

Wisconsin Department of Agriculture, Trade and Consumer Protection

Business Impact Analysis¹

Rule Subject: Price Gouging During an Emergency
Adm. Code Reference: ATCP 106
Rules Clearinghouse #: 07-004
DATCP Docket #: 06-R-08

DATCP is responsible for administering the price gouging prohibition under s. 100.305, Stats. Section 100.305, Stats., was created under 2005 Wisconsin Act 450. This law prohibits sellers from selling “consumer goods or services” at wholesale or retail 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” due to an emergency. An emergency may include, for example, a destructive act of nature, a disruption of energy supplies that poses a serious risk to the public health or welfare, a hostile action, or a strike or civil disorder. The statute requires DATCP to promulgate administrative rules to establish formulas or other standards to be used in determining whether a wholesale or retail price is unreasonably excessive.

Under Section 100.305, Stats. and this rule, a seller may not sell a consumer good or service in a declared emergency area during a declared emergency period at a price that is more than 10% 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. A seller may charge a higher price if the seller can prove, based on evidence in the seller’s possession at the time of sale, that any of the following apply:

- The higher price does not exceed the seller’s cost plus normal markup. “Normal markup” means the percentage markup, over the seller’s cost, which the seller regularly used in sales of like goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration. This allows sellers to pass on bona fide cost increases.
- The higher price is required by law. For example, a seller may prove that the higher price is required to comply with Wisconsin’s Unfair Sales Act (“minimum markup law”), s. 100.30, Stats.
- The Governor’s emergency declaration directly or impliedly exempts the sale from coverage under the emergency declaration.

¹ This analysis includes, but is not limited to, a small business analysis (“regulatory flexibility analysis”) under s. 227.114, Stats.

Under this rule, DATCP may require a seller to submit written, documented answers to DATCP questions related to the seller's compliance with this rule, including information related to any of the following:

- The highest price at which the seller sold a consumer good or service to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration.
- The scope of the relevant trade area.
- Any exemptions claimed by the seller under this rule.
- Other information relevant to DATCP's investigation.

Business Impact

Depending on the scope of a declared emergency, this rule could conceivably affect nearly every business that sells consumer goods in the state (whether at wholesale or retail). A declared emergency may be statewide or localized in scope, and may be broad-based or confined to certain economic sectors. The impact of this rule will vary accordingly. This rule could have a substantial impact on a wide array of businesses. But it is not possible to predict the impact on individual businesses or on business generally.

Whenever it applies in an emergency, this rule will limit the prices that may be charged by affected businesses. This rule prohibits prices that are more than 10% higher than pre-emergency prices, unless sellers can document that their higher prices do not exceed their cost plus normal markup. Sellers are thus free to pass on relevant cost increases, if they can document those increases.

This rule applies only when the Governor, by executive order, issues an emergency declaration. The emergency declaration determines the scope of coverage, and may exempt certain business sectors from coverage. This rule applies only for the period of time that the emergency declaration remains in effect.

This rule provides some latitude for price adjustments in response to supply and demand, and allows sellers to pass on bona fide cost increases. However, this rule does ultimately set limits on the prices that manufacturers, wholesale distributors and retailers may charge. Some sellers may withhold goods or services from the market rather than sell at those limited prices. Retailers may benefit from wholesale price limitations, but may suffer from wholesaler decisions to withhold goods or services from distribution.

Steps to Assist Small Business

Under 2003 Wis. Act 145, DATCP and other agencies must adopt rules spelling out their rule enforcement policy for small businesses. DATCP has adopted a separate rule outlining its small business enforcement policy (see ATCP 1, subch. VII). DATCP will follow that rule in the administration of this price gouging rule. DATCP will, to the maximum extent feasible, seek voluntary compliance with this price gouging rule.

This rule first applies to small businesses 2 months after it first applies to other businesses, as required by s. 227.22(2)(e), Stats. This rule will not apply to small businesses during declared emergencies that fall within that 2-month period, but will apply to small businesses during subsequent declared emergencies. If a declared emergency period starts before the small business effective date, but extends beyond the small business effective date, this rule will apply to small businesses for that portion of the emergency period that occurs after the small business effective date.

This rule does not exempt small business, or include more lenient “price gouging” prohibitions against small business, because that would violate the apparent intent of the “price gouging” legislation (2005 Wisconsin Act 450).

Conclusion

In a declared emergency, this rule could conceivably have a large impact on a large number and variety of businesses. However, the actual impact will depend on the nature, scope and duration of the declared emergency. That actual impact is impossible to predict. In any case, this rule merely implements the “price gouging” prohibition already contained in 2005 Wisconsin Act 450.

Dated this _____ day of _____, 2007

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Janet Jenkins, Administrator,
Division of Trade and Consumer Protection