



State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Rod Nilsestuen, Secretary

DATE: November 10, 2008

TO: Bruce Hoesly, Legislative Reference Bureau
1 East Main Street, Suite 200

FROM: Rodney J. Nilsestuen, Secretary

**SUBJECT: Price Gouging During an Emergency; Final Draft Rule for Publication
(Clearinghouse Rule No.07-004)**

The Department of Agriculture, Trade and Consumer Protection (DATCP) hereby submits the following rule for publication:

CLEARINGHOUSE RULE #: 07-004
SUBJECT: Price Gouging During an Emergency
ADM. CODE REFERENCE: ATCP 106
DATCP DOCKET #: 06-R-08

We are enclosing a copy of the final draft rule, as adopted by DATCP. We are also providing the following information for publication with the rule, as required by s. 227.114(6), Stats.

Final Regulatory Flexibility Analysis (Summary)

Depending on the scope of a declared emergency, this rule could conceivably affect nearly every business that sells consumer goods and services 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. However, 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 15% higher than the highest pre-emergency price during the previous 60 days, 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 ultimately limits the prices

that manufacturers, wholesaler distributors, and retailers may charge in emergency situations. 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.

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 initial applicability date, but extends beyond the small business initial applicability date, this rule will apply to small businesses for that portion of the emergency period that occurs after the small business initial applicability date.

Comments from Legislative Committees (Summary)

On October 3, 2007, DATCP transmitted the above rule for legislative review. The rule was assigned to the Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection and to the Assembly Committee on Judiciary and Ethics.

On October 8, 2007, the Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection requested a meeting with DATCP regarding the rule, thereby triggering a 30 day extension (to December 3, 2007) on the legislature's review period. The meeting was held on October 16, 2007.

On October 24, 2007, the Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection held a hearing regarding the rule, but took no formal action. However, the committee held an Executive Session on November 29, 2007 and passed a motion (5 to 0) to request that DATCP consider modifications to the rule. The motion specified that if DATCP did not agree to consider modifications, the committee would object to the rule pursuant to s. 227.19(4)(d)6., Stats. DATCP agreed to consider the modifications.

On January 18, 2008, DATCP Secretary Nilsestuen issued a letter to Senator Wirch (Chair of the Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection) stating that DATCP had considered the four modifications suggested by committee, and had agreed to two of them. Specifically:

- ***The committee asked that DATCP consider increasing the prima facie price increase cap from 10% to 15%.*** DATCP agreed and revised the rule to include a 15% increase.

- ***The committee asked that DATCP consider changing the standard of proof required to justify a higher price.*** DATCP agreed that the “clear and convincing” language in the original DATCP draft was unnecessary, and therefore removed that language.
- ***The committee asked that DATCP consider changing the type of evidence required to justify a higher price.*** The original DATCP draft of the rule required that a seller who wishes to claim an exemption to price increases greater than the allowed 10% must be able to show that *at the time of sale*, the seller possessed and relied upon accurate information showing that the sale qualified for the exemption. The committee asked that sellers not be required to have documents in their hands at the time of sale. DATCP responded to this request by saying that the rule requires *information*, not necessary specific written documents. DATCP did not make this requested change.
- ***The committee asked that DATCP consider allowing businesses to charge higher prices, based on their own subjective assessment of “business risk”.*** DATCP refused this change because it left no objective standard for compliance.

The revised proposed rule was re-submitted to the appropriate Senate and Assembly committees on January 18, 2008.

The Assembly Committee on Judiciary and Ethics held a hearing on the rule on January 31, 2008, and then voted (10-0) to request that DATCP make additional modifications to the rule. On February 4, 2008, Senator Wirch sent a letter to DATCP stating that he agreed with the request of the Assembly committee even though the Senate Committee on Small Business Preparedness, Workforce Development, Technical Colleges and Consumer Protection did not take a vote to request modifications. DATCP responded to both Representative Suder and Senator Wirch by letter dated February 5, 2008 agreeing to consider changes.

On August 28, 2008, DATCP received a letter from Representative Staskunas, member of the Assembly Committee on Judiciary and Ethics, clarifying the provisions of the rule that he believed needed modification.

After considering changes, DATCP notified the committee by letter dated August 29, 2008 that it would further modify the standard of proof required to justify a higher price by eliminating the word “possess”. However, DATCP did not make additional requested revisions to the rule. On September 25, 2008, the Assembly Committee on Judiciary and Ethics objected to the final proposed rule and referred the proposed rule to the Joint Committee for the Review of Administrative Rules.

Sen. Jauch requested a meeting with DATCP to discuss the rule. DATCP met with Sen. Jauch and interested industry representatives on October 23, 2008. The Joint Committee for Review of Administrative Rules took no action and as a result, did not concur with the objection.