



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection

DATE: April 24, 2020

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Lara Sutherlin, Administrator, Division of Trade and Consumer Protection

SUBJECT: ATCP 106: Price Gouging During an Emergency; Emergency Rulemaking Scope Statement

TO BE PRESENTED BY: David Woldseth

REQUESTED ACTION:

At the April 24, 2020 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve the attached Statement of Scope (SS 020-20) for proposed emergency amendments to the current DATCP rule related to price gouging during an emergency.

A scope statement spells out the general purpose and scope of a proposed rule. DATCP may not begin drafting a proposed rule (including a proposal to amend or repeal an existing rule) until the Governor approves a scope statement for the proposed rule and the DATCP Board approves the scope statement. In accordance with Wis. Stat. § 227.135 (2), the Governor approved this scope statement for emergency rule changes on April 9, 2020, thereby allowing DATCP to submit this scope statement for publication and to seek approval of the scope statement by the DATCP Board.

DATCP formally published this draft scope statement in the April 13, 2020 Administrative Register and filed a copy with the Department of Administration at least 10 days before the Board could approve the scope statement. After publication, DATCP requested the Board authorize a public hearing on the scope statement at its own behest under Wis. Stat. § 227.136 (2). The Board approved the public hearing notice at its April 10, 2020 meeting. The Department held the hearing on Friday, April 17, 2020, and permitted public comments until Monday, April 20, 2020. DATCP received the one attached comment from Wisconsin Manufacturers and Commerce. DATCP has chosen to proceed with this scope statement but plans to consider their comments and conduct outreach to all identified stakeholders.

If the Board approves this scope statement, DATCP will prepare the emergency rule, the rule and associated documents approved by the Secretary will be submitted to the Governor for approval. A copy of the emergency rule will be sent to the Board for informational purposes. If the Governor approves the emergency rule, it will be signed, docketed, published and then in effect for 150 days. The department will hold a hearing within 45 days of adopting the emergency rule.

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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.

Contact Person:

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Randy Romanski, Interim Secretary

April 8, 2020
Date Submitted



April 20, 2020

David A. Woldseth
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Delivered via Electronic Mail:
DavidA.Woldseth@wisconsin.gov

Re: Comments regarding procedural errors in DATCP SS 020-20

Dear Mr. Woldseth:

My name is Corydon Fish and I am writing today on behalf of Wisconsin Manufacturers and Commerce (WMC) to comment on both a procedural deficiency and policy recommendation regarding the Department of Agriculture, Trade and Consumer Protection (DATCP) Statement of Scope 020-20, which could potentially lead to the invalidation of the rule once promulgated.

WMC is the state chamber of commerce and largest general business association in Wisconsin. We were founded over 100 years ago, and are proud to represent approximately 3,800 member companies of all sizes, and from every sector of our economy. Our mission is to make Wisconsin the most competitive state in the nation in which to do business. One way WMC works to make our mission a reality is to ensure the administrative state operates pursuant to its statutory limitations, including those in Wisconsin's Administrative Procedure Act, Wis. Stat. Ch. 227.

WMC is particularly concerned that SS 020-20, as drafted, is so vague that it fails to provide a description of the new policies being proposed, which is required under Wis. Stat. § 227.135(1)(b). A statement of scope is required to include, "[a] description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives." Wis. Stat. § 227.135(1)(b). The Department does not detail any new policies to be included in the rule, instead they say:

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.¹

¹https://docs.legis.wisconsin.gov/code/register/2020/772A2/register/ss_notices/ss_020_20_notice_of_hearing/ss_020_20_scope_statement

The Department appears to be using this statement of scope as a “blank check” with which to fill in the regulatory blanks at a later date. This violates – to its very core – the entire purpose of Wis. Stat. Ch 227, to ensure agencies are transparent about the new law they are creating via administrative rule and can be held accountable by the people’s elected representatives. By not placing any description of new policy the Department is planning to implement in the statement of scope, the Department is in violation of Wis. Stat. § 227.135(1). This infirmity brings into question whether or not the Department of Administration (DOA) can even make a determination as to DATCP’s explicit statutory authority to promulgate the rule. Wis. Stat. § 227.135(2). DOA must make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed before sending the statement of scope to the Governor for his approval. *Id.* However, if DATCP does not lay out any of the policies it wishes to promulgate in the rule, how can DOA know whether or not DATCP has explicit authority to administer and enforce those policies? DOA cannot. Therefore DOA cannot send it to the Governor, the Governor cannot approve the statement of scope, and DATCP cannot legally promulgate a rule. Any rule DATCP unlawfully promulgates will be open to legal challenge.

Further, even if the above scenario were allowed, DATCP working off a statement of scope with no new policy outlined in it will necessarily trigger Wis. Stat. § 227.135(4) during the rulemaking process. Wis. Stat. § 227.135(4) requires that anytime an agency “changes the scope of the proposed rule in any meaningful or measurable way... the agency shall prepare and obtain approval of a revised statement of the scope of the proposed rule in the same manner as the original statement...” By not placing any new policies in the statement of scope, creating a rule with *any* new policy in it means DATCP will change the scope of the rule during the drafting process. This will then foster delays as DATCP will have to “re-scope” the rule. Instead, DATCP should follow the law and amend the statement of scope now fulfilling its duty to all Wisconsinites to act pursuant to the limitations of the authority Wisconsinites have provided it.

When the Department actually outlines the policy it plans to promulgate into an administrative rule, it should consider – to the extent that their statutory authority allows – policies that allow sellers to move with the market instead of being tied to specific, and arbitrary, price caps that create unintended consequences. This is not uncommon in other states. For example Tennessee’s “price gouging” law (TN Code 47-18-5103) allows for business flexibility while still protecting consumers:

- (b) A price increase is not grossly excessive if the increase was directly attributable to:
 - (1) Price increases in applicable regional, national, or international commodity markets;²

This provision explicitly protects businesses when prices of raw materials or component parts that are used in products fluctuate because of economic disruptions caused by crises such as

² <https://law.justia.com/codes/tennessee/2018/title-47/chapter-18/part-51/section-47-18-5103/>

COVID-19. It further protects businesses when prices fluctuate because of third-party actions such as transportation costs increasing. This flexibility both protects consumers from price gauging and acknowledges market realities on the ground.

WMC respectfully requests that DATCP follow the law in Wisconsin's Administrative Procedure Act and include reasonable flexibilities for businesses in their final rule.

Sincerely,

Corydon Fish
General Counsel
Wisconsin Manufacturers & Commerce

cc: Governor Tony Evers
All Members, Joint Committee for Review of Administrative Rules