Minimum markup laws discourage competition, harm consumers and are unnecessary, according to findings repeatedly issued by the Federal Trade Commission over the years but either never made public or given little attention in the mainstream media.

Leaders of the commission charged with protecting consumers and maintaining competition have weighed in on such laws at least three different times. Twice, they were specifically responding to requests from state Democratic lawmakers trying unsuccessfully to amend or repeal Wisconsin's minimum markup law.

In 2005, the FTC chairman herself, Deborah Platt Majoras, remarked on such laws during testimony at a joint hearing of the Senate Committee on Commerce, Science and Transportation and the Senate Committee on Energy and Natural Resources.

Majoras prefaced her comments on gas prices at the time by saying that the FTC had developed expertise in the gasoline industry “through years of investigation and research” that closely scrutinized prices and examined any activity that could decrease competition and harm consumers. Obstacles to competition, she added, can arise from either private behavior — things such as price gouging in the wake of Hurricane Katrina, for example — or public policies such as high taxes or government-mandated markups.

Gas taxes were — and are — relatively high in Wisconsin. In 2005, Majoras said, the average state gas tax was 22 cents per gallon across the country. (Wisconsinites at the time were paying a tax of 29.9 cents per gallon and are now paying a tax of 32.9 cents per gallon.)

In addition, she testified, 11 states at the time had laws banning sales below certain levels.

9.18% gas markup appears ‘completely arbitrary,’ FTC letter said

“These laws,” she told the U.S. senators, “harm consumers by depriving them of the lower prices that more efficient (e.g., high-volume) stations can charge.”

One of the biggest changes in the retail sale of gasoline in the prior three decades, she added, had been the rise of convenience stores and high-volume operations — places with multiple fuel islands, sometimes called “pumpers” — that “appear to lower retail gasoline prices.”

“Another change to the retail gasoline market that appears to have helped keep gasoline prices lower is the entry of hypermarkets,” she testified. “Hypermarkets are large retailers of general merchandise and grocery items, such as Wal-Mart and Safeway, that have begun to sell gasoline. Hypermarket sites typically sell even larger volumes of gasoline than pumper stations — sometimes four to eight times larger. Hypermarkets’ substantial economies of scale generally enable them to sell significantly greater volumes of gasoline at lower prices.”

Majoras was speaking in general terms when she said bans on below-cost sales harm consumers, but the FTC has twice issued findings specifically regarding the Wisconsin law, most recently in 2003.

The law’s evolution

Wisconsin’s Unfair Sales Act, adopted in 1939, has evolved over the years. In 1986, legislators passed a version that generally forbid below-cost sales of most goods but affirmed that three items — alcoholic beverages, tobacco products and motor vehicle fuel — had to be marked up 3% over wholesale and 6% over retail.

In 1997, legislators amended the law on gasoline to require either a 6% markup above certain actual costs or a 9.18%
above the “average posted terminal price,” whichever is greater, according to a decision by Federal Judge Rudolph Randa in 2009.

Randa indicated that the law, in reality, essentially mandates a 9.18% markup over the terminal price (a proxy for wholesale costs).

Randa wrote that an efficient retailer could sell gas “with substantially less markup than the imposed 9.18% markup … and still make a reasonable profit.”

That 9.18% mandated increase remains in effect today.

It has long been
unpopular with some legislators who lament the cost to consumers. One of them, former state Rep. Shirley Krug (D-Milwaukee), asked for an opinion from the FTC in 2003 and received an exhaustive eight-page response from the commission’s Bureaus of Competition and Economics and Office of Policy Planning.

Wisconsin’s law, described by the FTC as one of the steepest minimum markups on retail sales in the country, “likely leads to significantly higher prices for consumers” discourages pro-competitive price cutting and — given federal antitrust laws — is simply not necessary, according to the commission’s findings.

The FTC emphasized that the federal government, state attorneys general and private parties all have the ability without minimum markup laws to fight “predatory pricing,” something the U.S. Supreme Court defines as “pricing below an appropriate measure of (a defendant’s) cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.” But the FTC also stated that “predatory below-cost pricing happens infrequently.”
and that "anticompetitive below-cost sales of motor fuels are especially unlikely."

Finally, the FTC questioned the logic behind the 9.18% markup in particular, writing that it appears "completely arbitrary."

The 6% retail markup was included in the original bill way back in 1939. What was then known as Chapter 56 mandated a retail markup of 6% and a wholesale markup of 2% "added to the invoice cost," according to the Wisconsin Legislative Reference Bureau.

The legislation was based upon a model State Unfair Sales Act prepared by the National Food and Grocery Conference Committee. The committee, in turn, was made up of representatives of associations from various branches — retail, wholesale and manufacturing — of the food and grocery trade, according to 1939 drafting files.

It’s unclear why legislators at that time chose the 6% markup or the 2% markup or, for that matter, why the 2% markup eventually was raised to 3%. The state Department of Agriculture, Trade and Consumer Protection, which administers the law today, says it does not have information on why or how those percentages were chosen.

The other FTC-issued comment on Wisconsin’s law came in 1987 and was in response to a request from John Norquist, the Democratic state senator who later became Milwaukee mayor.

At the time, according to the FTC, the Wisconsin law required retailers to mark up their price on fuel, alcoholic beverages and tobacco products 6% over their cost in order to account for overhead — an amount that chilled discount pricing and encouraged "fixed profit margins."

Removing the "pricing restraints" would "enable consumers to benefit from lower and more competitive prices," John Peterson, director of the FTC’s Chicago Regional Office, wrote to Norquist.

Peterson told Norquist that the FTC staff had substantial experience analyzing the impact on various restraints on competition and concluded that the "requirement that sales be above cost unnecessarily raises consumer prices."

He also quoted the Supreme Court as saying that predatory pricing schemes are "rarely tried and even more rarely successful" and wrote that "even if predatory pricing activity occurred, it could be attacked under the Sherman Act, the Clayton Act or the Federal Trade Commission Act."

“We believe that the Wisconsin Unfair Sales Act is contrary to the public interest because, by prohibiting sales below cost, it unnecessarily restrains competition. The minimum markup provisions further restrain competition and appear to have no countervailing benefits to consumers. Apparently, the Act is intended to protect small retailers and wholesalers, but does so at the expense of consumers.”

The FTC staff urged repeal and commented that doing so would continue the state’s "tradition of progressive consumer legislation."

— WPRI staff