
Wisconsin Legislative Council

INFORMATION MEMORANDUM



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STATE AND FEDERAL GAS TAXATION AND REGULATION

Gas prices paid by a consumer are influenced, both directly and indirectly, by state and federal law. State and federal law both impose taxes on gasoline, but for differing purposes and at differing points in the distribution chain. Wisconsin's Unfair Sales Act, or minimum markup law, requires a markup on gasoline to prevent undercutting in the market by selling below cost. On the other hand, Wisconsin law also prevents excessive gasoline pricing during certain emergency situations. In the name of protecting a consumer's purchase of gasoline, both state and federal law prohibit certain deceptive practices in advertising and sale of gasoline. Finally, federal law requires that certain types of gasoline be used for environmental reasons, further influencing its price.

This information memorandum provides an overview of gasoline taxation, and also of select regulation that influences gasoline prices, at each the state and federal levels.

GASOLINE TAXATION

The gasoline supply chain has many stops, which account for much of the final price a consumer pays at the pump. Gas stations get gasoline from a fuel distributor, or "wholesaler," that contracts with different oil companies to buy gasoline, branded and unbranded, usually at a central distribution hub. The central distribution hub, or licensed supplier, receives the gasoline from a refinery via pipeline. The wholesaler receives gasoline from the licensed supplier and sells to gas stations, or "retailers." According to the U.S. Department of Energy, 89 percent of the national average of \$4.44 for a gallon of gasoline in May, 2022, was attributable to costs incurred in this supply chain, namely: the price of crude oil (59 percent); the cost of refining (25 percent); and expenses related to distribution and marketing (five percent). The remaining 11 percent was attributable to state and federal taxes.¹

State Law

Generally, the price of gasoline for a consumer includes the price charged by the retailer, the state excise tax, and state petroleum inspection fee.² An excise tax is a tax on the sale of specific products. The excise tax for gasoline is paid by licensed suppliers and is collected monthly when gasoline leaves terminal storage.³ The tax is levied on a per gallon basis. Gasoline excise tax receipts are collected by the Department of Revenue (DOR) before being deposited into Wisconsin's Transportation Fund.

¹ See <https://www.eia.gov/petroleum/gasdiesel/>.

² Wisconsin does not levy state sales or business taxes or local taxes on gasoline. For more information see Wisconsin Department of Transportation, [Transportation Issues](#).

³ For more information, see Legislative Fiscal Bureau, [Motor Vehicle Fuel and Alternative Fuel Tax](#), Informational Paper 38 (Jan. 2021).

With exceptions, the excise tax is imposed on all gasoline received by a supplier for sale in this state, for sale for export to this state, or exported to this state. [[s. 78.01 \(1\), Stats.](#)] No tax may be imposed on any of the following:

- Gasoline exported by a person licensed to export.
- Gasoline sold to and used by the United States or its agencies (requires proper documentation).
- Gasoline sold to a common motor carrier that certifies to DOR that the gasoline is for the urban mass transportation of passengers.
- Gasoline sold for non-highway use in mobile machinery and equipment, delivered directly into the consumer's tank in an amount of not less than 100 gallons. Certain machinery does not qualify for this exception: a snowmobile; an off-highway motorcycle not registered for private use; an all-terrain vehicle not registered for private use; or a recreational motorboat.
- Gasoline sold to an aviation fuel dealer and delivered directly into the dealer's storage tank in an amount of not less than 100 gallons.

[[s. 78.01 \(2\), Stats.](#)]

The tax rate for gasoline is determined by DOR annually before April 1. [[s. 78.015 \(1\), Stats.](#)] DOR calculates the new rate by dividing the annual average Consumer Price Index (CPI) for all urban consumers for the previous year, as determined by the U.S. Department of Labor, by the CPI for the year before the previous year. [[s. 78.015 \(2\), Stats.](#)] That value is then multiplied by the tax rate in effect at the time of calculation. The rate calculated is effective on the April 1 after calculation. [[s. 78.015 \(5\), Stats.](#)] The current state excise tax on gasoline is 30.9 cents per gallon.⁴ This tax has not changed since April 1, 2006.⁵

The petroleum inspection fee adds two cents per gallon to the total tax.⁶ One cent per gallon of this fee is deposited in the transportation fund, while the other one cent per gallon is deposited in the petroleum inspection fund, which is available for petroleum products cleanup, among other purposes. [ss. [168.12 \(1\)](#) and [168.128](#), Stats.] The addition of the petroleum inspection fee puts the current total state gasoline tax at 32.9 cents per gallon.⁷

Gasoline taxes and fees per gallon in neighboring states as of January, 2022:

- Illinois: 58.3 cents.
- Iowa: 30 cents.
- Michigan: 45.7 cents.
- Minnesota: 28.6 cents.
- Wisconsin: 32.9 cents.

Federal Law

Like its state counterpart, the federal excise tax on gasoline is imposed during the manufacturing process rather than on the retail consumer at the pump. With some exceptions, the tax is levied upon removal of taxable fuel from a refinery or terminal or upon entry into the

⁴ For more information, see Wisconsin Department of Revenue, [Motor Vehicle Fuel Tax](#) (Dec. 2021).

⁵ In 1997, the gasoline tax was increased statutorily by one cent. [[s. 78.017, Stats.](#)]

⁶ The petroleum inspection fee was reduced from three cents to two cents per gallon by [2005 Wisconsin Act 25](#).

⁷ Wisconsin's rate is only slightly higher than the national state tax average of about 31 cents per gallon. [See [Federal and State Motor Fuels Taxes](#), U.S. Department of Energy, U.S. Energy Information Administration.]

country for consumption, use, or warehousing. The rate of tax is currently 18.3 cents per gallon (with higher rates for aviation gasoline, diesel fuel, and kerosene).⁸ There is also a 0.1 cent per gallon increase in that rate, which is deposited into the Leaking Underground Storage Tank Trust Fund, which is available for certain petroleum release response and prevention activities. [26 U.S.C. s. 4081 (a) (1) (A) and (2) (A) and (B); 42 U.S.C. ss. 6991b to 6991d, 6991i, and 6991j.] Therefore, the effective federal gasoline tax rate is 18.4 cents per gallon.

Amounts equivalent to the federal gasoline tax (along with other amounts) are appropriated to the Highway Trust Fund. That trust fund is available for various federal-aid highway program expenditures, among other purposes. [26 U.S.C. s. 9503 (b) (1) (D) and (c).]

President Biden has recently proposed suspending the federal gasoline tax for a period of three months, ending September 30, 2022.⁹ Such a suspension would require a change in law. According to the Congressional Research Service, tax revenues have been insufficient to cover expenditures from the Highway Trust Fund since September, 2008.¹⁰ Therefore, a three-month suspension would likely require an infusion of other funds into the Highway Trust Fund to keep it whole.

GAS REGULATION

State Law

Two main regulatory statutes affect gasoline prices in Wisconsin: [s. 100.30, Stats.](#) (the Unfair Sales Act), which prevents larger sellers from selling below cost to attract patrons away from smaller competitors; and [s. 100.305, Stats.](#), which prevents sellers from charging excessive prices during a state of emergency.¹¹

Unfair Sales Act

The Unfair Sales Act, also known as the minimum markup law, requires wholesalers to include a minimum markup in their sales to retailers and, in turn, retailers to include a minimum markup in their sales to consumers. According to the act, the practice of selling items below cost is “generally a form of deceptive advertising and an unfair method of competition in commerce.” [[s. 100.30 \(1\), Stats.](#)] The 1939 act prohibits the selling of certain products, including gasoline, below the “cost to retailer.” It was described by one Wisconsin court as intended “to protect small businesses from being run out of business by the predatory pricing practices of large competitors.” [*Orion Flight Servs. v. Basler Flight Serv.*, 2004 WI App 222, ¶1.]

The act imposes specific markups for gasoline. The markup depends on the type of seller and the location of the sale. Because the act prohibits sales below cost, the calculation of “cost” is a key threshold determination. The act defines “cost” to include both the variable costs of each unit of fuel (generally, the invoice or replacement cost) and a proportionate share of the other costs of doing business attributable to each unit of fuel (such as taxes and transportation costs, less trade

⁸ Unless extended, the rate for gasoline is scheduled to drop to 4.3 cents per gallon on October 1, 2028. [26 U.S.C. s. 4081 (d) (1).]

⁹ The White House, [Fact Sheet: President Biden Calls for a Three-Month Federal Gas Tax Holiday](#), (June 22, 2022).

¹⁰ See Congressional Research Service, [Potential Impacts of a Federal Gasoline Tax Moratorium](#), (June 27, 2022).

¹¹ The Department of Agriculture, Trade and Consumer Protection (DATCP) website contains additional information on the [Unfair Sales Act](#) and [price gouging](#), and includes complaint questionnaires.

discounts). The latter component of that definition constitutes what is commonly referred to as the “minimum markup.”

In addition to a three percent markup imposed on wholesale sales, the retail gasoline markup, simplified, is determined as follows:

- **Retail sale of gasoline by a refiner at a retail station:** 9.18 percent on cost to retailer or average posted terminal price,¹² whichever is greater.
- **Retail sale of gasoline by a wholesaler, who is not a refiner, at a retail station:** 9.18 percent on cost to retailer or average posted terminal price, whichever is greater.
- **Retail sale of gasoline by a person other than a refiner or wholesaler, at a retail station:** six percent on cost to retailer or 9.18 percent of average posted terminal price, whichever is greater.

[[s. 100.30 \(2\) \(am\) 1m. and \(c\) 1g. and 1r., Stats.](#)]

The act excepts gasoline sales where: (1) the price of gasoline is made in good faith to meet the existing price of a competitor, based on evidence in the form of an advertisement, receipt, or other business record; or (2) the gasoline is sold by a person to a wholesaler who may sell the gasoline at either retail or wholesale. [[s. 100.30 \(6\) \(a\), Stats.](#)] A seller of gasoline who lowers its price in a good faith exercise of the first exception (sometimes referred to as the “meeting competition” exception), must notify DATCP of that fact before the close of business on the day on which the price was lowered.¹³ [[s. 100.30 \(7\) \(a\), Stats.](#)]

Under the Unfair Sales Act, any sale of an item by a seller of motor vehicle fuel at less than the cost to a retailer impairs and prevents fair competition, injures public welfare and is unfair competition contrary to public policy. Evidence of a sale below cost must be *prima facie* evidence of intent.¹⁴ [[s. 100.30 \(3\), Stats.](#)] DATCP or a district attorney may commence an action on behalf of the state to recover a civil forfeiture of not less than \$50 nor more than \$500 for the first violation, and not less than \$200 nor more than \$2,500 for each subsequent violation of the act. [[s. 100.30 \(4\), Stats.](#)] The act may also be enforced by a private cause of action. Any person injured as a result of a sale of gasoline in violation of the act may bring an action (within 180 days of the violation) against the violator for temporary or permanent injunctive relief, or three times the amount of any monetary loss sustained or \$2,000, whichever is greater. The forfeiture will multiply by each day of continued violation, and may include other costs like accounting and attorney fees. [[s. 100.305 \(5m\), Stats.](#)]

There have been multiple attempts to repeal the Unfair Sales Act in its entirety in the past decade. For example, [2019 Assembly Bill 155/Senate Bill 51](#) and [2015 Assembly Bill 452/Senate Bill 371](#) were introduced to repeal the act, but each failed to pass either house. In addition, the Governor’s executive budget proposal for the 2019-20 biennial budget, [2019 Assembly Bill 56/Senate Bill 59](#), proposed removing the specified markups for gasoline. The Legislature removed those provisions before enactment of the budget act.

¹² The “average posted terminal price” is defined as the average posted rack price for gasoline, as published by a petroleum price reporting service. [[s. 100.30 \(2\) \(a\), Stats.](#)]

¹³ In the past, DATCP has opined that the “meeting competition” exception often results in widespread retail pricing below the minimum markup, particularly where the competitor is located in a neighboring state with a lower gasoline tax and hence less expensive gasoline. [See [letter from DATCP to Senator Dave Zien](#) (May 3, 2006), at pp. 5-7; see also *Go America, LLC v. Kwik Trip, Inc.*, 2006 WI App 94 (affirming that a competitor for purposes of the “meeting competition” exception need not be located in Wisconsin).]

¹⁴ *Prima facie* evidence is evidence that, on its face, would be sufficient to prove a particular proposition or fact.

Excessive Pricing During a Period of Abnormal Economic Disruption

[2005 Wisconsin Act 450](#) established that no seller¹⁵ may charge “unreasonably excessive” retail or wholesale prices during a “period of abnormal economic disruption” caused by an emergency. [\[s. 100.305 \(2\), Stats.\]](#) An “emergency” is defined as any of the following:

- A tornado, flood, fire, storm, or other destructive act of nature.
- A disruption of energy supplies to the degree that a serious risk is posed to the economic well-being, health, or welfare of the public.
- Hostile action.¹⁶
- A strike or civil disorder.

[\[s. 100.305 \(1\) \(b\), Stats.\]](#)

DATCP promulgates rules to establish the standards used to determine whether a price is “unreasonably excessive.” [\[s. 100.305 \(3\), Stats.\]](#) DATCP’s administrative rules state that no seller may sell a consumer good or service in an emergency area during an emergency period that is more than 15 percent above the highest price the seller sold like goods or services during the 60-day period immediately preceding the emergency declaration. [\[s. ATPC 106.02 \(1\), Wis. Adm. Code.\]](#) This limit does not apply to a sale where the seller “possesses and relies upon accurate information” that shows any of the following:

- The selling price does not exceed the seller’s cost plus normal markup.¹⁷
- The selling price is required by law.
- The emergency declaration directly or impliedly exempted the sale from coverage.

[\[s. ATPC 106.02 \(2\), Wis. Adm. Code.\]](#)

If a seller charges unreasonably excessive prices during a period of abnormal economic disruption, DATCP may, upon consultation with the Department of Justice, either: (1) issue a warning to the seller; or (2) commence an action against the seller either to recover a civil forfeiture of not more than \$10,000, or to enjoin the seller from violating the statute. [\[s. 100.305 \(4m\), Stats.\]](#)

Governor Evers issued an emergency executive order relating to gasoline prices on June 21, 2022.¹⁸ The executive order declared that Wisconsin is in a period of abnormal economic disruption until December 1, 2022, and that gasoline sellers may not set unreasonably excessive prices during this time.¹⁹

¹⁵ “Seller” means a manufacturer, producer, supplier, wholesaler, distributor, or retailer. [\[s. 100.305 \(1\) \(e\), Stats.\]](#)

¹⁶ “Hostile action” is defined as an act of violence against a person or property in the United States by a foreign power. [\[s. ATPC 106.01 \(9\), Wis. Adm. Code.\]](#)

¹⁷ “Normal markup” means a percentage markup over the seller’s cost that the seller has regularly used in the sale of like consumer goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration. [\[s. ATPC 106.01 \(12\), Wis. Adm. Code.\]](#)

¹⁸ [Executive Order #170.](#)

¹⁹ As mentioned earlier, an unreasonably excessive price is a price 15 percent above the highest price the seller sold gasoline for during the 60-day period preceding the executive order.

Gasoline Price Deceptive Advertising

As mentioned, it is an unfair method of competition and deceptive advertising to advertise or otherwise represent the price of gasoline to be less than the seller's cost plus the respective markup. [[s. 100.305 \(1\), Stats.](#)] In addition, state law prohibits the publication, dissemination, or circulation of an advertisement that contains any assertion, representation, or statement of fact which is untrue, deceptive, or misleading. [[s. 100.18 \(1\), Stats.](#)]

Gas stations must conspicuously and accessibly post their price per gallon. Any seller (including wholesalers) of gasoline in Wisconsin must keep the net selling price per gallon and the amount of taxes per gallon of all grades of motor fuel posted in a "conspicuous place"²⁰ and on every pump. All prices posted must remain in effect for at least 24 hours. [[s. 100.18 \(8\), Stats.](#)]

The prohibitions in s. 100.18, Stats., described above, are enforced by DATCP, which may bring an action, in the name of the state, to enjoin violations of this statute. Also, any person suffering pecuniary loss because of a violation of this statute may bring suit. No action, however, may be commenced more than three years after the occurrence of the unlawful act or practice which is the subject of the action. [[s. 100.18 \(11\), Stats.](#)]

Federal Law

Prohibition on Energy Market Manipulation

Federal law does not specifically prohibit price gouging in the retail sale of gasoline, but it does prohibit the use of any manipulative or deceptive device or contrivance in connection with the sale at wholesale of crude oil, gasoline, or petroleum distillates (collectively "fuel"). [42 U.S.C. s. 17301.]

As enforced by Federal Trade Commission (FTC) regulations, this prohibition makes it unlawful to do either of the following in connection with the purchase or sale of fuel:

- Knowingly engage in any act, practice, or course of business—including the making of any untrue statement of material fact—that operates or would operate as a fraud or deceit upon any person.
- Intentionally fail to state a material fact that under the circumstances renders a statement made by such person misleading, if such omission distorts or is likely to distort market conditions for the fuel.

A state law that provides equal or greater protection to the FTC regulation is not preempted. [16 C.F.R. ss. 317.1 to 317.5.]

Reformulated Gasoline Requirement

Under the federal Clean Air Act, certain areas of the country with high smog levels must use reformulated gasoline. This type of gasoline burns more cleanly than conventional gasoline, but can be more expensive. In Wisconsin, reformulated gasoline must be used in the [following counties](#): Kenosha; Milwaukee; Ozaukee; Racine; Washington; and Waukesha. [42 U.S.C. s.7545 (k) (10) (D).]

The U.S. Environmental Protection Agency (EPA) has the authority to waive certain requirements of the Clean Air Act, including the reformulated gasoline requirement. A waiver

²⁰ A "conspicuous place" is one "most accessible to the public at his or her place of business." [[s. 100.18 \(8\), Stats.](#)]

may be granted if EPA determines, and the Secretary of the U.S. Department of Energy concurs, that all of the following apply:

- Extreme and unusual fuel or fuel additive supply circumstances exist which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers.
- Those circumstances are the result of a natural disaster, an act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive.
- It is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).

[42 U.S.C. s. 7454 (c) (4) (ii) (I).]

Earlier this year, a group of Wisconsin legislators sent a [letter](#) to EPA to request that the reformulated gasoline requirement be waived. The letter states that reformulated gasoline currently costs about \$0.40 more per gallon than traditional gasoline. The letter cites factors such as inflation, the COVID-19 pandemic, military conflict in Ukraine, and Presidential orders impacting the oil and gas industries, as reasons EPA should issue a waiver. Although EPA has issued waivers recently for other Clean Air Act requirements on the basis of the situation in Ukraine, such as the limitation on selling E15 gasoline-ethanol blends during the summer,²¹ it is not clear whether a waiver will be granted for the reformulated gasoline requirement. According to the EPA, a fuels waiver cannot be issued solely to address concerns regarding the price of fuel.²²

This information memorandum was prepared by Raine Black, Staff Attorney, and Ethan Lauer, Senior Staff Attorney, on July 28, 2022.

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²¹ See letter from EPA to governors and the mayor of the District of Columbia, [July 1, 2022 E15 Reid Vapor Pressure Fuel Waiver](#), dated June 29, 2022.

²² See EPA, [When can a fuels waiver be issued?](#).