

SEP 20 1999

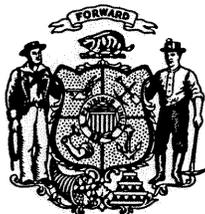
LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL STAFF

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 99-133

AN ORDER to create ATCP 105.24, relating to selling motor vehicle fuel below cost.

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

09-01-99 RECEIVED BY LEGISLATIVE COUNCIL.
09-14-99 REPORT SENT TO AGENCY.

RS:RW:jal;rv

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

WISCONSIN LEGISLATIVE COUNCIL STAFF

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CLEARINGHOUSE RULE 99-133

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 September 1998.]

2. Form, Style and Placement in Administrative Code

- a. The agency may wish to put the text of the rule in the definition section of ch. ATCP 105 instead of putting it in the last section of the chapter.
- b. It is not clear how a retailer will be able, prior to a sale, to determine some discounts, rebates or credits. As a result, some individual sales may be made at less than the seller's cost, causing a violation of the law. The agency may want to address this issue in the final rule.

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

The state of Wisconsin department of agriculture, trade and consumer protection proposes an order to create ATCP 105.24 relating to selling motor vehicle fuel below cost.

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

Statutory Authority: s. 93.07(1), Stats.

Statute Interpreted: s. 100.30, Stats.

This rule interprets s. 100.30, Stats., which prohibits sales of motor fuel and other merchandise below cost. The term "cost" is extensively defined in s. 100.30, Stats., and DATCP rules under ch. ATCP 105, Wis. Adm. Code. But neither the statute nor the current rules define "selling price."

Under s. 100.18(8), Stats., persons selling motor vehicle fuel at retail must post the retail sale price on the motor fuel pump. But many sellers now offer discounts such as customer loyalty discounts, fleet discounts, volume discounts, preferred payment method discounts and other incentives that may affect the ultimate sale price.

This rule clarifies how a seller's retail motor fuel "selling price" is calculated, for purposes of s. 100.30, Stats. Under this rule, the retail "selling price" of motor vehicle fuel is the selling price which the seller is required to post under s. 100.18(8), Stats., less any discounts offered by the seller that are fully earned and determinable at the time of sale, except that discounts based solely on the purchaser's method of payment or receipt of credit do not reduce the selling price. For example, a discount for using a specific credit card would not reduce the "selling price" of motor vehicle fuel for purposes of s. 100.30, Stats.

-
- 1 **SECTION 1.** ATCP 105.24 is created to read:
- 2 **ATCP 105.24 Retail selling price of motor vehicle fuel.** For purposes of s. 100.30,
- 3 Stats., a seller's retail selling price for motor vehicle fuel is the price which the seller is required
- 4 to post under s. 100.18(8), Stats., less any discounts, rebates or credits that are fully earned and

1 determinable at the time of sale, except that discounts, rebates or credits based solely on the
2 purchaser's method of payment or receipt of credit do not reduce the selling price.

3 **EFFECTIVE DATE.** The rules contained in this order shall take effect on the first day
4 of the month following publication in the Wisconsin administrative register, as provided under s.
5 227.22(2), Stats.

Dated this _____ day of _____, 1999.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel, Secretary

Initial Regulatory Flexibility Analysis

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

Sales of motor vehicle fuel below cost

The proposed additions to ATCP 105, Wis. Adm. Code do not have a significant effect on small business. The proposed rule is a presentation of the department's interpretation of how preferred payment method discounts effect whether or not gasoline was sold below cost.

ATCP 105 interprets s. 100.30, Wis. Stats. (sometimes referred to as "The Unfair Sales Act" or "The Minimum Markup Law"). This statute prohibits retailers, wholesalers and refiners of motor vehicle fuel from selling products below cost. The term "cost" is substantially defined in both the statute and the current rule. However, there are no provisions in either the statute or current rule that provide interpretations on how businesses are to determine the selling price of their products.

This rule specifies that discounts, credits or rebates that are tied to the payment method do not reduce the selling price of motor vehicle fuel. The rule also specifies that discounts, credit or rebates offered to the customer that are not tied to the payment method must be considered as a reduction in the selling price of motor vehicle fuel.

Dated May 12, 1999

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By William L. Oemichen

William L. Oemichen
Administrator,
Trade and Consumer Protection Division

FISCAL ESTIMATE

DOA-2048 N(R 10/98)

- ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No. / Adm. Rule No.

ATCP 105

Amendment No. (If Applicable)

Subject

Sales Below Cost - Motor Vehicle Fuel Selling Price

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

Decrease Costs

Local: No local government costs

1. Increase Costs
 Permissive Mandatory
 2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
 4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Unit Affected:

- Towns Villages Cities
 Counties Others _____
 School Districts WTCS Districts

Fund Source Affected

- GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

S. 100.30, Wis. Stats., (sometimes referred to as "The Unfair Sales Act" or the "Minimum Markup Law") prohibits retailers, wholesalers and motor vehicle fuel refiners from selling products below cost, as the term "cost" is defined in the statute. However, the statute is silent on how sellers are to determine their selling price. This rule interprets how special promotions, customer loyalty programs, payment methods incentives and other programs effect the selling price of motor vehicle fuels.

The department does not anticipate any substantial fiscal effects on the Unfair Sales Act enforcement program.

Long - Range Fiscal Implications

Agency/prepared by: (Name & Phone No.)

DATCP
Kevin LeRoy 608/224-4928

Authorized Signature/Telephone No.

Barbara Knapp
Barbara Knapp (608) 224-4746

Date

6/17/99

FISCAL ESTIMATE WORKSHEET

1999 SESSION

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

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

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

Amendment No.

Subject
Sales Below Cost - Motor Vehicle Fuel Selling Price

I. One-time Cost or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
Zero

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		-
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs by Category	\$	\$ -
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S		-
III. State Revenues -	Increased Rev.	Decreased Rev.
<small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>		
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	\$ 0	\$ 0
NET CHANGE IN REVENUES	\$ 0	\$ 0

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 6/17/99
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DEC 28 1999

Clearing House Rule 99-133
DATCP Docket No. 99-R-2

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF SUBMISSION OF PROPOSED RULES TO
PRESIDING OFFICERS OF EACH HOUSE OF THE LEGISLATURE

NOTICE IS HEREBY GIVEN, pursuant to s. 227.19(2), Stats., that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection is submitting a final draft of proposed Clearinghouse Rule Number 99-133 to the presiding officer of each house of the legislature for standing committee review. The proposed creates a new portion of chapter ATCP 105 relating to retailers of motor fuel meeting competition from other retailers' credit card promotions.

Dated this 22 day of December, 1999.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Ben Brancel
Ben Brancel, Secretary



State of Wisconsin
Tommy G. Thompson, Governor

DEC 28 1999

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

DATE: December 22, 1999

TO: The Honorable Fred Risser
President, Wisconsin State Senate
Room 220 South – State Capitol
PO Box 7882
Madison, WI 53707-7882

The Honorable Scott Jensen
Speaker, Wisconsin State Assembly
Room 211 West – State Capitol
PO Box 8952
Madison, WI 53708-8952

FROM: Ben Brancel, Secretary *Ben Brancel*
Department of Agriculture, Trade and Consumer Protection

SUBJECT: **Proposed Rules Relating to Selling Motor Vehicle Fuel Below Cost
(Clearinghouse Rule #99-133)**

In accordance with s. 227.19(2) and (3), Stats., the Department of Agriculture, Trade and Consumer Protection hereby transmits the above rule for legislative committee review. We are enclosing three copies of the final draft rule, together with the following report. In accordance with s. 227.19(2), Stats., the department will publish a notice of this referral in the Wisconsin Administrative Register.

Background

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers Wisconsin's "unfair sales act," s. 100.30, Stats. The unfair sales act prohibits sales of motor fuel and other merchandise below "cost" as defined in the act. DATCP has adopted rules under ch. ATCP 105, Wis. Adm. Code, to interpret the unfair sales act.

This rule modifies current rules related to retail sales of motor fuel. Under s. 100.30(6)(a)7 of the Unfair Sales Act, a person may sell below "cost" if the person is meeting the documented sale price of a competitor. Motor fuel retailers often use this exception to meet competitors' prices. A motor fuel retailer who sells below "cost" to meet competition must comply with the notification requirements under s. 100.30(7), Stats.

Competition in the retail motor fuel industry is also affected by credit card promotions offered by third parties. A credit card company (such as a financial institution or major oil company affiliate) may offer credit card discounts to consumers who buy a particular brand of motor fuel, even though the credit card company is not the retail seller from whom the consumers buy the motor fuel. For example, a credit card company may advertise: "Use your ABC Oil Company credit card, and receive a discount of 3 cents per gallon."

The credit card company, rather than the motor fuel retailer, offers the promotional discount. Although the motor fuel retailer charges and receives the normal pump price, the credit card user receives an effective discount of 3 cents per gallon.

Because the credit card company is not the motor fuel retailer, the credit card promotion may escape coverage under the Unfair Sales Act. Since the motor fuel retailer charges and receives the full pump price, the retailer may be in compliance with the act (assuming that the pump price complies). The credit card company, which offers the promotion, may escape coverage because it is not engaged in the retail sale of motor fuel.

This type of credit card promotion may have a serious impact on competing retailers of motor fuel. Yet a retailer who sells below cost to match the credit card promotion may risk an Unfair Sales Act violation. This rule clarifies that, under certain conditions, a motor fuel retailer may meet a competing credit card promotion without violating the Unfair Sales Act, even though the competing promotion is offered by a credit card company rather than a competing motor fuel retailer.

Rule Contents

Under this rule, a motor fuel retailer's credit card promotion does not violate the Unfair Sales Act, even though the promotion results in an effective sale price that is below the retailer's "cost," if all the following apply:

- The retailer offers the promotion in good faith, pursuant to s. 100.30(6)(a)7., Stats., to "meet but not beat" a credit card promotion that any person offers on credit card purchases of motor fuel from a competing retailer. A retailer may not claim to be meeting competition if the retailer offers the credit card promotion for more than 180 days after the competing credit card promotion is discontinued.
- The retailer gives the department written notice of the promotion. The notice must include all the following:
 - ◆ The retailer's name, and any trade name under which the retailer offers the credit card promotion.
 - ◆ The general terms, conditions and geographic scope of the credit card promotion.

- ◆ A description of the credit card promotion that the retailer is purporting to meet, including the person offering the promotion, the general terms of the promotion, and the identity and geographic distribution of competing motor fuel retailers who are benefiting from the promotion.

If a motor fuel retailer competes in this state with retailers who benefit from a statewide or regional credit card promotion, the retailer may offer a credit card promotion under this rule at any or all of its retail locations in that statewide or regional market, regardless of whether the competition occurs at every one of its retail locations in that market.

Hearing Draft Modified

The DATCP Board approved a hearing draft rule on July 14, 1999. The hearing draft rule attempted to define the "selling price" of motor fuel as the price which the seller is required to post under s. 100.18(8), Stats., less any discount offered by the seller that are fully earned and determinable at the time of the sale. However, the hearing draft also provided that discounts based solely on the purchaser's method of payment or receipt of credit do not reduce the selling price, for purposes of the Unfair Sales Act.

The department held three hearing in Wausau, Madison and Waukesha (October 11, 12 and 14, respectively). Five industry representatives spoke at the hearings and opposed the hearing draft rule. All of the persons who appeared at the hearings or presented written comments supported a narrower alternative proposal that would achieve many of the same goals.

In response to the hearing testimony, the department redrafted the final draft rule. The final draft does not attempt to define "selling price," but focuses more narrowly on credit card discount plans. The final draft allows a motor fuel retailer to "match" a competing credit card promotion, even though the competing promotion is offered by a credit card company rather than a motor fuel retailer.

The final draft rule specifies the terms and conditions that apply to a retailer's "matching" credit card promotion. The final draft appears to enjoy broad support from the retail motor fuel industry.

Persons who presented testimony

Name	Representing	Position	Oral Testimony	Written Testimony
David Myszka	Riiser Oil Co.	Opposed	Yes	No
Tom Kieffer	Kwik Trip	Opposed	Yes	Yes
Jennifer Badeau	Petroleum Marketers Assoc. & Wis. Assoc. of Convenience Stores	Opposed	Yes	Yes
Stewart Mills	Mills Fleet Farm	Opposed	No	Yes

Jim Goetz	Wis. Assoc. of Truck Stop Operators	Opposed	No	Yes
Ed Francois	Francois Oil	Opposed	Yes	Yes
Ron Hermes	Wis. Assoc. of Truck Stop Operators	Opposed	Yes	No

Response to Rules Clearinghouse Comments

The Legislative Council Rules Clearinghouse made two comments regarding the structure of the hearing draft rule. The department restructured the final draft rule, so the hearing draft comments no longer apply.

Small Business Analysis

A small business analysis is attached. The department does not expect this rule to have any significant adverse effects on small business. This rule may help some small motor fuel retailers by allowing them to compete more effectively.

Fiscal Estimate

A fiscal estimate is attached. The department does not expect this proposed rule to have any fiscal impact.

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

The state of Wisconsin department of agriculture, trade and consumer protection proposes an order to amend ATCP 105.23(intro.), and to create ATCP 105.009(5) relating to selling motor vehicle fuel below cost.

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

Statutory Authority: s. 93.07(1), Stats.

Statute Interpreted: s. 100.30, Stats.

The department of agriculture, trade and consumer protection (DATCP) administers Wisconsin's "unfair sales act," s. 100.30, Stats. The unfair sales act prohibits sales of motor fuel and other merchandise below "cost" as defined in the act. DATCP has adopted rules under ch. ATCP 105, Wis. Adm. Code, to interpret the unfair sales act. This rule modifies current rules related to retail sales of motor fuel.

Background

Under s. 100.30(6)(a)7. of the unfair sales act, a person may sell below "cost" if the person is meeting the documented sale price of a competitor. Motor fuel retailers often use this exception to meet competitors' prices. A motor fuel retailer who sells below "cost" to meet competition must comply with the notification requirements under s. 100.30(7), Stats.

Competition in the retail motor fuel industry is also affected by credit card promotions offered by third parties. A credit card company (such as a financial institution or major oil company affiliate) may offer credit card discounts to consumers who buy a particular brand of motor fuel, even though the credit card company is not the retail seller from whom the consumers buy the motor fuel. For example, a credit card company may advertise: "Use your ABC Oil Company credit card, and receive a discount of 3 cents per gallon."

The credit card company, rather than the motor fuel retailer, offers the promotional discount. Although the motor fuel retailer charges and receives the normal pump price, the credit card user receives an effective discount of 3 cents per gallon.

Because the credit card company is not the motor fuel retailer, the credit card promotion may escape coverage under the unfair sales act. Since the motor fuel retailer charges and receives the full pump price, the retailer may be in compliance with the act (assuming that the pump price complies). The credit card company, which offers the promotion, may escape coverage because it is not engaged in the retail sale of motor fuel.

This type of credit card promotion may have a serious impact on competing retailers of motor fuel. Yet a retailer who sells below cost to match the credit card promotion may risk an unfair sales act violation. This rule clarifies that, under certain conditions, a motor fuel retailer may meet a competing credit card promotion without violating the unfair sales act, even though the competing promotion is offered by a credit card company rather than a competing motor fuel retailer.

Rule Contents

Under this rule, a motor fuel retailer's credit card promotion does not violate the unfair sales act, even though the promotion results in an effective sale price that is below the retailer's "cost," if all the following apply:

- The retailer offers the promotion in good faith, pursuant to s. 100.30(6)(a)7., Stats., to "meet but not beat" a credit card promotion that any person offers on credit card purchases of motor fuel from a competing retailer. A retailer may not claim to be meeting competition if the retailer offers the credit card promotion for more than 180 days after the competing credit card promotion is discontinued.
- The retailer gives the department written notice of the promotion. The notice must include all the following:
 - * The retailer's name, and any trade name under which the retailer offers the credit card promotion.
 - * The general terms, conditions and geographic scope of the credit card promotion.
 - * A description of the credit card promotion that the retailer is purporting to meet, including the person offering the promotion, the general terms of the promotion, and the identity and geographic distribution of competing motor fuel retailers who are benefiting from the promotion.

If a motor fuel retailer competes on a statewide or regional basis with retailers who benefit from a statewide or regional credit card promotion, the retailer may offer a credit card promotion under this rule at all of its retail locations in that statewide or regional market, regardless of whether the competition occurs at every one of its retail locations in that market.

1 **SECTION 1. ATCP 105.009(5) is created to read:**

2 **(5) CREDIT CARD PROMOTIONS; MEETING COMPETITION. (a)** Pursuant to s.
3 100.30(6)(a)7., Stats., a motor fuel retailer may in good faith offer a credit card
4 promotion to meet, but not beat, a credit card promotion that any person offers on credit
5 card purchases of motor fuel from a competing retailer. A retailer may not claim to be
6 meeting competition if the retailer offers the credit card promotion for more than 180
7 days after the competing credit card promotion is discontinued.

8 **(b)** If a motor fuel retailer competes in this state with retailers who benefit from a
9 statewide or regional credit card promotion, the retailer may offer a credit card promotion
10 under par. (a) at any or all of its retail locations in that statewide or regional market,
11 regardless of whether the competition occurs at every one of its retail locations in that
12 market.

13 **(c)** A retailer offering a credit card promotion under par. (a) shall give the
14 department written notice of that promotion, and of any material change in the general
15 terms of that promotion. The retailer notice shall include all the following:

16 1. The retailer's name, and any trade name under which the retailer offers the
17 credit card promotion.

1 2. The general terms, conditions and geographic scope of the credit card
2 promotion.

3 3. A description of the credit card promotion that the retailer is purporting to
4 meet, including the person offering the promotion, the general terms of the promotion,
5 and the identity and geographic distribution of competing motor fuel retailers who are
6 benefiting from the promotion.

7 **SECTION 2.** ATCP 105.23(intro.) is created to read:

8
9 ATCP 105.23(intro.) **Notice of price offered to meet competition.** Except as
10 provided in s. ATCP 105.009(5)(c):

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

Dated this _____ day of _____, _____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel, Secretary

Final Regulatory Flexibility Analysis

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

(Sales of motor vehicle fuel below cost)

The proposed additions to ATCP 105, Wis. Adm. Code do not have a significant adverse effect on small business. ATCP 105 interprets the "Unfair Sales Act," s. 100.30, Stats. This statute prohibits sellers of motor vehicle fuel and other product from selling products below cost as "cost" is defined in the statute. An exception allows a seller to sell products below cost in order to meet the price of a competitor.

Competition in the retail motor fuel industry is also affected by credit card promotions offered by third parties. A credit card company (such as a financial institution or major oil company affiliate) may offer credit card discounts to consumers who buy a particular brand of motor fuel, even though the credit card company is not the retail seller of that motor fuel. For example, a credit card company may advertise: "Use your ABC Oil Company credit card, and receive a discount of 3 cents per gallon." The credit card company, rather than the motor fuel retailer, offers the promotional discount. Although the motor fuel retailer charges and receives the normal pump price, the credit card user receives an effective discount of 3 cents per gallon.

Because the credit card company is not the motor fuel retailer, the credit card promotion may escape coverage under the Unfair Sales Act. Since the motor fuel retailer charges and receives the full pump price, the retailer may be in compliance with the act (assuming that the pump price complies). The credit card company, which offers the promotion, may escape coverage because it is not engaged in the retail sale of motor fuel.

This rule clarifies that, under certain conditions, a motor fuel retailer may "match" a competing credit card promotion without violating the Unfair Sales Act, even though the competing promotion is offered by a credit card company rather than a competing motor fuel retailer. This rule may help some small motor fuel retailers by allowing them to compete more effectively

Dated December 1, 1999

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 
William L. Oemichen
Administrator,
Trade and Consumer Protection Division

FISCAL ESTIMATE

DOA-2048 N(R 10/98)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

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

Amendment No. (If Applicable)

Subject

Sales Below Cost - Motor Vehicle Fuel Selling Price

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

Increase Existing Appropriation Increase Existing Revenues

Decrease Existing Appropriation Decrease Existing

Decrease Costs

Revenues

Create New Appropriation

Local: No local government costs

1. Increase Costs
 Permissive Mandatory

2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory

4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Unit Affected:

Towns Villages Cities
 Counties Others _____
 School Districts WTCS Districts

Fund Source Affected

GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

S. 100.30, Wis. Stats., (sometimes referred to as "The Unfair Sales Act" or the "Minimum Markup Law") prohibits retailers, wholesalers and motor vehicle fuel refiners from selling products below cost, as the term "cost" is defined in the statute. There are, however, certain exceptions allowed under the law. One of the most commonly used exceptions is the "meeting competition" exception, which allows a seller to sell products below "cost," if they are doing so to meet the price of a competitor. This proposed rule amendment applies the "meeting competition" exception to credit card promotions. It expresses requirements that sellers must follow if they are going to claim the "meeting competition" expense.

The department does not anticipate any substantial fiscal effects on the Unfair Sales Act enforcement program.

Long - Range Fiscal Implications

Agency/prepared by: (Name & Phone No.)

DATCP
 Kevin LeRoy 608/224-4928

Authorized Signature/Telephone No.

Barbara Knapp
 Barbara Knapp (608) 224-4746

Date

12/1/99

FISCAL ESTIMATE WORKSHEET

1999 SESSION

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

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No/Adm.Rule No. ATCP 105	Amendment No.
---	---------------

Subject: Sales Below Cost - Motor Vehicle Fuel Selling Price

I. One-time Cost or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect): Zero		
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		-
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs by Category	\$	\$ -
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S		-
III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	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	\$ 0	\$ 0
NET CHANGE IN REVENUES	\$ 0	\$ 0

Agency Prepared by: (Name & Phone No.) DATCP Kevin LeRoy (608)224-4928	Authorized Signature/Telephone No. Barbara Knapp (608) 224-4746	Date
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STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF HEARING

SEP 01 REC'D

MOTOR FUEL SALES BELOW COST

SEP 01 1999

The State of Wisconsin Department of Agriculture, Trade and Consumer Protection announces that it will hold public hearings on proposed amendments to Chapter ATCP 105, Wis. Adm. Code, relating to sales below cost. The hearings will be held at the times and places shown below. The public is invited to attend the hearings and make comments on the proposed rule. Following the public hearings, the hearing record will remain open until November 5, 1999, for additional written comments.

A copy of this rule and the proposed amendments may be obtained free of charge, from the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Trade and Consumer Protection, 2811 Agriculture Drive, PO Box 8911, Madison, WI 53708, or by calling (608)224-4928. Copies will also be available at the public hearings.

An interpreter for the hearing impaired will be available on request for these hearings. Please make reservations for a hearing interpreter by September 30, 1999 either by writing to Kevin LeRoy, 2811 Agriculture Drive, PO Box 8911, Madison WI 53708-8911, (608/224-4928), or by contacting the message relay system (TDD) at 608/224-5058. Handicap access is available at the hearings.

Three hearings are scheduled:

Monday, October 11, 1999, 1:00 pm until 4:00 pm
Marathon County Public Library
400 1st St.
Wausau, WI 54403

Tuesday, October 12, 1999, 1:00 pm until 4:00 pm
Wisconsin Department of Agriculture, Trade and Consumer Protection
Board Room
2811 Agriculture Drive
Madison, WI 53718-6777

Thursday, October 14, 1999, 1:00 pm until 4:00 pm
Department of Corrections
Room 129
State Office Building
141 Northwest Bastrow St.
Waukesha, WI 53186

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

Statutory Authority: s. 93.07(1), Stats.

Statute Interpreted: s. 100.30, Stats.

This rule interprets s. 100.30, Stats., which prohibits sales of motor fuel and other merchandise below cost. The term "cost" is extensively defined in s. 100.30, Stats., and DATCP rules under ch. ATCP 105, Wis. Adm. Code. But neither the statute nor the current rules define "selling price."

Under s. 100.18(8), Stats., persons selling motor vehicle fuel at retail must post the retail sale price on the motor fuel pump. But many sellers now offer discounts such as customer loyalty discounts, fleet discounts, volume discounts, preferred payment method discounts and other incentives that may affect the ultimate sale price.

This rule clarifies how a seller's retail motor fuel "selling price" is calculated, for purposes of s. 100.30, Stats. Under this rule, the retail "selling price" of motor vehicle fuel is the selling price which the seller is required to post under s. 100.18(8), Stats., less any discounts offered by the seller that are fully earned and determinable at the time of sale, except that discounts based solely on the purchaser's method of payment or receipt of credit do not reduce the "selling price" of motor vehicle fuel for purposes of s. 100.30, Stats.

Fiscal Estimate

The department does not expect this rule to have any fiscal impact on the department or local governments.

Initial Regulatory Flexibility Analysis

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

Sales of motor vehicle fuel below cost

The proposed additions to ATCP 105, Wis. Adm. Code do not have a significant effect on small business. The proposed rule is a presentation of the department's interpretation

of how preferred payment method discounts effect whether or not gasoline was sold below cost.

ATCP 105 interprets s. 100.30, Wis. Stats. (sometimes referred to as "The Unfair Sales Act" or "The Minimum Markup Law"). This statute prohibits retailers, wholesalers and refiners of motor vehicle fuel from selling products below cost. The term "cost" is substantially defined in both the statute and the current rule. However, there are no provisions in either the statute or current rule that provide interpretations on how businesses are to determine the selling price of their products.

This rule specifies that discounts, credits or rebates that are tied to the payment method do not reduce the selling price of motor vehicle fuel. The rule also specifies that discounts, credit or rebates offered to the customer that are not tied to the payment method must be considered as a reduction in the selling price of motor vehicle fuel.

Dated 9/1, 1999

STATE OF WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER
PROTECTION

By Ben Brancel
Ben Brancel, Secretary