

Chapter ATCP 102

PRICE DISCRIMINATION AND RELATED PRACTICES

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Note: This chapter is adopted under authority of s. 100.20 (2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.26 (3) or (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20 (5), Stats., and may recover twice the amount of the loss together with costs and reasonable attorneys' fees.

See also s. 133.04, Stats. (price discrimination; intent to destroy competition); s. 100.201, Stats., and ch. ATCP 103 (dairy trade practices); s. 100.22, Stats. (price discrimination in milk procurement); and s. 100.31, Stats. (drug price discrimination).

Subchapter I – Fermented Malt Beverages

ATCP 102.01 Definitions. In this subchapter:

(1) "Brewer" means a person, firm or corporation engaged in the sale of beer to wholesalers licensed to sell beer to retailers under the provisions of s. 66.054 (6), Stats.

(2) "Wholesaler" means a person, firm, or corporation engaged in the sale of fermented malt beverages for resale.

(3) "Fermented malt beverages" means any liquor or liquid capable of being used for beverage purposes, made by the alcoholic fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing one-half of one percent or more of alcohol by volume.

History: Cr. Register, August, 1968, No. 152, eff. 9-1-68; am. (1), Register, July, 1969, No. 163, eff. 8-1-69; renum. from ATCP 106.01, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.02 Prohibited trade practices. (1) No brewer shall discriminate in price, allowance, rebate, refund, commission or discount between wholesalers purchasing fermented malt beverages of like kind or quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition by a person who is or in good faith intends to become a competitor, in the wholesaling of fermented malt beverages, unless such discrimination is:

(a) Merely commensurate with a difference in the cost of manufacture, sale, or delivery resulting from differing methods or quantities of sale or delivery, or

(b) Made in good faith to meet or enable a wholesaler to meet the price or other terms of a competitor of either of them.

(2) No brewer shall threaten any wholesaler with any discrimination prohibited under sub. (1) with the purpose or effect of changing or maintaining resale prices of the wholesaler.

(3) Nothing in this chapter shall be deemed to prohibit brewers from selecting their own customers in bona fide transactions not in restraint of trade.

(4) The provisions of sub. (1) shall not be deemed to prohibit a brewer from extending to its wholesalers different terms of credit in the ordinary course of business taking into consideration the financial condition of the individual wholesaler and other factors normally considered in establishing credit, or from offering or furnishing to its wholesalers different advertising, promotional

or merchandising services, provided that such services shall not be intended or used to effect a discrimination in price, allowance, rebate, refund, commission or discount prohibited by said sub. (1).

History: Cr. Register, August, 1968, No. 152, eff. 9-1-68; am. (1), cr. (4), Register, July, 1969, No. 163, eff. 8-1-69; renum. from ATCP 106.02, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.03 Report requirements. In any investigation under this chapter a brewer or wholesaler upon request of the department shall furnish to it price lists and such other information as directed concerning the terms of any agreement, transaction, or offer which may be the subject of any prohibition under this chapter.

History: Cr. Register, August, 1968, No. 152, eff. 9-1-68; renum. from ATCP 106.03, Register, February, 1996, No. 482, eff. 3-1-96.

Subchapter II – Soda Water Beverages

ATCP 102.11 Definitions. In this subchapter:

(1) "Soda water beverage" means all beverages commonly known as soft drinks, including soda water, carbonated or uncarbonated or sweetened or flavored, and bases, fountain syrups, concentrates and powders intended to be reconstituted by wholesalers or retailers to produce soft drinks. It does not include strong spiritous, vinous, malt, ardent or intoxicating liquors.

(2) (a) "Retailer" means every person making sales of soda water beverages for consumption or use other than resale or further processing or manufacturing. In the case of a person making both sales at wholesale and retail, such term shall apply to only the retail portion of such sales. "Retailer" does not include the United States, the state, any municipality as defined in s. 345.05 (1) (a) Stats., or any agency thereof, or any religious, charitable or educational organization or institution, but does include any other person engaged in the business of making retail sales wholly or in part for profit at an institution or facility operated by such an exempt party.

(b) Any subsidiary or affiliate corporation, cooperative, partnership or association, and any officer, director or partner of a corporation, cooperative, partnership, association or any other business unit which owns, controls or franchises any retailer or which has any retailer as an affiliate, member or subsidiary, is deemed to be a retailer of soda water beverages.

(3) (a) "Wholesaler" means every person making sales of soda water beverages for purposes of resale or further processing or manufacturing. In the case of a person making both sales at retail and wholesale, such term shall apply only to the wholesale portion of such business.

(b) Any subsidiary or affiliate corporation, cooperative, partnership or association, and any officer, director or partner of a corporation, cooperative, partnership or association which is a wholesaler of soda water beverages is deemed to be a wholesaler of soda water beverages.

(4) "Broker" means any person engaged in negotiating sales or purchases of soda water beverages for or on behalf of a retailer or wholesaler or both.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.01, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.12 Prohibited trade practices. No wholesaler of soda water beverages shall, in the sale or distribution of soda water beverages, engage in the following unfair methods of competition or unfair trade practices:

(1) Discriminate, directly or indirectly, in the price at which soda water beverages are sold to customers by selling or offering to sell such beverages at a special price or discount, or with special allowances, rebates, or commissions, or under other price or credit terms or conditions not offered or made available to all customers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or otherwise injure, destroy or prevent competition between wholesalers of soda water beverages or any of their customers.

(2) Furnish, sell, give, lend or rent any equipment, after the effective date of this chapter, for the refrigerated or heated storage or display, or mechanical dispensing of soda water beverages to a retailer, but this shall not prevent:

(a) The sale or rental of such equipment to a retailer under a written agreement describing the equipment sold or rented, and specifying the price and other terms and conditions under which it is to be sold or rented. Copies of agreements shall be kept on file by the wholesaler for at least 3 years after final payment has been received. No agreement for the sale or rental of equipment other than agreements for the rental of coin-operated vending machines shall contain any provision that prohibits the use of the equipment for the storage, display, or dispensing of the products of competing wholesalers or reserves any part of the available capacity of the equipment for the products of the wholesaler selling or renting the equipment.

1. Terms for the sale of equipment shall provide that the wholesaler shall recover at least the wholesaler's cost for the equipment, including all costs for transportation and installation of the equipment, either by advance payment in full or by equal monthly installment payments over a period not to exceed 5 years.

2. Terms for the rental of equipment, other than coin-operated vending machines, shall provide that minimum monthly rental charges shall be no less than one-sixtieth (1/60) of the total cost to the wholesaler, including all costs for transportation and installation of the equipment. Rentals may be charged in equal periodic installments or on a volume basis, and shall be collected at least once each year in an amount sufficient to recover all such costs within a period of 60 months.

3. Terms for the rental of coin-operated vending machines shall provide that the minimum monthly rental charge shall be no less than one ninety-sixth (1/96) of the total cost to the wholesaler, including all costs for transportation and installation. Rentals may be charged in equal periodic installments or on a volume basis, and shall be collected at least once each year in an amount sufficient to recover all such costs within a period of 96 months.

4. Cost of equipment which has been returned or repossessed or on which rental contracts are renewed shall be based on fair market value of the equipment, whether or not cost was recovered in whole or in part under a previous sale or rental agreement.

(b) The furnishing of equipment to a retailer, for the storage, transportation or display of soda water beverages for not more than a total of 20 days in a calendar year for use at fairs, exhibitions, expositions or other events for agricultural, industrial, charitable, educational, religious or recreational purposes.

(3) Discriminate, directly or indirectly, between customers in furnishing of advertising, promotional or other services or facilities

to them, or in compensating customers for services or facilities to be rendered or furnished by or through them in connection with the sale or distribution of soda water beverages, under terms or conditions not available to all customers on proportionally equal terms, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or otherwise injure, destroy or prevent competition between wholesalers of soda water beverages or any of their customers. This does not apply to the furnishing of equipment under sub. (2) (b).

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; am. (2) (a) and (3), r. (2) (c), Register, August, 1979, No. 284, eff. 9-1-79; renum. from ATCP 107.02, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.13 Prohibited acts of retailers. No retailer or any officer, director, employe or agent thereof shall solicit or receive, directly or indirectly, from or through a wholesaler, broker, or another retailer, anything which is prohibited by s. ATCP 102.12, where it is known, or in the exercise of reasonable prudence should be known that it is prohibited.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.03 and am., Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.14 Prohibited acts of brokers. (1) No broker, or any officer or agent thereof, shall participate, directly or indirectly, in any trade practice prohibited by s. ATCP 102.12.

(2) No wholesaler shall engage or offer to engage in any trade practice prohibited by s. ATCP 102.12, directly or indirectly, through a broker.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.04 and am. (1) and (2), Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.15 Exceptions. (1) Nothing in s. ATCP 102.12 (1) and (3) shall apply to the sale or offering for sale of soda water beverages:

(a) At a price different from that charged other customers, if such price differential merely allows for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such soda water beverages are sold or delivered, or if made in good faith to meet an equally low price of a competitor, or the terms or conditions under which they are sold by a competitor.

(b) With differences in services or facilities under s. ATCP 102.12 (3), if made in good faith to meet services or facilities, or any compensation therefor, furnished by a competitor.

(c) Which are imperfect, damaged, subject to immediate loss because of obsolescence or perishability, or discontinuance from sale.

(d) In the final liquidation of a soda water beverage business.

(e) To customers other than retailers or wholesalers as defined in s. ATCP 102.12 (2) or (3).

(f) Under the order or direction of any court.

(2) Equipment furnished, sold, given, lent, or rented prior to the effective date of this chapter shall, within 18 months after the effective date of this chapter, be either removed from the retailer's premises or brought into compliance with the requirements of s. ATCP 102.12 (2) and (3).

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.05 and am. (1) (intro.), (b), (e) and (2), Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.16 Reporting requirements. (1) In any investigation under this chapter, any wholesaler shall on request of the department furnish to it price lists, accounting records and data used in determining cost, and such other information as requested concerning the terms or conditions of any agreement, transaction, or offer related to the sale of soda water beverages.

(2) Cost data shall to the extent permitted by law be accorded confidentiality by the department and not opened to the public

inspection without 10 days prior notice to the wholesaler concerned.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.06, Register, February, 1996, No. 482, eff. 3-1-96.

Subchapter III – Motor Fuel

ATCP 102.21 Definitions. In this subchapter:

(1) "Retailer," "wholesaler," "sell at retail" and "sell at wholesale" shall have the same meanings as those terms have in s. 100.30 (2), Stats.

(2) "Supplier" means a person who manufactures motor fuels or who is a controlled subsidiary of one who manufactures motor fuels and is engaged in the business of selling motor fuels to wholesalers, retailers or consumers.

(3) "Motor fuel" includes motor fuels and special fuels as defined in ch. 78, Stats.

(4) "Person" means any individual, sole proprietorship, partnership, corporation or other business entity or any individual acting on behalf of any individual, sole proprietorship, partnership, corporation or other business entity.

History: Cr. Register, May, 1972, No. 197, eff. 9-1-72; renum. from ATCP 108.01 and amend (intro.), Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.22 Discrimination. (1) No supplier or wholesaler of motor fuel shall enter into any agreement or arrangement whereby directly or indirectly discrimination is made in the price at which said supplier or wholesaler sells motor fuel to wholesalers or retailers thereof, where the effect of such discrimination

may be to substantially lessen competition or to tend to create a monopoly, or to injure, destroy or prevent competition with any person in the marketing of motor fuel in the community in which said supplier or wholesaler is thus selling at a lower price; provided, that it shall be a justification for such a discrimination in price if the difference, made by said supplier or wholesaler in the price to the wholesaler or retailer to whom said supplier or wholesaler sells at a lower figure, is merely commensurate with an actual difference in the quality or quantity of motor fuel sold to said wholesaler or retailer or in the transportation charges or other expenses of marketing involved in the sale to said wholesaler or retailer. Nothing herein contained shall prevent a seller from showing that the lower price was made in good faith to meet an equally low price of a competitor.

(2) No person any part of whose business is the sale of motor fuel to wholesalers shall sell motor fuel for ultimate consumption or use at a price lower than that at which he or she sells to such wholesaler unless such lower price is justified as provided in sub. (1).

History: Cr. Register, May, 1972, No. 197, eff. 9-1-72; corrections made under s. 13.93 (2m) (b) 5., Stats., Register, April, 1993, No. 448; renum. from ATCP 108.02, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.23 Coercion. No supplier or wholesaler shall threaten any of his or her customers with any price discrimination or use any form of coercion with the purpose or effect of changing or maintaining resale prices of such customer.

History: Cr. Register, May, 1972, No. 197, eff. 9-1-72; correction made under s. 13.93 (2m) (b) 5., Stats., Register, April, 1993, No. 448; renum. from ATCP 108.03, Register, February, 1996, No. 482, eff. 3-1-96.