

STATE OF WISCONSIN)
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) SS.
DEPARTMENT OF AGRICULTURE,)
)
TRADE & CONSUMER PROTECTION)

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SEP 14 1988
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Revisor of Statutes
Bureau

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Donald J. Soberg, Administrator of the Trade and Consumer Protection Division of the State of Wisconsin, Department of Agriculture, Trade and Consumer Protection, and custodian of the official records of said Division, do hereby certify that the annexed order adopting Chapter Ag 119, Wis. Adm. Code, relating to establishing uniform methods of determining a cigarette wholesaler's cost of doing business under the state unfair sales act was duly approved and adopted by the Department on September 13, 1988.

I further certify that said copy has been compared by me with the original on file in the Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the Department offices in the city of Madison, this 13th day of September, 1988.

Donald J. Soberg
Donald J. Soberg
Administrator
Trade and Consumer
Protection Division

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SEP 14 1988

ORDER
OF THE STATE OF WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER PROTECTION Revisor of Statutes
ADOPTING RULES Bureau

The Wisconsin department of agriculture, trade and consumer protection adopts an order to create ch. Ag 119, relating to establishing uniform methods of determining a cigarette wholesaler's cost of doing business under the state unfair sales act.

Analysis Prepared by the Department of Agriculture, Trade
and Consumer Protection

Statutory authority: ss. 93.07 (1) and 93.15 (1), Stats.
Statutes interpreted: s. 100.30 (2) (c) 1, Stats.

The unfair sales act (s. 100.30, Stats.) currently requires wholesalers of cigarettes and other tobacco products to sell these products with at least a 3% minimum markup, to cover their costs of doing business. If a wholesaler can prove a lesser cost of doing business, though, it can reduce its markup. Some wholesalers of these products have lowered their prices below the 3% minimum markup, but since the state has no uniform method of determining which costs to allocate to cigarette and other tobacco product sales, determining whether the prices are legal is difficult. Competitors of those who have reduced their prices argue that these prices cannot be legally justified and constitute predatory pricing, which is harming their businesses. To prevent unfair competition and facilitate compliance and enforcement under the unfair sales act, this rule establishes two methods of allocating overhead expenses (the cost of doing business) for these wholesalers to use.

The first method presented requires an average allocation of most expenses according to the percentage of total sales that sales of cigarette and other tobacco products comprise. This method allocates warehouse-related expenses according to the percentage of warehouse space used to store cigarettes and other tobacco products, and similarly allocates delivery vehicle-related expenses according to the percentage of space used in trucks to transport these products. Certain other expenses, such as the cost of wholesale cigarette sales permits, are allocated entirely to the sale of cigarettes and other tobacco products. If a wholesaler keeps sub-records and can assign expenses directly to cigarettes and other tobacco products, under this first method the wholesaler can make these assignments instead of using indirect allocation methods.

The rule also allows a wholesaler to use its own, more specific allocation method, if an independent certified public accountant attests to its appropriateness for purposes of the unfair sales act and the wholesaler supports its method with a time and motion study. A determination by a certified public accountant is not binding on the department.

The unfair sales act includes jobbers, distributors and multiple retailers in its definition of a cigarette and other tobacco products "wholesaler". (A cigarette jobber is a person who buys stamped cigarettes and resells them to retailers; a cigarette distributor stamps cigarettes and resells them to jobbers, distributors, multiple retailers or other retailers; a multiple retailer buys stamped cigarettes and sells them at retail through 10 or more of its own outlets.) Multiple retailers, who combine wholesale and retail functions, are required to add in both the 3% minimum wholesale markup and the 6% minimum retail markup. Because of this different markup requirement for multiple retailers, this rule does not control their methods of calculating the cost of doing business.

Current law defines "cost to wholesaler" differently for cigarette jobbers than for distributors. The law treats manufacturers' discounts differently for jobbers than for distributors. A jobber may subtract most trade discounts from the lesser of his or her product invoice or replacement costs when setting the product's base level price (i.e., the price before a markup is added to cover the cost of doing business). The single exception to this law concerns cash discounts a manufacturer may offer for early payment of bills; jobbers must ignore these discounts when setting base level prices. Distributors must set their base level prices not only by ignoring cash discounts but by ignoring all manufacturers' discounts, because current law does not allow distributors to reduce their base level prices for cigarettes and other tobacco products by subtracting any trade discount from the manufacturer's price. Under current law, to this base level price the wholesaler must add at least a 3% markup or a lesser amount if the wholesaler can prove a lesser cost of doing business.

Although the law describes proper accounting of manufacturers' discounts when calculating base level prices, it does not explain how to account for these discounts when a wholesaler calculates its cost of doing business. The rule provides this missing explanation for jobbers and distributors. Regarding cash discounts, which are usually the largest discount a manufacturer will offer, the rule authorizes a wholesaler to account for the discount when calculating its cost of doing business by offsetting the discount against interest expenses or bank charges it has allocated to cigarettes and other tobacco products.

If a wholesaler reduces its prices below the 3% minimum markup, the rule requires it to possess written proof of a lesser

cost of doing business at the time of a sale or offer to sell. The department can require production of such proof within 10 days. This proof must be in a form permitting a reasonable determination of the cost of doing business, must refer to business records and must include all expense items that appear or should appear on balance sheets plus supporting documents and records.

SECTION 1. Chapter Ag 119 is created to read:

CHAPTER AG 119

UNIFORM SYSTEM OF DETERMINING

CIGARETTE WHOLESALERS' COST OF DOING BUSINESS

Ag 119.01 PURPOSE. The purpose of this chapter is to interpret the provisions of s. 100.30 (2) (c) 1, Stats. This statute requires tobacco product wholesalers to mark up the price of cigarettes or other tobacco products at least 3%. A wholesaler may sell at a lower markup if the wholesaler can prove a lesser cost of doing business. This chapter creates a uniform accounting system for establishing that proof. The chapter governs 2 types of cigarette or other tobacco product wholesalers licensed to do business in this state, jobbers and distributors. Multiple retailers, whom the statute also includes in its definition of "wholesaler", are not covered by this chapter because multiple retailers must include both the wholesaler's and the retailer's markups in the prices of their cigarettes and other tobacco products.

Ag 119.02 DEFINITIONS. In this chapter:

(1) "Cigarette" has the meaning specified in s. 139.30 (1), Stats.

(2) "Department" means the Wisconsin department of agriculture, trade and consumer protection.

(3) "Distributor" has the meaning specified in s. 139.30 (3), Stats.

(4) "Jobber" has the meaning specified in s. 139.30 (6), Stats.

(5) "Multiple retailer" has the meaning specified in s. 139.30 (8), Stats.

(6) "Tobacco products" has the meaning specified in s. 139.75 (12), Stats.

(7) "Wholesaler" means any person engaged in the business of selling cigarettes or other tobacco products at wholesale in this state, including any person holding a permit as a distributor or jobber but excluding any person holding a permit as a multiple retailer.

Ag 119.03 DETERMINING THE COST OF DOING BUSINESS. (1)
PROOF OF LESSER COST REQUIRED. Every wholesaler shall mark up cigarette and other tobacco products at least 3% over the cost to wholesaler unless it has in its possession, at the time a sale or offer to sell at a reduced markup is made, written proof of a lesser cost of doing business. "Cost to wholesaler", as used in this subsection, has the meaning specified in s. 100.30 (2) (c) 1, Stats. The proof shall be in a form that permits a reasonable determination of the cost of doing business, in accordance with the methods specified in this chapter. The proof shall refer to business records and shall include balance sheets, profit and loss statements, all expense items incurred that appear or should

appear on profit and loss statements, and supporting documents and records. Each wholesaler shall use the accrual method of accounting in its proof of a lesser cost of doing business.

(2) REPORTING REQUIREMENTS. Pursuant to s. 93.15 (1), Stats., the department may require a wholesaler to file copies of its proof of a lesser cost of doing business with the department. The proof shall be submitted within 10 days after the department requests its production. An authorized representative of the wholesaler shall swear that the proof submitted is a factual, accurate representation of the wholesaler's cost of doing business at the time the sale or offer to sell was made.

Note: Failure to comply with s. Ag 119.03 (2) is subject to the penalty listed in s. 93.21 (4), Stats. Failure to justify a reduced markup by proving a lesser cost of doing business is subject to the penalties listed in ss. 100.30 (4) and (5), Stats.

Ag 119.04 PERIOD OF TIME TO COMPUTE EXPENSES. Expense data used to prove a wholesaler's cost of doing business shall be computed for a 12-month period. This period shall end on the fiscal quarter that the wholesaler most recently completed prior to the date it sells or offers to sell cigarettes or other tobacco products at less than the minimum 3% markup.

Ag 119.05 ALLOCATION METHODS. In order to prove a lesser cost of doing business, a wholesaler shall either use the average expense allocation method specified in ss. Ag 119.06 and 119.07 or the specific expense allocation method specified in s. Ag 119.09.

Ag 119.06 AVERAGE EXPENSE ALLOCATION. The average expense allocation method for calculating a wholesaler's cost of doing business shall allocate a portion of the wholesaler's expenses

incurred in the operation of the business to the sale of cigarettes and other tobacco products, as provided in s. Ag 119.07, and shall establish the percentage relationship between this portion of total expenses and the cost to wholesaler, calculated over the same 12-month period as used in s. Ag 119.04, for cigarette and other tobacco products.

Ag 119.07 FACTORS FOR ALLOCATING EXPENSES. Under the average expense allocation method, all expenses incurred in the operation of the business shall be allocated to the sale of cigarettes and other tobacco products using the following methods:

(1) SALES ALLOCATION. (a) The expenses listed in par. (b), plus any other expenses incurred in the operation of the business that are not listed elsewhere in this section, shall be allocated according to the percentage that the sale of cigarettes and other tobacco products comprises of total sales.

(b) The sales allocation factor applies to the following expenses:

1. Bad debts.
2. Data processing.
3. Depreciation on buildings, except as allocated under sub. (2) (b) 1.
4. Depreciation on lease improvements on the wholesaler's general facilities, other than its warehouse.
5. Depreciation on office equipment.
6. Non-delivery vehicles.

7. Dues, subscriptions and licenses. Wholesale cigarette sales permit expenses shall be allocated entirely as overhead associated with the sale of cigarettes and other tobacco products. No permit or license expenses required to sell other specific commodities may be allocated to the sale of cigarettes and other tobacco products.

8. Miscellaneous expenses.

9. Insurance on inventory. If a wholesaler's inventory insurance is based on the value of inventory these expenses may be allocated based on the percentage that cigarettes and other tobacco product inventory value comprises of total inventory value, rather than on sales. The inventory valuation reports required by the insurer shall be used as the basis of allocation according to inventory value.

10. Insurance, except as allocated under subd. 9 and subs. (2) (b) 6 and (3) (b) 2. b.

11. Interest, except as allocated under sub. (2) (b) 7.

12. Office expenses and supplies.

13. Professional fees, except as allocated under sub. (2) (b) 12.

14. Promotion and advertising.

15. Retirement and employe welfare.

16. Salaries, fringe benefits and other remuneration, including officers' salaries and payroll taxes, except as allocated under subs. (2) (b) 13 and (3) (b) 1 and 2.a. If officers or other management personnel receive no remuneration or token remuneration, a value shall be placed on their services at a rate

no lower than the average labor rate paid in Wisconsin by the "Food and Kindred Products Industry", reported by the Wisconsin department of industry, labor and human relations as part of its published earnings and hours data.

17. Telephone.

18. Rent and real estate taxes, except as allocated under sub. (2) (b) 8.

(2) WAREHOUSE SPACE ALLOCATION. (a) The expenses listed in par. (b) shall be allocated according to the percentage that the cubic feet of warehouse space used to store cigarettes and other tobacco products comprises of total warehouse space used for the storage of goods for sale. All other space in the warehouse shall be excluded from this percentage calculation, although expenses associated with this space shall be allocated.

(b) The space allocation factor applies to the following expenses:

1. Depreciation on warehouse buildings.
2. Depreciation on lease improvements on warehouses.
3. Depreciation on warehouse equipment.
4. Warehouse equipment rental.
5. Heat, light, power and water. If any of these items is separately metered for warehouse areas not serving cigarettes and other tobacco products, such as freezers or coolers, these expenses may not be allocated to the sale of cigarettes and other tobacco products. If any of these items is separately metered for warehouse areas serving only cigarettes and other tobacco products, such as humidity-controlled rooms, these expenses shall

be allocated entirely to the sale of cigarettes and other tobacco products.

6. Insurance on warehouse equipment and buildings.

7. Interest on real estate.

8. Warehouse rent and warehouse property taxes.

9. Repairs, maintenance and groundskeeping.

10. Garbage pickup.

11. Security.

12. Fees of professionals whose work is principally associated with the wholesaler's warehouses.

13. Salaries, fringe benefits and other remuneration of warehouse employes.

14. Warehouse supplies.

(3) DELIVERY VEHICLE SPACE ALLOCATION. (a) The expenses listed in par. (b) shall be allocated according to the percentage that the cubic feet of space in vehicles used for transporting cigarettes and other tobacco products comprises of total space used for the transportation of goods in delivery vehicles. All other space in the delivery vehicles shall be excluded from this percentage calculation, although expenses associated with this space shall be allocated.

(b) The delivery vehicle space allocation factor applies to the following expenses:

1. Salaries, fringe benefits and other remuneration of delivery vehicle drivers.

2. Garage expenses for the housing and maintenance of vehicles, including:

a. Salaries, fringe benefits and other remuneration of garage employes.

b. Depreciation and insurance on garage equipment.

c. Noncapitalized expendable tools.

d. Garage supplies.

e. Purchased parts.

f. Purchased repairs to vehicles.

3. Gas, oil, tires and licenses.

4. Delivery vehicle insurance and depreciation.

5. Delivery vehicle lease payments.

(4) DIRECT ASSIGNMENT OF EXPENSES. Upon approval of the department, a wholesaler that maintains sufficient sub-records may assign expenses directly to cigarettes and other tobacco products instead of using the indirect allocation methods listed in this section.

Ag 119.08 APPLICATION OF DISCOUNTS AND ALLOWANCES. (1)

DEFINITIONS. In this section:

(a) "Allowance" means a manufacturer's payment of consideration to a wholesaler who, in exchange, performs some service for or provides something of value to the manufacturer. "Allowance" includes advertising allowances, customary discounts for cash payment and manufacturer's hand stamping allowances.

(b) "Consideration" means something of value in any form, including adjustments a manufacturer makes to the list price of cigarettes and other tobacco products and an offer of other goods for free or at reduced prices.

(c) "Manufacturer's discount" includes any trade discount and any allowance.

(d) "Trade discount" means a manufacturer's payment of consideration to a wholesaler to account for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which the manufacturer's cigarettes or other tobacco products are sold or delivered to the wholesaler. "Trade discount" does not include allowances.

Note: State v. Eau Claire Oil, 35 Wis. 2d 724 (1967), 63 OAG 516 (1974) and 72 OAG 126 (1983) all provide definitions of trade discounts and allowances under s. 100.30, Stats. Section 100.30, Stats., uses the terms "trade discount" and "manufacturer's discount" more loosely than they are defined in these rules. As a result, the definitions of "trade discount" and "manufacturer's discount" in these rules may not be appropriate in interpreting these phrases where they appear in the statute.

(2) JOBBERS' APPLICATION OF DISCOUNTS AND ALLOWANCES. The following provisions interpret s. 100.30 (2) (c) 1. a, Stats., regarding the proper accounting treatment of trade discounts and allowances by cigarette jobbers:

(a) All trade discounts may be used to reduce the cost of merchandise to the jobber.

(b) To the extent provided under this paragraph, allowances may be deducted from the jobber's cost of doing business. Each allowance so used shall offset expenses incurred when performing the service or providing the item of value; customary discounts for cash payment shall offset interest expenses and other bank charges. These offsets may not exceed the amount of expense incurred for performing the service or providing the item of value that is allocated to cigarettes and other tobacco products.

(3) DISTRIBUTORS' APPLICATION OF DISCOUNTS AND ALLOWANCES.

The following provisions interpret s. 100.30 (2) (c) 1. b, Stats., regarding the proper accounting treatment of trade discounts, manufacturer's discounts and allowances by cigarette distributors holding permits under s. 139.30 (3), Stats:

(a) Neither the state stamping discount under s. 139.32 (5), Stats., nor any manufacturer's discount may be used to reduce the cost of merchandise to the cigarette distributor.

(b) To the extent provided under this paragraph, allowances and the state stamping discount under s. 139.32 (5), Stats., may be deducted from the cost of doing business. If an allowance or the state stamping discount is so used it shall offset expenses incurred when performing the service or providing the item of value; customary discounts for cash payment shall offset interest expenses and other bank charges. These offsets may not exceed the amount of expense incurred for performing the service or providing the item of value that is allocated to cigarettes and other tobacco products.

Ag 119.09 SPECIFIC EXPENSE ALLOCATION. In lieu of using the average expense allocation method specified in ss. Ag 119.06 and 119.07, a wholesaler may prove a lesser cost of doing business using its own specific allocation method. An independent certified public accountant shall attest that the method is appropriate for complying with the purposes of s. 100.30, Stats., and the wholesaler shall support its allocation of expenses with a time and motion study. The certified public accountant's attestation is not binding on the department and any wholesaler's specific

allocation method is subject to the department's review and approval under s. Ag 119.03 (2).

Ag 119.10 APPLICABILITY. This chapter applies to any offer to sell or sale of cigarettes and other tobacco products occurring on or after the effective date of the chapter.

SECTION 2. EFFECTIVE DATE. The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Dated this 13th day of September, 1988.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Donald J. Soberg
Donald J. Soberg, Administrator
Trade and Consumer Protection Division

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