

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 into effect..." The Department of Agriculture, Trade and Consumer Protection (department) finds 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 COVID-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 gauging (sic) 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 was not 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 or used 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 policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Existing Policies Relevant to the Rule:

ATCP 106 follows from Wis. Stat. § 100.305 (3). Most likely, any temporary emergency changes that the department may make would be to ATCP 106.02 (1), ATCP 106.03 (1), or both:

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 like 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) related to 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 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 citation 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, in 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, 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).

(b) Commence an action against the seller in the name of the state to recover a civil forfeiture of not more \$10,000 or to temporarily or permanently restrain or enjoin the seller from violating sub. (2), or both.

Wis. Stat. § 227.24 (1) (a) allows the department to promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under Wis. Stat. ch. 227.

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

5. Estimate of amount of time that state employees will spend developing the rule and of 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, drafting the emergency rule, preparing related documents, coordinating meetings, holding public hearings, and communicating with affected persons and groups. The department will use existing 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 both inside and outside the state of Wisconsin. The effect on out-of-state sellers, however, may be largely dependent on the extent to which this rule encompasses their online sales.

7. Summary and preliminary comparison with any existing or proposed federal regulation 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 prices 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, one would expect more costs for investigation and prosecution and additional forfeitures imposed on those violating the law.

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