



State of Wisconsin
Governor Scott Walker

COPY

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

April 21, 2017

Costco Wholesale
c/o Ralph Weber
Glass Weber Mullins, LLC
309 N Water St. – Suite 700
Milwaukee, WI 53202

Via Certified Mail Number: 7014 0150 0001 5199 1055

Re: The Unfair Sales Act, Wisconsin Statutes Section 100.30
Warning Letter, our file numbers 10572 and 10388
Requesting meeting to discuss claims of meeting competition.

Dear Costco Wholesale:

The Unfair Sales Act (“the Act”) prohibits the wholesale or retail sale of merchandise at a price that is below the seller’s cost – as the term is defined in the statute. In the case of motor vehicle fuel, tobacco products and alcoholic beverages, the definition of cost includes a minimum markup to account for the cost of doing business. For complete definitions of the term cost, including the appropriate markup formula, please refer to Wis. Stat. § 100.30(2) (am), 1m.b.

We have received multiple complaints alleging that Costco Wholesale violated the Unfair Sales Act on multiple occasions with its prices for motor vehicle fuel at its Wisconsin locations. We asked you to respond to a select sample of these complaints in an inquiry letter from Auditor Nadine Stankey dated September 13, 2016. As stated in your response, dated October 4, 2016, Costco did not have adequate evidence in its possession to claim the “meeting competition” exception pursuant to Wis. Stat. § 100.30 (6) (a) 7 on two occasions. Therefore, the prices described below were clearly in violation of the Act.

- April 23, 2016, Pewaukee, \$2.05⁹ regular reformulated gasoline
- June 4, 2016, Menomonee Falls, \$2.32⁹ regular reformulated gasoline

In response to other allegations listed in the Inquiry Letter, Costco provided either new or revised Notice of Meeting Competition Forms as evidence that it had set those prices in order to meet the existing prices of competitors. Meeting competition is, of course, a valid exception to the law. However, some of the specific claims that Costco made raised additional questions.

Pursuant to Wis. Stat. § 100.30 (6) (a) 7, selling motor vehicle fuel and other products for less than the minimum amount is allowed if the price is set “in good faith to meet the existing price of a competitor.” The definition of the phrase “existing price of a competitor” [Wis. Stat. § 100.30 (2) (cj)] further limits its application to “direct” competitors. We noted that some of the competitors listed on Costco’s revised notices from its October 4 response are:

- a significant distance from Costco’s retail location, with a large concentration of gas stations between;
- not along logical high-traffic transportation corridors;
- not being claimed by any other motor vehicle fuel retailer in the area; and/or
- dissimilar types of sellers.

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For purposes of this investigation, we did not conduct a thorough examination of these meeting competition claims. But if we had, it seems likely additional violations would have been identified.

We would like to meet to discuss the statutory requirements for exercising the meeting competition exception of the Unfair Sales Act. While the specific allegations contained in the inquiry letter are no longer under investigation, we suggest that a meeting to discuss the topic more generally would be beneficial to avoid potential future violations. Please contact me at your earliest convenience to arrange a time.

This letter serves as a warning that any future violations of the Unfair Sales Act may be met with more strict enforcement measures. Pursuant to s. 100.30(4), Wis. Stats., the state or a district attorney may seek a civil forfeiture of \$50 to \$2,500 per violation. The state may also seek a variety of special orders, injunctions and other remedies. Also, any person who is injured as a result of a competitor selling motor vehicle fuel below cost may sue for up to \$2,000 per day or treble actual damages, whichever is greater, plus reasonable accounting and attorney fees.

Notices of Meeting Competition are only valid if they are accurate, and failing to provide a notice is punishable pursuant to s. 100.26 (9), Wis. Stats. Further, failing to provide a notice sets up a rebuttable presumption that the price was not set to meet the price of a competitor [and therefore, in violation of s. 100.30 (3), Wis. Stats.].

For your reference, we have enclosed the following items:

- ◆ Copy of s. 100.30, Wis. Stats.
- ◆ Copy of Ch. ATCP 105, Wis. Adm. Code
- ◆ Unfair Sales Act Complaint Form
- ◆ Competition Survey Form
- ◆ Notice of Meeting Competition Form
- ◆ Copy of s. 100.18, Wis. Stats.

We look forward to meeting with you to discuss these issues further.

Sincerely,



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cc: Lauren Van Buren, Attorney