



The
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Legislative, Regulatory & Information Services

2005 Wis. Act 450

Wisconsin's New "Price Gouging" Law

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2005 Wis. Act 450 prohibits excessive pricing of consumer goods during times of abnormal economic disruption. The Department of Agriculture, Trade and Consumer Protection (DATCP) is directed to develop a rule that sets forth the criteria used in determining whether a price is unreasonably excessive. DATCP's efforts must conform to the administrative rulemaking procedures set forth in Wis. Stat. Chapter 227.

A. Overview of Act 450

Senate Bill 358 was signed into law by Gov. Doyle as [2005 Wis. Act 450](#) on May 25, 2006. The Act became effective on June 10, 2006. Known as Wisconsin's "price gouging" law, the legislation passed the Senate 31-1 and the Assembly 91-0. The political impetus behind the law related to increasing gasoline prices in Wisconsin.

The law covers all consumer goods or services and sets forth a three-step process to enforce its ban on excessive pricing. First, the Governor must certify by executive order that there is a "period of abnormal economic disruption" due to an "emergency." Examples of emergencies are set forth in the Act. Second, the Department of Agriculture, Trade and Consumer Protection (DATCP) or the Department of Justice (DOJ) makes a finding that a seller is selling or offering to sell at unreasonably excessive prices. DATCP must promulgate rules to establish formulas or other standards to be used in determining whether a wholesale or retail price is "unreasonably excessive." Third, DATCP, or DOJ after consulting with DATCP, would issue a warning notice specifying corrective actions, or commence an action to obtain civil forfeitures or an injunction, or both.

While the political momentum pushing Act 450 is related to gasoline pricing, the new law applies to all "consumer goods or services." Act 450 prohibits a seller from selling or offering to sell in Wisconsin, 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." Definitions set forth in the newly created Wis. Stat. §100.305 include:

- Seller means "a manufacturer, producer, supplier, wholesaler, distributor, or retailer."
- Consumer goods or services means "goods or services that are used primarily for personal, family, or household purposes."
- Period of abnormal economic disruption means "a period of time during which normal business transactions in the state or a part of the state are disrupted, or are threatened to be disrupted, due to an emergency."



- Emergency includes but is not limited to 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, which means "an act of violence against a person or property in the United States by a foreign power or by a foreign or domestic terrorist."
 - A strike or civil disorder.

DATCP is required to promulgate rules to establish formulas or other standards to be used in determining whether a wholesale or retail price is "unreasonably excessive." If a seller violates the prohibition, DATCP or the Department of Justice, after consulting with DATCP, may do any of the following:

- Issue to the seller a warning notice specifying the action that the seller is required to take in order not to be in violation.
- Commence an action against the seller in the name of the state to recover a civil forfeiture of not more than \$10,000 or to temporarily or permanently restrain or enjoin the seller from violating the prohibition, or both.

B. Overview of DATCP Rulemaking

Wisconsin rulemaking procedures offer opportunities for interested parties to provide input and otherwise participate in the Act 450 rule development process. Statutory provisions found in Wis. Stat. Chapter 227 outline formal procedural and record requirements that must be followed throughout this process.

We recommend clients get involved at the agency staff level during the more informal drafting stage, which generally provides the best opportunities for input. Once the proposed rule is drafted, a more formal process presents additional opportunities for input, including testimony at hearings and written comments, as well as through legislative review.

Related points and opportunities include:

- The DATCP Act 450 rulemaking process has "officially" commenced when DATCP's Board approves its rulemaking scope statement at the Aug. 9, 2006 Board meeting.
- In its scoping statement, DATCP noted that its rule drafting effort will include "coordinating advisory council discussions and communicating with affected persons and groups." If a formal advisory council is part of this process, interested industry groups should consider requesting representation. Regardless, this informal rule drafting stage is a critical time for providing input.
 - [Note: DATCP recently told us that at this time they do not intend to form an advisory committee, but instead will look to other state programs such as New York for drafting ideas. They would, however, still be willing to discuss issues with interested parties throughout the drafting process.]
- Once DATCP finalizes its proposed rule, it undertakes the formal notice, hearing and comment portion of its rulemaking. This is an important juncture to present facts for the official agency record, generally as formal written comments.
 - [Note: DATCP is likely to go to its Board with a draft rule at its Dec. 13 meeting in Madison. If the Board approves the draft, the staff would then set up hearings.]
- Wisconsin law sets forth detailed procedures relating to legislative review of proposed rules prior to final promulgation. The final proposed rule sent to the Legislature usually is different from the rule that goes to public hearings as public comments and other considerations invariably result in modifications.



- The legislative review process offers meaningful opportunities for further input and modifications to rules. The standing committees may hold hearings on the rule and otherwise broker compromises with interested parties and the agency.
- Under Wisconsin law, courts are to declare a rule invalid if it is found the rule violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rulemaking procedures.

[Note: While legal challenges are rare, it is advisable to carefully build a solid record during the rulemaking process if there is any possibility a judicial challenge of the final rule may be in order.]

- An agency can temporarily bypass the above procedural requirements upon a finding an emergency exists. In effect, the emergency rule is considered a draft rule that must still meet all of the notice and hearing requirements, as well as be subject to legislative review, but with the critical distinction that it is effective pending that review.

[Note: The possibility DATCP would circumvent the Chapter 227 procedural requirements through an emergency rule is heightened should the Governor make a finding that, due to an emergency, a period of abnormal economic disruption exists.]

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DATCP Act 450 "Excessive Pricing" Scope Statement

Subject

Rules affect ch. ATCP 106, relating to price gouging during an emergency.

Objective of the rule. Adopt rules to implement newly enacted "price gouging" legislation, as mandated by the Legislature in 2005 Wis. Act 450.

Policy Analysis

Section 100.305, Stat., created by 2005 Wisconsin Act 450, prohibits a seller 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 Department of Agriculture, Trade and Consumer Protection ("DATCP") must adopt rules to implement the "price gouging" legislation. DATCP is specifically required to adopt rules to determine when prices are considered "unreasonably excessive."

Policy Alternatives

The Legislature has directed DATCP to adopt rules. DATCP has no alternative but to do so. DATCP has not yet determined the content of the rules.

Statutory Authority

Sections 93.07 (1) and 100.305 (3), Stat.



Staff Time Required

DATCP estimates that it will use approximately 1.0 FTE staff time to develop this rule. This includes research, drafting, preparing related documents, holding public hearings, coordinating advisory council discussions and communicating with affected persons and groups. DATCP will assign existing staff to develop this rule.

Entities Affected by the Rule

Depending on the scope of a declared emergency, this rule could conceivably affect nearly every wholesaler and retailer of consumer goods in the state. 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.

Whenever it applies in an emergency, this rule will limit the prices that may be charged by affected wholesalers and retailers. This rule will prohibit prices that are "unreasonably excessive," as determined by this rule. DATCP has not yet determined what rule criteria will be used to identify prices that are "unreasonably excessive," but DATCP does not anticipate that this rule will prevent sellers from maintaining their normal markup on consumer goods and services.

The rule may benefit consumers by preventing egregious price gouging during periods of abnormal economic disruption caused by an emergency. DATCP will attempt to develop rules that prevent egregious price gouging without aggravating market disruption.

Comparison to Federal Regulations

There are no federal "price gouging" prohibitions currently in effect. However, there are federal laws that set or limit prices for certain products or services in certain sectors. Some of these laws may preempt state "price gouging" provisions related to the federally-regulated products or services. For example, state law may not regulate interest rates charged by federally chartered banks, or certain prices charged by certain federally regulated common carriers. The scope and effect of federal regulation varies by industry sector, and is highly specific to individual federal programs.