>LOCAL</u>
NET CHANGE IN COSTS	\$ <u>5,600</u>	\$ _____
NET CHANGE IN REVENUES	\$ _____	\$ _____

Agency Prepared by: (Name & Phone No.) DATCP Kevin LeRoy (608)224-4928	Authorized Signature/Telephone No. <i>Barbara Knapp</i> Barbara Knapp (608) 224-4746	Date 6/4/98
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Initial Regulatory Flexibility Analysis

Proposed revisions to ch. ATCP 105, Wis. Adm. Code

The Unfair Sales Act

This rule interprets s. 100.30, Wis. Stats., which prohibits sales below cost. The legislature recently modified this statute with 1997 Wis. Act 55. The department is proposing changes to the rule at this time to bring the rule into conformity with the amended statute. The proposed rule does not include any substantive provisions that are now already addressed in the statute. Therefore, the small business impacts are based on an analysis of the impacts of Wis. Act 55.

Small business in Wisconsin that sell motor vehicle fuels at either wholesale or retail are effected by the statutory change. There will be some increased reporting required and some retailers may need to purchase additional information services. However, these increased burdens on small business may be offset by the potential for increased revenues.

New definitions for "cost"

Under the new law, cost of motor vehicle fuel is based on "the average posted terminal price" of the fuel. This is the average of all the refining companies' selling prices at the petroleum terminal located nearest to the retail station. Under the old law, cost of motor vehicle fuel was based on the seller's invoice cost. The new definitions of cost should help sellers of motor vehicle fuel increase their revenue.

Under the old law, a seller who is able to purchase gasoline at low wholesale cost has two choices. They could either set their price at the minimum and hope to capture increased market share because of a low price, or they could set their price at a medium or high level and enjoy increased profits. If this seller chooses the first option, this forces other sellers with higher wholesale costs to set their price below the minimum markup so they do not lose market share. (This is perfectly legal because of the "meeting competition" exception.) This scenario leads to an equilibrium retail price that is approximately 9.18% over the *lowest* terminal price.

Under the new law, all sellers in a certain area have the same "cost" for minimum markup purposes. All sellers must base their price on the *average* terminal price. This change leads to an equilibrium retail price that may be a couple pennies higher per gallon than the scenario discussed above because the 9.18% is over the *average* terminal price. This may result in higher revenues for some gasoline dealers.

Petroleum Pricing Service

The new definitions of cost rely on the "average posted terminal price." This price is valuable proprietary information that can only be obtained by subscribing to a service. The minimum cost of this service is roughly \$55 per month. The service will report prices via fax, e-mail,

satellite, or allow their customers to search through the database (requires a modem and computer). Motor vehicle fuel sellers who wish to make their pricing decisions based on statutory costs (as opposed to competition) will need to subscribe to this service.

Many petroleum dealers already use this service to help them determine where and when to buy fuel. At first glance 1997 Wis. Act 55 does not present an additional expense to this group. However, many of these business receive their prices early in the day. But these prices are irrelevant for determining minimum markup. The new law specifies that the average posted terminal price is at the "close of business" on the determination date. Therefore, petroleum dealers who already subscribe to the service must carefully determine whether the information they are already getting is relevant to the Unfair Sales Act. They may have to increase their spending on this service to get the information needed to comply with the statute.

Other petroleum dealers, typically small business, rely on a distributor or jobber to sell them fuel. These people have had no need for a subscription to a pricing service until now. Under the new law, a subscription to a pricing service will be essential to determine whether or not their price is in compliance with the law.

Although this could be a significant cost to the seller, it should be stressed that the neither the department nor the new statute requires small business to absorb this expense. Sellers could choose to simply always meet their competitor's prices or estimate the "average posted terminal price" based on their own invoices or price reports pulled earlier in the day. However, if they chose one of these options, they must submit a notice to the department to take advantage of the meeting competition defense. (see below).

Private cause of action

Beginning August 1, 1998, sellers of motor vehicle fuel who are injured or threatened with injury may bring suit against their competitors who violate the Unfair Sales Act. Maximum damages are treble any monetary loss or \$2,000 per day, whichever is greater, plus attorney fees. Obviously, this could significantly impact small business. All business who sell gasoline will need to carefully asses their pricing policies and procedures and determine their level of risk of having to pay damages. In addition there will be a cost associated with bringing a suit or successfully defending against a suit.

Notification for meeting competition

The Unfair Sales Act has always granted certain exceptions where sales below cost are acceptable. The exception most widely used by motor vehicle fuel sellers is the "meeting competition defense." It is acceptable to sell fuel below cost if the seller is doing so to meet the price of a competitor. However, under the new statute, sellers who "notify the department" that they are lowering their price below the minimum in order to meet a competitor's price enjoy immunity from liability under private and state enforcement actions.

There will be a cost associated with submitting notifications. The department will accept notices via: fax, e-mail, U.S. mail, courier, or hand delivery. Because of the immunity that

sellers will receive if they submit a notice, the department predicts that many sellers will wish to submit a notice on a very regular basis, simply as a risk management precaution. This will involve a significant paperwork burden for small business.

It should be stressed that submitting a notice is decision that the motor vehicle fuel sellers make for themselves. It is not mandated by the department or by the statute. Alternatively, a seller could chose to not sell below the minimum markup – regardless of what their competitors are doing -- or they could simply take their chances on being sued for selling fuel below the minimum markup. Failing to provide notice does not mean that the seller will automatically lose any case that may be brought against them. Furthermore, there is no penalty for simply failing to submit a notice on a day that the seller lowered their price to meet the price of a competitor. The notice is simply an efficient way of defending against a suit when it is first filed.

Conclusion

It is very difficult to estimate the statute and rule's overall impact on small businesses. There may be a potential for increased revenues. However this could be offset by increases in expenses for a subscription to an oil pricing service and the expense of filing a notification with the department. These potential increases in expenses are entirely at the discretion of the business.

Dated this 4th day of June, 1998

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND
CONSUMER PROTECTION

By: 

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