

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: ATCP 106

Relating to: Price Gouging During an Emergency

Rule Type: Emergency

1. Finding/nature of emergency (Emergency Rule only):

Under Wis. Stat. § 227.24 (1) (a), an agency may promulgate an emergency rule "... if preservation of the public peace, health, safety, or welfare necessitates putting the rule in effect..." The Department of Agriculture, Trade and Consumer Protection (department) has determined that an emergency exists and that promulgating an emergency rule is appropriate given the Governor's Executive Order No. 72, "Relating to Declaring a Health Emergency in Response to the 2019 19 Coronavirus." Item Number 7 of that order proclaimed "that a period of abnormal economic disruption, as defined in Section 100.305 of the Wisconsin Statutes, exists in the State of Wisconsin." In addition, Item Number 8 of that order specifically directed "... the Department of Agriculture, Trade, and Consumer Protection to enforce prohibitions against price gouging during an emergency, as authorized under Section 100.305 of the Wisconsin Statutes and Chapter ATCP 106 of the Wisconsin Administrative Code."

2. Detailed description of the objective of the proposed rule:

Although ATCP 106 went into effect more than eleven years ago on January 1, 2009, it has not been invoked until the current public health emergency that a governor has needed to issue an executive order declaring a period of abnormal economic disruption for the state, or a part of the state, pursuant to Wis. Stat. § 100.305 (2). Therefore, ATCP 106 has never previously been invoked because it is only operative during a period of abnormal economic disruption that has been certified by the governor in an executive order. Now that the rule is operative and being enforced, the department would like to consider what additional changes to the rule may be necessary in order to implement fully the Wis. Stat. § 100.305 (2) prohibition on selling or offering to sell, consumer goods or services at unreasonably excessive prices during a period of abnormal economic disruption. Again, ATCP 106, by definition, only operates "in a period of abnormal economic disruption" certified by the governor in an executive order-- that is, during emergencies that threaten the well-being of Wisconsin's citizens.

3. Description of the existing policy relevant to the rule, any policy proposed,

ATCP 106.02 (1): PROHIBITION. Except as provided in sub. (2), no seller may sell a consumer good or service in an emergency area during an emergency period at a price that is more than 15% above the highest price at which the seller sold like consumer goods or services to customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration.

ATCP 106.03 (1): DEPARTMENT MAY REQUIRE SELLER TO PROVIDE INFORMATION. The department may by written notice require a seller to provide information under sub. (2) at a price at which a seller has sold a consumer good or service in an emergency area during an emergency period. The notice shall identify the price, the sale location, the specific type of consumer good or service sold, and the information required under sub. (2). The seller shall provide the required information to the department in writing within 10 days after the date the department issues the notice to the seller, or by a later date specified in the notice.

New Policies Proposed to be Included in the Rule:

On March 13, 2020, the department issued a press release that provided information to consumers about Wis. Stat. § 100.305, Wisconsin’s “price gouging law,” and how to seek relief through the agency. After three weeks of experience, the department hopes to use collected data to determine if any modifications to the rule must or should be made at this time.

4. Detailed explanation of statutory authority for the rule (including the statutory authority and language):

Wis. Stat. § 100.305 (2) prohibits selling, or offering to sell, consumer goods or services at unreasonably excessive prices during a period of abnormal economic disruption, the existence of which the governor has certified by executive order. Subsection (3) of the statute directs the department to promulgate rules “to establish formulas and other standards to be used in determining whether a wholesale or retail price is unreasonably excessive.” The statute’s subsection (4m), also provides enforcement and penalties for violations of the law.

(2) PROHIBITION. No seller may sell, or offer to sell, in this state at wholesale or at retail prices, any consumer goods or services at unreasonably excessive prices if the governor, by executive order, has certified that the state or a part of the state is in a period of abnormal economic disruption.

(3) RULES. The department shall promulgate rules to establish formulas or other standards to be used in determining whether a wholesale or retail price is unreasonably excessive.

(4m) ENFORCEMENT; PENALTY. If a seller violates sub. (2), the department or, after consulting with the department, the department of justice, may do any of the following:

(a) Issue to the seller a warning notice specifying the action that the seller is required to take in order not to be in violation of sub. (2).

Wis. Adm. Code § ATCP ch. 106, Price Gouging during an Emergency, resulted from rulemaking the Legislature authorized in 2005 Wisconsin Act 450.

5. Estimate of amount of time that state employees will spend developing the rule other resources necessary to develop the rule:

The department estimates that it will take approximately 160 staff hours to develop this emergency rule. That calculation includes time required for investigation and analysis, the emergency rule, preparing related documents, coordinating meetings, holding public hearings, and communicating with affected persons and groups. The department will use staff to develop this rule.

6. List with description of all entities that may be affected by the proposed rule:

This rule will affect Wisconsin consumers, as well as sellers of consumer goods or services inside and outside the state of Wisconsin. The effect on out-of-state sellers, however, is largely dependent on the extent to which this rule encompasses their online sales.

7. Summary and preliminary comparison with any existing or proposed federal rule that is intended to address the activities to be regulated by the proposed rule:

Due to evolving federal responses to the COVID-19 crisis, it is not yet clear what federal regulations may affect DATCP enforcement of ATCP 106.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

Indeterminate. The economic impact depends on how many complaints about excessive pricing the department receives and changes that may be made by temporary, emergency amendments to the current rule. As enforcing the prohibition of price gouging is the reason for the rule, the department would expect more costs for investigation and prosecution and additional forfeitures in cases where those violating the law.

Contact Person:

David A. Woldseth

Policy Analyst, Division of Trade and Consumer Protection

Phone: (608) 224-5164

DavidA.Woldseth@wisconsin.gov