



**STATE OF IDAHO**

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

April 16, 2014

The Honorable Jason Monks  
Idaho State Representative  
1002 W. Washington Dr.  
Meridian, ID 83642

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: The Idaho Unfair Sales Act

Dear Representative Monks:

You have asked the Attorney General for information regarding the Idaho Unfair Sales Act, Idaho Code § 48-401, *et seq.* (the "Act"). Specifically, you have asked whether there is separate Idaho law addressing the issues of below cost pricing and deceptive advertising should the Act be repealed.

This letter will first provide an overview of the Act and its history. Thereafter, it will address remaining available Idaho law regarding below cost sales and deceptive advertising, should the Act be repealed.

**I.  
UNFAIR SALES ACT BACKGROUND**

**A. Legislative History of the Unfair Sales Act**

The Unfair Sales Act was originally enacted by the Legislature in 1939. *See* 1939 Idaho Sess. Laws 427-431. The Act, among other things, declared the practice of selling "certain items of merchandise below cost in order to attract patronage" to be a deceptive form of advertising and an unfair method of competition in that it "tends to create a monopoly in commerce." *See* Idaho Code § 48-404. The Act also prohibits deceptive advertising. Idaho Code § 48-412. The Act made it (and still does) a misdemeanor to sell goods below cost and authorized civil actions for injunctive relief and damages against below-cost sellers. *See* Idaho Code §§ 48-405 and 48-406. The original Act placed the duty of prosecuting violators on each county's prosecuting

attorney but also authorized private causes of action (which are still authorized today) for damages and injunctive relief.

The first amendments to the Unfair Sales Act came during the 1941 legislative session. *See* 1941 Idaho Sess. Laws 230-238. These amendments expanded the Act's enforcement provisions and made it a duty of the Attorney General to assist the various prosecuting attorneys in the enforcement of the Act. *Id.* at Sec. 4. Among the new sections that were added to the Act in 1941 were the following: (1) a new Section 8, which directed the Attorney General to appoint and employ investigators, attorneys and legal assistants to aid in prosecuting and enjoining violations of the Act; and (2) new Sections 10 and 11, which levied an excise tax on merchants to be collected for the use of the Attorney General in enforcing the Act and which appropriated the sum of \$20,000 to pay expenses incurred by the Attorney General prior to the effective date of the new taxes.

The amendments of 1945, however, removed the primary responsibility for investigating and enforcing the Unfair Sales Act from the Office of the Attorney General and delegated it instead to the Commissioner of Finance. *See* 1945 Idaho Sess. Laws 387-088. The Act still provided for some involvement by the Attorney General, but this was limited to aiding and assisting in the prosecution of the Act when called upon to do so by the Commissioner of Finance. *Id.* at Sec. 2, amending § 8 of the Act. Since these amendments went into effect in 1945, the role of the Office of the Attorney General under the Act has been limited to that of aiding and assisting other departments of state government in enforcing the Act. The Attorney General has no independent enforcement authority under the law.

The Unfair Sales Act was next amended in 1955. *See* 1955 Sess. Laws 211-219. Section 8 of the Act, which had been codified as Idaho Code § 48-408, was repealed, and a new section 48-408 was enacted. The new section reads as follows:

Supervision and administration of act by governor. -- (1) The governor of the state of Idaho shall have the responsibility for the supervision and administration of this act and he shall have the authority to designate any department of the state government to supervise and administer this act under his direction.

(2) The governor or the department designated by him to supervise and administer this act shall employ such employees as may be required to supervise and administer this act, whose duties shall be:

- (a) To inspect and investigate the sales practices of all persons subject to this act;
- (b) To investigate and ascertain violations of this act;
- (c) To prosecute all violations of this act, either by injunction proceedings, criminal proceedings or both;
- (d) To aid and assist the attorney general of the state of Idaho and the prosecuting attorneys of the various counties in the enforcement of this act;
- (e) To collect such taxes as called for in this act;

- (f) To perform such other duties in connection with this act as may be designated by the governor.

Idaho Code § 48-408, as added by 1955 Idaho Sess. Laws at 211. The language of this section has not been amended in subsequent legislative sessions, nor have there been any reported cases interpreting this section of the Act.

Along with the amendment of Idaho Code § 48-408 in 1955, the Legislature amended the statutory section authorizing the levy and collection of taxes to pay for the enforcement of the Act. *See* 1955 Idaho Sess. Laws 211, Sec. 6, codified at Idaho Code § 48-410. This amendment increased the tax amount collectable from merchants and specifically provided that the funds were to be collected by the Governor's Office or the designated department for the enforcement of both the Act and the Fair Trade Act, title 48, chapter 3, Idaho Code (which the Legislature repealed in 2000). *See* 2000 Idaho Sess. Laws 377.

Interestingly enough, at the same time the Legislature delegated the duty to supervise and enforce the Act to the Governor, or to a department of state government the Governor so designated, the Legislature also enacted legislation creating a state Department of Commerce and Development, and delegated to this new department the responsibility of "administer(ing) and supervis(ing) the provision of Chapters 3 and 4 [the Unfair Sales Act], Title 48, Idaho Code, as amended." *See* 1955 Idaho Sess. Laws 521, Sec. 3(5). The legislation also provided that "all moneys collected pursuant to the tax levied and imposed by Section 48-410, Idaho Code, as amended, shall be deposited to the credit of the Idaho Development and Publicity Fund." *See* Sec. 7 and Sec. 9. This tax, however, was repealed effective January 1, 1979. *See* 1978 Idaho Sess. Laws 412, Sec. 1.

This dual delegation of duties was noted in the 1977 legislative session. At that time, "to eliminate a statutory conflict," the Legislature struck the provision of the statute charging the (then) Division of Tourism and Industrial Development with the duty to administer and supervise the Act. *See* 1977 Idaho Sess. Laws 770-771. The Legislature left the language of Idaho Code § 48-408, assigning the Governor the duty of supervising and administering the Act, quoted above, unchanged.

The most recent substantive amendments to the Act occurred in 2009, wherein the Legislature repealed Idaho Code § 48-405A. This section had prohibited limiting any quantity of a good being sold to any one consumer.

#### **B. Enforcement History of the Unfair Sales Act**

As is evident by a review of the Unfair Sales Act's legislative history, enforcement of the Act has rested with either the Governor's Office or a department of state government for all but approximately six of the Act's 75-year history. During those six years (from 1939 through 1945), enforcement responsibilities were delegated to either local county prosecutors or the Attorney General. The result, however, seems to have been the same no matter which division of state government was responsible for enforcing the Act—that is, it does not appear that

aggressive enforcement has ever been the rule. Despite the Act's 75-year history, there are no reported Idaho cases interpreting the below cost provisions of the Act.

There is, however, one unreported district court memorandum decision of which we are aware denying a defendant's motion to dismiss a complaint filed by the state alleging violations of the Unfair Sales Act. The decision came in an old Ada County case, entitled State of Idaho, on Relation of W. D. Searns, Director of Unfair Sales for the Department of Commerce and Development v. Rosauer's Super Markets, Inc., Albertson's, Inc., Safeway Stores Incorporated, and Others, Civil Case No. 36021. In this case, the state alleged that all of the defendants had violated the Act and sought to enjoin future violations. Albertson's filed a motion to dismiss the complaint, alleging that the Act was unconstitutional in a number of respects. The district court denied Albertson's motion. It held, citing to Idaho Code § 48-405, that in order to prove a violation of the Act, the plaintiff must show (1) that the defendant sold product at less than cost, and (2) that he did so in "contravention of the policy" of the Act. The court reviewed the statute that defined the public policy of the Act (Idaho Code § 48-404), and found that a violation of the Act cannot be proven unless it can be shown that the sale of product below cost actually had an injurious effect on the defendant's competitors.

Enforcement of the Act has been perhaps deterred by the various exceptions found in the Act. For example, it is a defense to an allegation of violating the Act that one's competitor lowered his price first, and the accused offender is merely meeting his competitor's low price. Idaho Code § 48-407(d). This requires the prosecutor (or private plaintiff) to bear the burden of proving which business lowered its price below cost first. Other exceptions to the Act exist if the below cost product is a perishable or damaged item, or is the subject of a liquidation or court-ordered sale.

## II. BELOW COSTS SALES

With the Unfair Sales Act background in place, we now turn specifically to your first question: Is there Idaho law available to address below costs sales practices should the Act be repealed? As noted, the Act makes illegal the advertising, offer to sell, or retail sale of any merchandise below a statutory definition of cost<sup>1</sup> in the State of Idaho. Idaho Code § 48-404. The Act specifically provides:

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<sup>1</sup> The statutory definition of "cost" depends on the type of seller. "Cost to the retailer" is the lower of the actual, bona fide cost of the merchandise to the retailer or the lowest prevailing replacement cost; less all trade discounts (other than cash discounts); plus a "cost of doing business" markup (6% of the cost of the merchandise to the seller) and freight costs (actual) and cartage costs (0.75% of merchandise cost). Idaho Code § 48-403(a)(1) to (3). "Cost to the wholesaler" is calculated in the same manner as "cost to the retailer," but the "cost of doing business" markup is 2% of the cost to the seller plus cartage and freight costs. Idaho Code § 48-403(b)(1) to (3). "Cost to the direct seller" is calculated in the same manner, but permits a cartage cost of 1.5% and a "cost of doing business" markup of 8% based on cost to the seller plus freight. Idaho Code §48-403(b)(aa)(1) to (3).

[A]ny advertising, offer to sell or sale of any merchandise,<sup>2</sup> either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Idaho Code § 48-404.

Breaking the statutory provision above into its essential elements, the advertisement, offer, or sale of merchandise by a retailer or wholesaler<sup>3</sup> violates the Act if each of the following three elements is satisfied:

1. The advertisement, offer, or sale is below "cost," as that term is statutorily defined;
2. The advertisement, offer, or sale is designed to induce purchase of other merchandise or unfairly divert trade from competitors; and
3. The advertisement, offer, or sale results in (a) a tendency to deceive purchasers; (b) substantially lower competition; (c) an unreasonable restraint of trade; or (d) a tendency to create a monopoly.

Element one is fairly straightforward, given the definition in the Unfair Sales Act for "cost." Element two, however, is more problematic: Does not a retailer hope that an advertisement for an item of merchandise will lead to the purchase of other merchandise? There is no readily available test to determine when a specific advertisement is not "designed to induce purchase of other merchandise."<sup>4</sup> Further, in what instances is it "unfair" to divert trade from competitors? The statute is silent. At a fundamental level, robust competition in the market place involves businesses seeking to win over their competitors' customers and the market place properly rewards the more innovative, lower-priced, better provider of services with more customers and trade. Laws prohibiting such interaction are inimical to the principles of the market place.

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<sup>2</sup> The Act does not define "merchandise." The commonly understood meaning of the term is "Goods or commodities that may be bought or sold." Webster's II New College Dictionary.

<sup>3</sup> Section 48-403 of the Act defines a number of terms in addition to costs, including "retailer," "wholesaler," and "direct seller."

<sup>4</sup> The situation presented here is to be distinguished from bait-and-switch advertising, wherein the seller advertises a good or service with the intent not to sell them but to lure the consumer to the seller's place of business and then switch the consumer from buying the advertised goods or service to other or different goods or service on a basis more advantageous to the seller. *See* IDAPA 04.02.01.020.06 (defining "bait and switch" sales). For such sales, Idaho law prohibits them as violations of the Idaho Consumer Protection Act. IDAPA 04.02.01.050.

Element three is similarly problematic. It is hard to understand how a below cost sale deceives purchasers, and how, in and of itself, it lowers competition. It is certainly foreseeable, however, as spelled out below, that some below cost sales may unreasonably restrain trade (although the Act itself is silent with respect to delineating those below cost sales which may reasonably restrain trade and those which may not), or have a tendency to create a monopoly. And it cannot be gainsaid but that these sales would be damaging to the market place and ultimately consumers. Thus, there is a valid reason to prohibit these sales. To the degree that such below cost sales occur, however, they are covered and prohibited by other Idaho law, as spelled out below. Thus, the Unfair Sales Act is not needed to prohibit such sales.

Idaho Code § 48-105 of the Idaho Competition Act prohibits predatory pricing. The United States Supreme Court has defined predatory pricing as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."<sup>5</sup> The United States Supreme Court has made it clear, though, that it is vital to distinguish between procompetitive price cutting and anticompetitive predatory pricing because:

[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."<sup>6</sup>

Thus, price cutting is not deemed predatory under federal antitrust law merely because it is intended to or does meet or beat competition and, in fact, is below the seller's costs.<sup>7</sup>

In Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.,<sup>8</sup> the United States Supreme Court held that two elements must be proved to establish predatory pricing:

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<sup>5</sup> Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117, 107 S. Ct. 484, 493, 93 L.Ed.2d 427 (1986).

<sup>6</sup> Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 1360, 89 L.Ed.2d 538 (1986) (citations omitted) (alteration in original); *see also* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38, 341, 110 S. Ct. 1884, 1890-91, 1893, 109 L.Ed.2d 333 (1990) (cutting prices to get more business is the essence of competition; hence a competitor injured by low but non-predatory price competition suffers no antitrust injury); Cargill, Inc., 479 U.S. at 117-18 (predatory pricing "is a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice 'inimical to the purposes of [the antitrust] laws, and one capable of inflicting antitrust injury.'") (citation omitted).

<sup>7</sup> *See, e.g.*, R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 488 (1<sup>st</sup> Cir. 1994) (nonpredatory, aggressive price competition not unlawful); Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 998 F.2d 1073, 1080 (1<sup>st</sup> Cir. 1993) ("A company that rationally prices its own product or service at or above its own costs does not violate the Sherman Act merely because its costs, and thus its prices, are lower than a rival's costs . . .") (footnote omitted); American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317 (7<sup>th</sup> Cir. 1991) ("Consumers like lower prices. The plaintiff must therefore show that the defendant's lower prices today presage higher, monopolistic prices tomorrow.")

<sup>8</sup> 509 U.S. 209 (1993).

First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.<sup>9</sup>

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The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a . . . dangerous probability, of recouping its investment in below-cost prices. . . . Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.<sup>10</sup>

The Legislature has provided that the provisions of the Idaho Competition Act "shall be construed in harmony with federal judicial interpretation of comparable federal antitrust statutes." Idaho Code § 48-102(3). Thus, the rules laid down by the United States Supreme Court regarding predatory pricing under federal antitrust law would be followed by Idaho courts in applying Idaho's Competition Act. The bottom line, then, is that Idaho's Competition Act presently addresses below cost sales to the extent that such sales are deemed predatory, as set forth above.<sup>11</sup>

### III. DECEPTIVE ADVERTISING

The Unfair Sales Act also prohibits deceptive advertising.<sup>12</sup> The basis for such a provision is readily apparent. The market place works best when truthful information is communicated to consumers. With accurate information, consumers are best equipped to choose the product that best fits their needs. If the consumer is given false, deceptive, or misleading information, this prevents them from making an informed choice. Such a result harms the market place, consumers, and businesses. Thus, a provision like the Act's prohibition of deceptive advertising is important. Even if the Act is repealed, however, there is other Idaho law that prohibits deceptive advertising.

The Idaho Consumer Protection Act was enacted with the purpose of deterring deceptive or unfair trade practices.<sup>13</sup> Under the Idaho Consumer Protection Act, an act or practice is unfair and deceptive if it is shown "to possess a tendency or capacity to deceive consumers."<sup>14</sup>

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<sup>9</sup> *Id.* at 222.

<sup>10</sup> *Id.* at 224.

<sup>11</sup> Separate sections of the Competition Act provide a variety of remedies for conduct in violation of the Act's provisions, including civil penalties, damages, injunctive relief, attorney fees and costs and a private cause of action. See Idaho Code §§ 48-108 and 48-112, and 48-113.

<sup>12</sup> Idaho Code § 48-412.

<sup>13</sup> Idaho Code § 48-601.

<sup>14</sup> *State ex rel. Kidwell v. Master Distribs. Inc.*, 101 Idaho 447, 453, 615 P.2d 116, 122 (1980).

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The Consumer Protection Act sets forth a number of acts or practices that are declared false, deceptive and misleading.<sup>15</sup> Included therein are a number of provisions addressing deceptive representations regarding the advertising or promotion of a product. Subsection 48-603(17) is a "catch-all" provision that prohibits "any act or practice which is otherwise misleading, false, or deceptive to the consumer." The provision is broad in scope and reach.

The provisions of the Consumer Protection Act are enforced by the Attorney General.<sup>16</sup> Furthermore, Idaho Code § 48-608 of the Consumer Protection Act provides for a private cause of action. Thus, in summary, even if the Unfair Sales Act were repealed, remaining Idaho law would still be in place that prohibits deceptive advertising. Attorney General enforcement for deceptive advertising would still be available and a remedy for violations thereof still provided private parties hurt by the deceptive advertising.<sup>17</sup>

Thank you for contacting the Attorney General's Office. If you have any further questions or concerns that you would like to discuss, please do not hesitate to contact me at 334-4114.

Sincerely,



BRETT T. DeLANGE  
Deputy Attorney General  
Consumer Protection Division

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<sup>15</sup> See Idaho Code § 48-603.

<sup>16</sup> See Idaho Code § 48-606.

<sup>17</sup> Remedies under the Consumer Protection Act, like the Competition Act, are broad and include provisions for civil penalties, restitution, damages, injunctive relief, attorney fees and costs. See Idaho Code §§ 48-606 and 48-607, and 48-608.