



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Understanding Wisconsin's "Minimum Markup" Law

Wisconsin's Unfair Sales Act (the Act) generally prohibits sales below cost, known as "loss leader sales," for all merchandise. [s. 100.30, Stats.] The Act outlines the policy underlying this prohibition: support of fair competition promotes stability, prevents disruption, and creates consumer benefit through sustained long-term competition. Loss leader sales are a form of unfair competition. The Act prohibits loss leader sales made with the intent or effect to induce the purchase of other merchandise, divert trade, or otherwise injure a competitor. A classic loss leader strategy would be to attempt to force a competitor out of business through near-term below-cost sales in order to create and take advantage of a less competitive long-term market.

The portion of the Act that applies specifically to the sale of motor vehicle fuel is commonly referred to as the "minimum markup" law. In general, the Act prohibits sales below cost. For motor vehicle fuel, it requires that the "cost" of motor vehicle fuel includes a percentage markup over actual cost, meant to represent a proportionate part of the costs of doing business. A similar law applies to cigarettes and alcohol. The Department of Agriculture, Trade, and Consumer Protection (DATCP) is generally responsible for the enforcement of Wisconsin's Unfair Sales Act, and accordingly, for enforcement of the minimum markup law contained therein.

"MINIMUM MARKUP" AND "COST" OF MOTOR VEHICLE FUEL

REQUIREMENTS OF THE LAW

In order to implement the policy promoting fair competition, the Act contains the language commonly referred to as Wisconsin's minimum markup law: a specific definition of "cost" that applies only to motor vehicle fuel. This definition is at the core of the minimum markup law. It is complicated by the diverse structure of the motor vehicle fuel market and the need to ensure fairness and consistency between competitors with differing positions in this structure.

The statute defines the "cost" of motor vehicle fuel to include the variable costs of each unit of fuel as well as a proportionate share of the other costs of doing business attributable to each unit of fuel. The statute allows a minimum percentage markup based on each seller's variable costs to satisfy the requirements for including the proportionate share of other costs.

The statute categorizes sellers according to their position in the stream of commerce and specifically defines "cost" for each seller category. Different categories use different markups because variable costs in certain categories include prior markups. The statute contains five categories for retailers of motor vehicle fuel and two categories for wholesalers of motor vehicle fuel. For example, there is a category for retail sales by a seller who purchases motor vehicle

fuel **from** a wholesaler as well as a category for retail sales by a seller who **is** a wholesaler. Those categories, and the “cost” calculation for each, are described in the Appendix. “Retailer,” “wholesaler,” and other terms related to the stream of commerce of motor vehicle fuel have specific meanings in the Unfair Sales Act. The Appendix explains those terms.

Additionally, for calculation of retail “cost,” the statute allows the substitution of average posted terminal price (AFTP) for the variable costs of each unit of fuel. The AFTP is a price calculated by a petroleum price reporting service based on average price at a “terminal,” a distribution facility from which at least three refiners or wholesalers sell fuel. The AFTP is an accurate, timely, and easily verified measure of wholesale prices in a particular area. Accordingly, use of AFTP adds transparency to the markup process and lowers costs of compliance, investigation, and enforcement in state and private actions.

PENALTIES AND ENFORCEMENT

With regard to sales below-cost of any merchandise, DATCP or a district attorney may commence an action on behalf of the state to recover a forfeiture of not less than \$50 nor more than \$500 for a first violation and not less than \$200 nor more than \$2,500 for each subsequent violation. [s. 100.30 (4), Stats.]

With specific regard to below cost sales of motor vehicle fuel, additional state remedies as well as a private cause of action exist. [s. 100.30 (5) and (5m), Stats.] DATCP may issue a cease and desist order, bring an action to enjoin a violation, and recover a forfeiture of not less than \$200 nor more than \$5,000 for each violation involving motor vehicle fuel. A district attorney may bring an action to enjoin a violation and recover a forfeiture of not less than \$200 nor more than \$5,000 for each violation involving motor vehicle fuel.

The private cause of action allows any person who is injured or threatened with injury as a result of the below-cost sale of motor vehicle fuel to bring an action. Available relief includes injunctive relief as well as the recovery of treble damages or \$2,000, whichever is greater, multiplied by each day of continued violation, and attorney fees and other costs. A private action must commence within 180 days after the date of the violation. In DATCP’s experience, a private action often will commence after initiation of a state action in order to take advantage of evidence gathered by the state. In a private action, the plaintiff can gain access to DATCP records through a public records request during the discovery period of the private action. DATCP feels that the private cause of action is a strong deterrent to violation of the “minimum markup” law on account of the potential liability for treble damages and attorney fees in the action.

EXCEPTIONS

The Unfair Sales Act provides several exceptions to the prohibition on sales below cost and, accordingly, exceptions to the minimum markup requirement for sales of motor vehicle fuel. Specifically, there is a broad exception for meeting competition. This exception allows a seller, including a seller of motor vehicle fuel, to sell below cost if the price of merchandise is set in good faith response to a competitor’s existing price. [s. 100.30 (6), Stats.] An example of this exception would be a seller in a border city, such as La Crosse, who meets the price of a

Minnesota seller. Further, the exception could cascade throughout the state as in-state sellers lower their prices to meet the competition from the border city.

In order to utilize this exception with respect to retail sales of motor vehicle fuel, however, a motor vehicle fuel retailer must submit notification of its lower price to DATCP before the close of the business day on which the seller lowered its price to meet competition. Failure to comply with the notification requirement creates a rebuttable presumption that the seller did not lower its price in order to meet competition. In a dispute, this presumption shifts the burden of proof from the state to the selling retailer, requiring the retailer to prove it lowered prices to meet competition. On the other hand, compliance with the notification requirement provides the seller with immunity from the private cause of action and special department remedies described above.

Other exceptions relate to clearance and liquidation sales, perishable items, and sales related to government contracts or judicial orders.

ETHANOL

Recently, there has been widespread interest in the application of the minimum markup law to ethanol-blended fuels. In the Act, “motor vehicle fuel” means any liquid prepared, advertised, or sold for use as or commonly and commercially used as a fuel in internal combustion engines. [s. ATCP 105.001 (4), Wis. Adm. Code.] Accordingly, ethanol and any ethanol-blended fuel would be considered motor vehicle fuel for purposes of the “minimum markup” law.

An August 2006 directive from Governor James Doyle suspended DATCP enforcement of the “minimum markup” law on ethanol-blended fuels. The DATCP staff indicates that the suspension complements the Governor’s stated interest in promoting production of ethanol-blended fuels in the state. The Governor’s directive does not remove the private cause of action as applied to ethanol-blended fuel. However, private plaintiffs may no longer benefit from DATCP records if there is no DATCP investigation.

This memorandum is not a policy statement of the Joint Legislative Council or its staff. The memorandum was prepared by Scott Grosz, Staff Attorney, on November 6, 2006.

CATEGORIES OF MOTOR VEHICLE FUEL SALES

RETAIL

Retail sale, by a refiner, at a retail station owned or operated either directly or indirectly by the refiner. [s. 100.30 (2) (am) 1m. a., Stats.]

Cost is the greater of the following:

The refiner's lowest selling price to other retailers or to wholesalers on the date of the refiner's sale,

Less trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice cost,

Plus a markup of 9.18% of the sum of the above amounts to cover a proportionate part of the costs of doing business.

Or,

The average posted terminal price (AFTP) at the terminal closest to the retail station,

Plus a markup of 9.18% of AFTP to cover a proportionate part of the costs of doing business.

Retail sale 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. [s. 100.30 (2) (am) 1m. b., Stats.]

Cost is the greater of the following:

The invoice cost of the fuel to the wholesaler within 10 days prior to the date of sale, or replacement cost of the fuel, whichever is lower,

Less trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice or replacement cost,

Plus a markup of 9.18% of the sum of the above amounts to cover a proportionate part of the costs of doing business.

Or,

The APTP at the terminal closest to the retail station,

Plus a markup of 9.18% of APTP to cover a proportionate part of the costs of doing business.

Retail sale, by a person other than a refiner or wholesaler, at a retail station. [s. 100.30 (2) (am) 1m. c., Stats.]

Cost is the greater of the following:

The invoice cost of the fuel to the retailer within 10 days prior to the date of the sale, or replacement cost of the fuel, whichever is lower,

Less trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice or replacement cost,

Plus a markup of 6% of the sum of the above amounts to cover a proportionate part of the costs of doing business.

Or,

The APTP at the terminal closest to the retail station,

Plus a markup of 9.18% of APTP to cover a proportionate part of the costs of doing business.

Retail sale, by a refiner, at a place other than a retail station. [s. 100.30 (2) (am) 1m. d., Stats.]

Cost is:

The refiner's lowest selling price to other retailers or to wholesalers on the date of the refiner's sale,

Less trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice cost,

Plus a markup to cover a proportionate part of the costs of doing business. This markup shall be 3% of the sum of the above amounts in the absence of proof of lesser costs.

Retail sale, by a person other than a refiner, at a place other than a retail station. [s. 100.30 (2) (am) 1m. e., Stats.]

Cost is:

The invoice cost of the fuel to the retailer within 10 days prior to the date of the sale, or replacement cost of the fuel, whichever is lower,

Less trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice or replacement cost,

Plus a markup to cover a proportionate part of the costs of doing business. This markup is 3% of the sum of the above amounts in the absence of proof of lesser costs.

WHOLESALE

Wholesale sale by a refiner. [s. 100.30 (2) (c) 1g., Stats.]

Cost is:

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 trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice cost,

Plus a markup to cover a proportionate part of the costs of doing business. This markup is 3% of the sum of the above amounts in the absence of proof of lesser costs.

Wholesale sale by a person other than a refiner. [s. 100.30 (2) (c) 1r., Stats.]

Cost is:

The invoice cost of the fuel to the wholesaler within 10 days prior to the date of the sale, or replacement cost of the fuel, whichever is lower,

Less trade discounts except discounts for cash,

Plus excise, sales, or use taxes,

Plus transportation costs,

Plus any other charges not included in the invoice or replacement cost,

Plus a markup to cover a proportionate part of the costs of doing business. This markup is 3% of the sum of the above amounts in the absence of proof of lesser costs.

DEFINED TERMS

“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. [s. 100.30 (2) (a), Stats.]

“Refiner” means a manufacturer, producer, or refiner of motor vehicle fuel. [s. 100.30 (2) (cm), Stats.]

“Retailer” includes every person engaged in the business of making sales at retail within this state, but, in the case of a person engaged in the business of selling both at retail and at wholesale, such term shall be applied only to the retail portion of such business. [s. 100.30 (2) (e), Stats.]

“Sell at retail,” “sales at retail,” and “retail sale” mean any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the retailer's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. [s. 100.30 (2) (h), Stats.]

“Sell at wholesale,” “sales at wholesale,” and “wholesale sales” include any transfer for a valuable consideration made in ordinary course of trade or the usual conduct of the wholesaler's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. [s. 100.30 (2) (i), Stats.]

“Terminal” means a motor vehicle fuel storage and distribution facility supplied by pipeline or marine vessel, from which facility motor vehicle fuel may be removed at a rack and from which facility at least three refiners or wholesalers of motor vehicle fuel sell motor vehicle fuel. [s. 100.30 (2) (j), Stats.]

“Wholesaler of motor vehicle fuel” includes any of the following:

1. A person who stores motor vehicle fuel and sells it through five 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. [s. 100.30 (2) (m), Stats.]

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