

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION NOTICE OF PROPOSED GUIDANCE DOCUMENTS

Pursuant to section 227.112 of the Wisconsin Statutes, the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) is hereby accepting comments on the proposed guidance document:

Wisconsin Liquor Wholesalers

LOCATION OF PROPOSED GUIDANCE

Proposed guidance document may be reviewed by accessing:

[https://datcp.wi.gov/Pages/About Us/GuidanceDocuments.aspx](https://datcp.wi.gov/Pages/About%20Us/GuidanceDocuments.aspx)

SUBMITTING PUBLIC COMMENTS

Public comments on proposed or adopted guidance document may be submitted by accessing:

[https://datcp.wi.gov/Pages/About Us/GuidanceDocuments.aspx](https://datcp.wi.gov/Pages/About%20Us/GuidanceDocuments.aspx)

DEADLINE FOR SUBMISSION

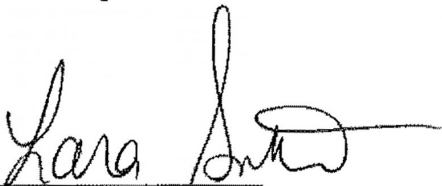
The comment period will run no fewer than 21 days after the publication of this document in the Administrative Register.

AGENCY PUBLICATION

The attached guidance document contains statements or interpretations of law under the following applicable provisions of federal law or the applicable state statutory or administrative code provisions: Wis. Stat. ch. 100, Wis. Admin. Code, ch. 105.

CERTIFICATION

Pursuant to the authority delegated to me by the Secretary, I have reviewed the attached guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.



Lara Sutherlin
Administrator
Division of Trade and Consumer Protection



Wisconsin Department of Agriculture, Trade and Consumer Protection

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GUIDANCE DOCUMENT

Wisconsin Liquor Wholesalers

This guidance document is based on Wis. Stat. ch. 100 and chapter(s) ATCP 105 Wis. Admin. Code. This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed.

42 (TCP)

See attached.

January 23, 2020

Lara Sutherland - Administrator, Division of Trade and Consumer Protection

DATE

Contributors:



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection

DATE: January 22, 2020

TO: Wisconsin Liquor Wholesalers

FROM: Jeremy McPherson, Director
Bureau of Business Trade Practices

SUBJECT: Wisconsin Unfair Sales Act – calculating the minimum retail selling price for liquor products under Wis. Stat. § 100.30.

The purpose of this memo is to discuss the Unfair Sales Act as it applies to retail sellers of liquor and other alcoholic beverages. We encourage you to share this information with your customers.

While the law does not prohibit liquor wholesalers from offering free merchandise to their retailer customers, we have seen a number of examples of retailers factoring free goods into their calculation of cost under the Unfair Sales Act, which is codified at Wis. Stat. § 100.30. Further, some retailers have reported that they are being instructed to do so by their wholesaler. As explained below, this method of calculating “cost to retailer” violates the Unfair Sales Act.

In general, the Unfair Sales Act (also commonly referred to as the minimum markup law) prohibits the sale of merchandise at less than “cost,” as the statute defines “cost.” For the exact wording of this prohibition, please refer to Wis. Stat. § 100.30 (3). The Act includes definitions of “cost” for several different types of products and types of sellers. With regard to the sale of liquor, the definition of “cost to retailer” is found in Wis. Stat. § 100.30 (2)(am)1 and reads as follows:

With respect to the sale of cigarettes or other tobacco products, fermented malt beverages or intoxicating liquor or wine, “cost to retailer” means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on such merchandise or the sale thereof other than excise taxes collected by the retailer, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or replacement cost of the merchandise as herein set forth, to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 6 percent of the cost to the retailer as herein set forth.

The above paragraph must be read in conjunction with Wis. Stat. § 100.30 (2) (k), which says:

In the case of retail sales of alcohol beverages, “trade discount” shall not include discounts in the form of cash or merchandise.

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This means that if the wholesaler offers incentives in the form of free merchandise, **the retailer is prohibited from using that free merchandise as a “trade discount” for the purpose of reducing their “cost to retailer” and minimum legal selling price.** Again, wholesalers may provide free merchandise to retailers, but retailers are not allowed to consider that free merchandise as a “trade discount” when they calculate their “cost to retailer” and minimum legal selling price. To determine “cost to retailer” for the free merchandise, Wis. Stat. § 100.30 (2) (b) requires that retailers use bona fide costs that can be justified by prevailing market conditions. Therefore, the “cost to retailer” for free merchandise is replacement cost.

DATCP has promulgated administrative rules clarifying the statutory provisions relating to trade discounts. Please refer to Wis. Admin Code § ATCP 105.007 (3) for a definition of “trade discounts” and information about when they may be considered a reduction from invoice or replacement cost. In particular, see Wis. Admin Code § ATCP 105.007 (3) (b) 4 for additional clarification regarding trade discounts in the form of cash or merchandise in the case of retail sales of alcoholic beverages.

Thank you for your attention to this matter. We invite you to share this information with your customers, and we are happy to answer any follow up questions. You or your customers may contact Kevin LeRoy at 608/224-4925 or kevin.leroy@wisconsin.gov, or Nadine Acker at 608/224-4989 or Nadine.acker@wisconsin.gov