

CR 89-91

STATE OF WISCONSIN)
)
DEPARTMENT OF AGRICULTURE,) SS
TRADE AND CONSUMER PROTECTION)

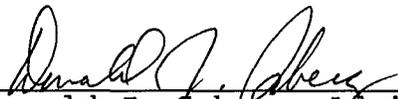
RECEIVED

JUL 11 1990
10:50 am
Revisor of Statutes
Bureau

I, Donald J. Soberg, Administrator of the Division of Trade and Consumer Protection, Wisconsin Department of Agriculture, Trade and Consumer Protection and custodian of the official records, certify that the annexed rules, relating to enforcing the unfair sales act, were duly approved and adopted by this department on July 5, 1990.

I further certify that this copy has been compared by me with the original on file in this department and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Agriculture, Trade and Consumer Protection at 801 W. Badger Road in the city of Madison, this 5th day of July, 1990.



Donald J. Soberg, Administrator
Division of Trade and Consumer
Protection, Wisconsin Department of
Agriculture, Trade and Consumer
Protection



**ORDER
OF THE STATE OF WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER PROTECTION**

The Wisconsin department of agriculture, trade and consumer protection adopts an order to renumber Ag 119; and to create Ag 119 (title) and subchapter I of Ag 119, relating to enforcing the unfair sales act.

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

Statutory authority: s. 93.07 (1), Stats.
Statute interpreted: s. 100.30, Stats.

Current rules of the department of agriculture, trade and consumer protection regarding s. 100.30, Stats. (the unfair sales act), specify methods of determining a cigarette wholesaler's cost of doing business. This rule interprets a variety of other provisions of the unfair sales act.

I. Definitions

The rule defines "motor vehicle fuel", one of 3 types of products subject to required wholesale and retail markups. The definition includes gasoline, diesel fuel and other fuels commonly and commercially used in internal combustion engines.

The unfair sales act prohibits selling below cost. It requires that cost, whether for wholesalers or retailers, include either the invoice cost of the merchandise for sale or its replacement cost. The rule defines "replacement cost" as a price meeting 3 criteria: it must be a price for the same merchandise as that whose cost is in question, must be a price available for merchandise bought in the same quantity as the quantity most recently purchased, and must be available between 2 dates: the date of the sale in question and the date (before this sale) when the same merchandise was last purchased.

The rule incorporates definitions used in the unfair sales act, for consistency and for brevity. This incorporation allows changes such as shortening the phrase "sell or offer to sell" (currently used in ch. Ag 119) to "sell", because of the statutory definition of the word "sell".

II. Computing markups

The rule clarifies the proper calculation of markups in 3 areas:

1. A retailer who purchases any of 3 "named" product types (cigarettes or other tobacco products; fermented malt beverages, intoxicating liquor or wine; motor vehicle fuel) directly from the manufacturer or processor must include both the wholesaler and the retailer markups when calculating prices. In the absence of proof of a lesser cost of doing business, this means the 3% wholesaler markup and the 6% retailer markup must be compounded to a total markup of 9.18%.

2. A cigarette multiple retailer (defined by statute as a person who acquires stamped cigarettes from manufacturers, cigarette distributors or jobbers, who stores the cigarettes and who sells them through 10 or more retail outlets it owns and operates) who purchases cigarettes from a wholesaler must also include both the wholesaler and the retailer markups when calculating prices.

3. A merchant who sells any of the named products to its own retail customers and also to other retailers must calculate the price for sales to its own retail customers by using, as its invoice cost, the sale price to other retailers. To this price is added the retailer markup. If such a merchant not only sells to retailers and to retail customers but is also a manufacturer or producer of a named product, the rule adds the compounded markup instead of the retailer markup.

III. Invoices

The unfair sales act specifies that "cost to wholesaler" and "cost to retailer" must be based on either the invoice cost of the product for sale or on its replacement cost. The rule generally requires that the seller use the most recent invoice available when determining invoice cost. For sellers of the named products, the statute requires that the invoices be no more than 30 days old. The statute also prohibits calculating "cost to wholesaler" or "cost to retailer" on anything other than bona fide costs. For named products, a 30-day old invoice may not indicate a bona fide cost, since inventory can turn over and prices change frequently in 30 days. The rule therefore specifies that invoice cost for named products must be calculated by examining the cost shown on the invoices of the product actually being sold; although other invoices less than 30 days old may be available, they may not be used. For the purpose of implementing this restriction, the rule requires first-in first-out accounting.

IV. Excise taxes

With one exception, the unfair sales act requires the inclusion of excise taxes as part of a wholesaler's or retailer's cost. For named products, this means the wholesaler or retailer markup is added on top of the excise tax. The exception is when a retailer of a named product collects the excise tax, rather than paying for it as part of its invoice cost. In this case the statute prohibits inclusion of the excise tax as part of "cost to retailer". At times, retailers of motor vehicle fuels do collect excise taxes, although for other named products it is the wholesaler who collects the excise tax.

The rule defines "excise tax" to include state and federal excise taxes, petroleum inspection fees and state and federal assessments for leaking underground storage tank programs. The rule states that excise taxes on motor vehicle fuel paid by a wholesaler as part of its purchase price for fuel are subject to the wholesale markup, while excise taxes on motor vehicle fuel paid by a retailer as part of its purchase price for fuel are subject to the retail markup. If a retailer buys gasoline directly from a refiner, the rule requires that the excise taxes (whether paid as part of the purchase price or collected by the retailer) are subject to the compounded wholesale and retail markups.

V. Discounts

The unfair sales act allows most wholesalers and all retailers to reduce their cost of merchandise by the value of trade discounts, except cash discounts. The unfair sales act prohibits cigarette distributors and multiple retailers from reducing their cost of merchandise by any discounts.

Current department rules specify the proper use of discounts by cigarette wholesalers as they compute their cost of doing business. The rules expand on the use of discounts when calculating the cost of merchandise. The rules define cash discounts to include all discounts that are conditioned on payment within a certain time, and define trade discounts to mean a manufacturer's or wholesaler's payment or allowance, whether granted as a deduction from the purchase price or by a subsequent payment. The rules allow use of trade discounts as a deduction from invoice cost, if: the discount is not a cash discount; the discount is based on the quantity or dollar value of merchandise actually purchased or sold and the discount is fully earned and determinable as of the time of sale. The rules also include an attorney general's interpretation of the unfair sales act (63 OAG 516), which states that for retail sales of intoxicating beverages, the restriction on use of trade discounts prohibits all discounts in the form of cash, discounts in ready-money cash equivalents, such as checks, and discounts offered in the form of merchandise.

VI. Meeting competition

The unfair sales act generally allows wholesalers and retailers to meet the existing (legal) price of a competitor, even though doing so drives the seller's price below its costs. The rule requires that merchants seeking to use "meeting competition" as a defense must show that they sold the merchandise in question on the same day as the date the competitor's price was in effect, and that the terms and conditions of their sale were the same as the competitor's. Sellers typically conduct surveys of their competitors' unadvertised prices to support a "meeting competition" defense. The rule describes what such a survey must include: the name and address of the person conducting the survey; a description of the product being surveyed; the competitor's name, address and selling price; the date and time of the survey; the date and time the seller met a competitor's price and any other elements the department may require.

The unfair sales act specifically prohibits cigarette distributors from relying on the "meeting competition" defense. The rule explains that when such a person sells other merchandise in addition to cigarettes, the "meeting competition" defense is available to justify the selling price of the other merchandise.

SECTION 1. Chapter Ag 119 is renumbered subchapter II of chapter Ag 119.

SECTION 2. Chapter Ag 119 (title) is created to read:

CHAPTER Ag 119

UNFAIR SALES ACT

SECTION 3. Subchapter I of chapter Ag 119 is created to read:

SUBCHAPTER I

GENERAL PROVISIONS

Ag 119.001 DEFINITIONS. Except as otherwise provided, the definitions specified in s. 100.30 (2), Stats., apply to this chapter. In this chapter and in s. 100.30, Stats:

(1) "Customary discounts for cash" includes all discounts offered to a wholesaler or retailer that are conditioned on payment within a certain time.

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

(3) "Excise taxes" includes state and federal excise taxes, petroleum inspection fees and state and federal assessments on petroleum products to fund leaking underground storage tank programs.

(4) "Motor vehicle fuel" means any liquid prepared, advertised or sold for use as or commonly and commercially used as a fuel in internal combustion engines.

(5) "Replacement cost of the merchandise" means the price to the wholesaler or retailer meeting all of the following requirements:

(a) The price is for the same merchandise as the merchandise whose cost is in question.

(b) The price is available for merchandise if bought in the same quantity as the quantity purchased on the most recent date before the date of the sale in question.

(c) The price was available between 2 dates: the date of the sale in question and the date, before this sale, when the wholesaler or retailer last purchased the same merchandise.

Ag 119.003 RETAILERS PURCHASING DIRECTLY FROM MANUFACTURERS OR PRODUCERS. A retailer who purchases cigarettes and other tobacco products, fermented malt beverages, intoxicating liquor, wine or motor vehicle fuel directly from a manufacturer or producer shall compound the wholesaler markup with the retailer markup to determine the total markup on the merchandise.

NOTE: Section 100.30 (2) (f), Stats., requires that markups be compounded when a retailer buys direct-

ly from the manufacturer or producer, thus acting both as a wholesaler and a retailer. In the absence of proof of a lesser cost of doing business, a wholesaler's markup is at least 3% and a retailer's markup is at least 6%, making the product's total compounded markup at least 9.18%.

Ag 119.004 CIGARETTE MULTIPLE RETAILERS. A cigarette multiple retailer, as defined in s. 139.30 (8), Stats., who purchases cigarettes from a wholesaler shall compute the minimum selling price by adding the wholesaler markup, compounded with the retailer markup, to the price of the cigarettes the manufacturer charged the wholesaler.

NOTE: Section 100.30 (2) (L) 2, Stats., defines cigarette multiple retailers as wholesalers. This permits other cigarette wholesalers (jobbers and distributors) to sell to multiple retailers with no markup, because ss. 100.30 (2) (c) 1. a and b, Stats., which specify when jobbers and distributors must add a wholesale markup, do not cover sales between wholesalers. Under s. 100.30 (2) (f), Stats., cigarette multiple retailers who have purchased from jobbers or distributors must apply both the wholesale and the retail markups. This rule consolidates the provisions of these statutes by requiring the use of a compounded markup. This rule also directs cigarette multiple retailers to use the manufacturer's price as the basis of their cost calculations, which is required by s. 100.30 (2) (c) 1. b, Stats.

In the absence of proof of a lesser cost of doing business, a wholesaler's markup is at least 3% and a retailer's markup is at least 6%, making the total compounded markup for cigarettes sold under this rule at least 9.18%.

Ag 119.005 RETAILERS SELLING TO OTHER RETAILERS. (1) NON-MANUFACTURERS AND NON-PRODUCERS. In order to determine the selling price to its own retail customers, a non-manufacturing or non-producing retailer of cigarettes and other tobacco products, fermented malt beverages, intoxicating liquor, wine or motor vehicle fuel who sells to other retailers shall use the selling

price for the sales to other retailers plus at least the minimum retailer markup.

NOTE: Under s. Ag 119.005 (1) and s. 100.30 (2m) (b), Stats., if retailer A sells cigarettes or other named merchandise to retailer B at a 10% markup, when retailer A sells at retail to A's own customers the minimum retail markup must be 10% compounded with 6% (absent proof of a lesser cost of doing business), or 16.6%.

(2) MANUFACTURERS AND PRODUCERS. In order to determine the selling price to its own retail customers, a manufacturer or producer of cigarettes and other tobacco products, fermented malt beverages, intoxicating liquor, wine or motor vehicle fuel who acts as both a wholesaler and a retailer shall use its selling price to other retailers plus the wholesaler markup compounded with the retailer markup.

NOTE: Under s. Ag 119.005 (2) and s. 100.30 (2m) (b), Stats., an integrated manufacturer-wholesaler-retailer who sells to an independent retailer must compound the wholesale and retail markups over its selling price to independent retailers, in order to determine its selling price to its own retail customers. In the absence of proof of a lesser cost of doing business, the wholesale markup is at least 3% and the retail markup is at least 6%, making the product's total compounded markup at least 9.18%.

Ag 119.007 CALCULATING THE COST OF MERCHANDISE. (1)

INVOICE COST CALCULATIONS. (a) Except as provided in par. (b), the invoice cost of merchandise sold at wholesale or retail shall be calculated by examining the cost shown on the most recent invoices of the merchandise.

(b) The invoice cost of cigarettes and other tobacco products, fermented malt beverages, intoxicating liquor, wine or motor vehicle fuel, whether sold at wholesale or retail, shall be calculated by examining the cost shown on the invoices of the

product actually being sold. Invoices of product purchased more than 30 days before the date of sale may not be used. For the purposes of this paragraph, wholesalers and retailers of these products shall use the first-in first-out accounting method when determining what product is actually being sold.

NOTE: Sections 100.30 (2) (a) 1 and (c) 1. a, Stats., calculate the retail and wholesale cost of cigarettes and other named products according to the "invoice cost of the merchandise ... within 30 days prior to the date of sale." Some of these products, however, turn over and change prices so rapidly that a 30-day old invoice may not reasonably compare to the cost of product actually being sold. For example, a tanker load of motor vehicle fuel may sell within three to four days. In periods of rising prices, using a 30-day old invoice would create an artificially low price for motor vehicle fuel and would not be a "bona fide cost", as required by s. 100.30 (2) (b), Stats.

If a retailer of cigarettes or other named products has not purchased merchandise within 30 days before the date of sale, the retailer must use "replacement cost" as the basis for determining prices.

(2) **EXCISE TAXES SUBJECT TO MARKUP.** (a) All excise taxes on motor vehicle fuel paid by a wholesaler as part of its purchase cost of the fuel are costs subject to the wholesale markup.

(b) All excise taxes on motor vehicle fuel paid by a retailer as part of its purchase cost of the fuel are costs subject to the retail markup.

(c) If a gasoline retailer purchases directly from a refiner, all excise taxes the retailer pays as part of its purchase cost of the fuel or subsequently pays directly to the state or federal government are costs subject to the compounded wholesale and retail markup.

NOTE: Section 100.30 (2) (a) 1, Stats., specifies (for cigarettes and other named products) that "cost to retailer" includes all excise taxes "other than excise

taxes collected by the retailer." At times, motor vehicle fuel retailers do collect excise taxes, but for the other named products the wholesaler pays the excise taxes. Therefore all excise taxes on cigarettes and other tobacco products, fermented malt beverages, intoxicating liquors and wines become costs subject to both wholesale and retail markups.

(3) TRADE DISCOUNTS. (a) In this subsection, "trade discount" means a manufacturer's or wholesaler's payment or allowance, either deducted from the purchase price or subsequently paid.

(b) A trade discount may be considered as a reduction from invoice or replacement cost if all of the following exist:

1. The trade discount is not a customary discount for cash.
2. The trade discount is calculated on the basis of the quantity or dollar amount of merchandise actually purchased or sold.
3. The trade discount is fully earned and determinable at the time of sale.
4. In the case of retail sales of fermented malt beverages, intoxicating liquor or wine, the trade discount is not in the form of cash, a check or other equivalent in ready money or merchandise.

NOTE: The trade discount provisions in this subsection apply only to calculations of the cost of merchandise, not calculations of the cost of doing business. Section Ag 119.08 specifies rules for using discounts when cigarette jobbers or distributors calculate the cost of doing business. The following examples describe the effect of this subsection:

- (1) An advertising allowance of 20¢ per unit purchased may be considered a cost reduction. An advertising allowance of a flat \$1,000 is not a cost reduction.

(2) A trade allowance calculated on the basis of quantity sold between April 1 and September 30 may not be used as a cost reduction until September 30, unless the retailer earns the full allowance prior to that date.

Section Ag 119.007 (3) (b) 4 incorporates the provisions of 63 OAG 516, interpreting s. 100.30 (2) (k), Stats.

Ag 119.009 MEETING COMPETITION. (1) EXISTING PRICE. A price for merchandise meets an existing price of a competitor under s. 100.30 (6) (a) 7, Stats., only if the merchandise in question is sold on a day when the competitor's price is in effect and is offered under the same terms and conditions as the competitor's offer.

NOTE: Under this subsection, if a merchant offers a price reduction with the redemption of a coupon, another merchant can meet this competition with a similar coupon promotion--simply dropping the price of the product, without any coupon redemption, would not be an offer under "the same terms and conditions."

(2) HOLDERS OF CIGARETTE PERMITS. A person who holds a cigarette permit under subch. II of ch. 139, Stats., and who also sells merchandise other than cigarettes may reduce the price of the other merchandise to meet a competitor's existing price, in accordance with the exemption specified in s. 100.30 (6) (a) 7, Stats. Sections 100.30 (6) (c) and (d), Stats., which prohibit persons holding these cigarette permits from claiming this exemption, apply only to the sale of cigarettes.

(3) SURVEYS. A wholesaler or retailer who conducts a survey of competitor's prices in the following manner may rely on the survey of competitor's existing prices as proof of sale under s. 100.30 (6) (a) 7, Stats., if the department finds the survey to be accurate. Such a survey shall include:

- (a) The name and address of the person conducting the survey.
- (b) A description of the product being surveyed.
- (c) The competitor's name, address and selling price.
- (d) The date and time of the survey.
- (e) The date and time the wholesaler or retailer met a competitor's price.
- (f) Any other elements the department requires.

NOTE: Section 100.30 (6) (a) 7, Stats., also permits merchants to substantiate a competitor's price by having in their possession an advertisement, proof of sale or receipted purchase.

SECTION 4. Ag 119.01 is amended to read:

Ag 119.01 PURPOSE. The purpose of this ~~chapter~~ subchapter is to interpret the provisions of s. 100.30 (2) (c) 1, Stats. This statute requires cigarette or other 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~~ subchapter creates a uniform accounting system for establishing that proof. The ~~chapter~~ subchapter 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~~ subchapter because multiple retailers must include both the wholesaler's and the retailer's markups in the prices of their cigarettes and other tobacco products.

SECTION 5. Ag 119.02 (intro.) is amended to read:

Ag 119.02 (intro.) In this ~~chapter~~ subchapter:

SECTION 6. Ag 119.02 (2) is repealed.

SECTION 7. Ag 119.03 (1) and (2) are amended to read:

Ag 119.03 (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~~ subchapter. 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.

SECTION 8. Ag 119.04 is amended to read:

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.

SECTION 9. Ag 119.10 is amended to read:

Ag 119.10 APPLICABILITY. This ~~chapter~~ subchapter applies to any offer to sell or sale of cigarettes and other tobacco products occurring on or after the effective date of the chapter November 1, 1988.

(Note to Revisor: Insert the following NOTE after s. Ag 119.10:)

NOTE: References in this chapter to "sell", "sale" and "sold" include offers to sell. See s. 100.30 (2) (g), Stats., for the complete definition of these words.

SECTION 10. 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 3rd day of July, 1990.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

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