

Chapter ATCP 105

SALES BELOW COST

Subchapter I — General Provisions

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Note: Chapter Ag 119 was created on an emergency rule effective June 23, 1987; Chapter Ag 119 was renumbered chapter ATCP 105 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

Subchapter I — General Provisions

ATCP 105.001 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.

History: Cr. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.003 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 directly 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%.

History: Cr. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.004 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%.

History: Cr. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.005 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. ATCP 105.005 (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. ATCP 105.005 (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%.

History: Cr. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.007 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 ATCP 105.08 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 ATCP 105.007 (3) (b) 4. incorporates the provisions of 63 OAG 516, interpreting s. 100.30 (2) (k), Stats.

History: Cr. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.009 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.

History: Cr. Register, August, 1990, No. 416, eff. 9-1-90.

Subchapter II — Cigarette Pricing

ATCP 105.01 Purpose. The purpose of this 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 subchapter creates a uniform accounting system for establishing that proof. The 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 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.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88; am. Register, August, 1990, eff. 9-1-90.

ATCP 105.02 Definitions. In this subchapter:

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

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

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

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

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

(6) "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.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88; am. (intro.), r. (2), Register, August, 1990, No. 416, eff. 9-1-90; renum (3) to (7) to be (2) to (6) under s. 13.93 (2m) (b) 1., Stats., Register, August, 1990, No. 416.

ATCP 105.03 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 at a reduced markup is made, written proof of a lesser cost of doing business. 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 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 it

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 was made.

Note: Failure to comply with s. ATCP 105.03 (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 s. 100.30 (4) and (5), Stats.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88; am. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.04 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 cigarettes or other tobacco products at less than the minimum 3% markup.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88; am. Register, August, 1990, No. 416, eff. 9-1-90.

ATCP 105.05 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. ATCP 105.06 and 105.07 or the specific expense allocation method specified in s. ATCP 105.09.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88.

ATCP 105.06 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. ATCP 105.07, 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. ATCP 105.04, for cigarette and other tobacco products.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88.

ATCP 105.07 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 remunerations 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.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88.

ATCP 105.08 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) **JOBBER'S 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.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88.

ATCP 105.09 Specific expense allocation. In lieu of using the average expense allocation method specified in ss. ATCP 105.06 and 105.07, 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. ATCP 105.03 (2).

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88.

ATCP 105.10 Applicability. This subchapter applies to any offer to sell or sale of cigarettes and other tobacco products occurring on or after November 1, 1988.

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.

History: Cr. Register, October, 1988, No. 394, eff. 11-1-88; am. Register, August, 1990, No. 416, eff. 9-1-90.