Motor Fuel Marketing

This legislation prohibits pricing practices designed to diminish or eliminate the independent motor fuel market sector, which over time yields higher prices and a less efficient marketplace.

Submitted as:
New York
Chapter 691 of 2003
Status: Enacted into law in 2003.

Suggested State Legislation

(Title, enacting clause, etc.)

1. [Short Title.] This Act may be cited as the "Motor Fuel Marketing Practices Act."

2. [Legislative Findings and Intent.] The [legislature] finds that fair and healthy competition in the marketing of motor fuel provides maximum benefits to consumers in this state and that certain marketing practices which impair such competition are contrary to the public interest. Predatory practices and, in certain circumstances, discriminatory practices constitute unfair trade practices and anti-competitive restraints which reduce motor fuel industry competition and, if left to continue unabated, will ultimately threaten or harm the consuming public. It is the intent of the [legislature] to promote and encourage competition to ensure the general welfare of citizens of this state by prohibiting such unfair practices.

3. [Definitions.] As used in this Act:
   (a) "Affiliate" means any person whose stock is more than [fifty percent] owned by, or who, regardless of stock ownership, is controlled by or is under common control with, any other person.
   (b) "Competition" means the vying for motor fuel sales between any [two or more] sellers in the same relevant geographic market.
   (c) "Dealer" means any person, other than a refiner or wholesaler, who is engaged in the business of selling motor fuel at a retail outlet.
   (d) "Direct labor cost" means the personnel costs incurred and attributable to providing motor fuel sales at a retail outlet and includes, without limitation, the personnel costs relating to the purchase, storage, inventory, and sale of motor fuel, the maintenance of equipment, and environmental reporting and compliance, but does not include the costs of environmental cleanup or remediation. In no case shall the direct labor cost be less than the cost of one employee's salary and benefits, based upon that employee's working those hours in which the retail outlet is providing motor fuel available to the public.
   (e) "Motor fuel" means any petroleum product including any special fuel that is used for the propulsion of any motor vehicle.
   (f) "Nonrefiner" means any person, other than a refiner, engaged in the sale of motor fuel.
   (g) "Nonrefiner cost" means the nonrefiner's invoice cost of the motor fuel, by grade, less credit card allowances, trade discounts, and rebates actually received, to which shall be added federal, state, and local taxes and fees applicable to motor fuel; freight charges to the retail outlet.

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outlet; and direct labor costs and the reasonable rental value of the retail outlet attributable to the
sale of motor fuel by the nonrefiner. If motor fuel is sold with another item at a combined price,
nonrefiner motor fuel cost shall also include the cost of the other item and the direct labor costs
and the reasonable rental value of the retail outlet attributable to the retail sale of the item by the
nonrefiner.

(h) "Persons" means any individual, public or private corporations or limited liability
corporations, companies, associations, societies, firms, partnerships, limited liability
partnerships, joint stock companies, the United States, this state and any of its political
subdivisions or agents.

(i) "Posted terminal price" means a refiner's posted price at a terminal, by grade of motor
fuel, to the wholesale class of trade within a general trade area. If a refiner does not have a
posted terminal price in a general trade area, such refiner's posted terminal price shall be deemed
to be no lower than the lowest posted terminal price of motor fuel of like grade and quality of
any other refiner selling to the wholesale class of trade in the general trade area.

(j) "Reasonable rental value" means the bona fide amount of rent which would reasonably
be paid in an arm's length transaction for the use of the specific individual retail outlet, including
land and improvements, utilized for the sale of motor fuel. The value of the land and
improvements shall include the costs of equipment, signage, utilities, property taxes, and
insurance, if paid by the owner; environmental compliance, such as testing, detection, and
containment systems; but does not include the costs of environmental cleanup and remediation.
In determining the reasonable rental value of the specific retail outlet, the rental amount of
comparable retail outlets in the relevant geographic market shall be considered. When motor fuel
is sold at the retail level along with other products, the reasonable rental value attributable to the
sale of motor fuel at the retail outlet shall be allocated by the percentage of gross sales
attributable to motor fuel sales.

(k) "Refiner" means any person who produces and stores or exchanges motor fuel at a
terminal facility and who sells or transfers motor fuel through the loading rack at such terminal
facility, and includes an affiliate of such refiner with respect to such affiliate's sale of motor fuel.

(l) "Refiner cost" means a refiner's posted terminal price plus federal, state, and local
taxes and fees applicable to motor fuel; freight charges to its retail outlet; and direct labor costs
and reasonable rental value of the retail outlet attributable to the retail sale of motor fuel by the
refiner. If motor fuel is sold with another item at a combined price, refiner cost shall also include
the cost of the other item and direct labor costs and reasonable rental value of the retail outlet
attributable to the retail sale of the item by the refiner.

(m) "Relevant geographic market" means the geographic area of effective competition.

(n) "Rent" means the payment of an amount by any person in return for the right to
occupancy or use of the property of another.

(o) "Reseller" means any person who purchases motor fuel for resale to another person
regardless whether such subsequent sale is at retail or to another reseller.

(p) "Retail outlet" means a facility, including land and improvements, where motor fuel is
offered for sale at retail to the public.

(q) "Sale" or "sell" means any transfer, gift, barter, sale, offer for sale, or advertisement
for sale in any manner or by any means whatsoever, including any transfer of motor fuel from a
person to itself or an affiliate at another level of distribution, but does not include product
exchanges at the wholesale level of distribution.

(r) "Supplier" means any person who conveys, transports or otherwise causes motor fuel
to be delivered to another person except that any person who conveys, transports or otherwise
causes motor fuel to be delivered as part of a retail sale shall not be considered a supplier.
(s) "Terminal facility" means any inland, waterfront, or offshore appurtenance on land used for the purpose of receiving, storing, handling, or transferring motor fuel, but does not include bulk storage facilities owned or operated by a wholesaler.

(t) "Wholesaler" means any person, other than a refiner or dealer, who purchases motor fuel at a terminal facility and supplies motor fuel to retail outlets.

Section 4. [Predatory Practices Unlawful; Exceptions.]

(a) (1) It is unlawful for any refiner engaged in commerce in this state to sell any grade or quality of motor fuel at a retail outlet at a price which is less than ninety-eight percent of the refiner cost where the effect is to injure competition.

(2) It is unlawful for any nonrefiner engaged in commerce in this state to sell any grade or quality of motor fuel at a retail outlet at a price which is less than ninety-eight percent of the nonrefiner cost where the effect is to injure competition.

(b) It is unlawful for any refiner, including any affiliate or agent thereof, to sell any grade or quality of motor fuel at a retail outlet at a price that is less than ninety-eight percent of the price charged by that refiner to any wholesaler or dealer under written contract for the like grade and quality of motor fuel, to the extent that the wholesaler or dealer resells in the relevant geographic market where the refiner's retail price is in effect.

(c) (1) An isolated, inadvertent incident involving activity prohibited pursuant to subdivision (a) or (b) of this section shall not be a violation of this Act.

(2) A refiner's sale at a price which is less than ninety-eight percent of the refiner cost or a nonrefiner's sale at a price which is less than ninety-eight percent of the nonrefiner cost made in good faith to meet an equally low retail price of a competitor selling motor fuel of like grade or quality in the same relevant geographic market which can be used in the same motor vehicle, or of the same or similar items in combination with motor fuel of like grade or quality which can be used in the same motor vehicle, is not a violation of this Act.

Section 5. [Discriminatory Practices Unlawful; Exceptions.]

(a) It is unlawful for any person engaged in commerce in this state:

(1) To sell for resale any grade or quality of motor fuel at a price which is less than ninety-eight percent of the price at which the seller contemporaneously sells motor fuel of like grade or quality to another person on the same level of distribution, in the same class of trade, and within the same relevant geographic market as the purchaser where the effect is to injure competition.

(2) To knowingly receive for resale any grade or quality of motor fuel at a price which is less than ninety-eight percent of the price at which the seller from which the motor fuel is purchased or received contemporaneously sells motor fuel of like grade or quality to any person on the same level of distribution, in the same class of trade, and within the same relevant geographic market as the purchaser where the effect is to injure competition.

(b) A sale of motor fuel of like grade and quality at different prices to persons at the same level of distribution is not a violation of this section if the difference in price is due to a difference in the cost of sale or delivery resulting from differing methods or quantities at which the grade of motor fuel is sold or delivered.

(c) Subject to the limitations of subdivision (b) of Section 4 of this Act, a sale made in good faith to meet an equally low price of a competitor selling motor fuel of like grade and quality which can be used in the same motor vehicle is not a violation of this section.

(d) It is unlawful for a refiner to sell any grade or quality of motor fuel to a wholesaler under written contract at a price, after adding federal, state, and local taxes and fees, which is higher than the net price, after deducting all allowances, rebates, and discounts, at which the

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refiner contemporaneously sells motor fuel of like grade and quality to a dealer in competition
with any retail outlet supplied by such wholesaler, where the effect is to injure competition,
except to the extent that the difference in price is attributable to a rebate, rent subsidy, or other
concession which is offered to the wholesaler on proportionately equal or comparable terms.
(e) An isolated, inadvertent incident involving the activity prohibited pursuant to
subdivision (a) or (d) of this section shall not be a violation of this Act.

Section 6. [Discriminatory Allocations Unlawful.]
(a) It is unlawful for any person supplying motor fuel in this state to limit or allocate the
quantity of motor fuel available to a reseller purchasing under contract from such supplier
because such reseller was prevented by such supplier from purchasing the minimum quantities
such reseller was obligated to purchase from such supplier in the immediately preceding year,
unless the limitations or allocations are applied in a reasonable and nondiscriminatory manner
among all resellers supplied by such supplier under contract in a general trade area and the
supplier's own retail outlets.

(b) It is unlawful for a supplier to limit or allocate for more than five consecutive days the
quantity of motor fuel available to a reseller purchasing under contract from such supplier, unless
the limitations or allocations are applied in a reasonable and nondiscriminatory manner among
all resellers supplied by such supplier under contract in a general trade area and the supplier's
own retail outlets.

Section 7. [Unfair Practices Unlawful.]
(a) It shall be unlawful for a refiner or other supplier to fix or maintain the retail price of
motor fuel at a retail outlet supplied by that refiner or supplier. Nothing in this section shall be
construed to prevent a refiner or supplier from counseling concerning retail prices, provided no
threat or coercion is used in the counseling. This subdivision shall not apply to retail outlets
operated by the refiner or supplier.

(b) It is unlawful for any person who supplies motor fuel to a dealer for resale and who
leases a retail outlet to the dealer to impose any material modification in the contractual
arrangements during the term of the contract, including a material modification of the leased
retail outlet, unless such modification is made in good faith and based upon reasonable business
practices.

Section 8. [Certain Rebates Unlawful.] It is unlawful for any person selling motor fuel to
offer or give a rebate, rent subsidy, or concession of any kind in connection, either directly or
indirectly, with the sale of motor fuel to a person for resale when the seller does not provide, on
proportionately equal terms, the same rebate, rent subsidy, or concession, or the equivalent of the
rebate, rent subsidy, or concession, to all persons purchasing for resale in the relevant geographic
market, where the effect is to injure competition. If a wholesaler receives a rebate, rent subsidy,
or concession, the wholesaler must offer on proportionately equal terms, the rebate, rent subsidy,
or concession, or the equivalent of the rebate, rent subsidy, or concession, to any retail outlet
supplied by such wholesaler to the extent the wholesaler passes through such rebate, rent subsidy
or concession. However, a rebate, rent subsidy, or concession made in good faith to meet the
same or a comparable rebate, rent subsidy, or concession of a competitor shall not be a violation
of this Act, provided that any person who sells motor fuel to any wholesaler or dealer under
written contract for resale in the relevant geographic market shall offer the rebate, rent subsidy,
or concession, or the equivalent of such rebate, rent subsidy, or concession, to all other similarly
situated wholesalers and dealers on proportionately equal terms.
Section 9. [Exempt Sales.] The provisions of this Act shall not apply to the following retail sales by a refiner:

(a) A bona fide clearance sale for the purpose of discontinuing trade in such motor fuel;
(b) A final business liquidation sale;
(c) A sale of the refiner’s motor fuel by a fiduciary or other officer under the order or direction of any court; or
(d) Sales made during a grand opening to introduce a new or remodeled business not to exceed three days, which grand opening shall be held within sixty days from the date the new or remodeled business begins operations.

Section 10. [Enforcement; Civil Penalties.]

(a) Any person who knowingly violates this Act shall be subject to a civil penalty not to exceed ten thousand dollars per violation. Each day that a violation of this Act occurs shall be considered a separate violation, but no civil penalty shall exceed two hundred fifty thousand dollars.

(b) Any complaints regarding violations of this Act shall be first filed with the state [consumer protection board] which shall conduct an investigation and may request in writing the production of documents and records as part of its investigation. Trade secrets and proprietary business information contained in the documents or records received by the state [consumer protection board] pursuant to a written request or a subpoena are confidential. If the person upon whom such request was made fails to produce the documents or records within thirty days after the date of the request, the state [consumer protection board] may issue and serve subpoenas to compel the production of such documents and records. If any person shall refuse to comply with a subpoena issued under this section, the state [consumer protection board] may petition a court of competent jurisdiction to enforce the subpoena and such sanctions as the court may direct. Refiners shall afford the state [consumer protection board] reasonable access to the refiners’ posted terminal price. After completion of an investigation, the state [consumer protection board] shall either:

(i) Dismiss the complaint following a determination that no violation occurred;
(ii) Dismiss the complaint following a determination that there has been a de minimus injury to competition; or
(iii) Determine that a violation has likely occurred and, if so, shall attempt to resolve the matter by settlement. If no settlement is achieved, then the matter shall be referred to the [attorney general] for further proceedings, including, if necessary, legal action.

(c) Any records, documents, papers, maps, books, tapes, photographs, files, sound recordings, or other business material, regardless of form or characteristics, obtained by the state [consumer protection board] pursuant to subpoena are confidential. At the conclusion of an investigation, any matter determined by the state [consumer protection board], the [attorney general], or by a federal or state judicial or administrative body, to be a trade secret or proprietary confidential business information held by either the state [consumer protection board] or the [attorney general] pursuant to such investigation shall be considered confidential. Such materials may be used in any administrative or judicial proceeding so long as the confidential or proprietary nature of the material is maintained.

(d) The civil penalty imposed under this section and/or any injunctive relief may be sought in a civil action brought by the [attorney general] in any court of competent jurisdiction. If the [attorney general] prevails in a civil action, the court may award the [attorney general] reasonable attorneys’ fees as it deems appropriate.

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Section 11. [*Limitations Period for Actions.*] Any action brought by the [attorney general] shall be commenced within two years after the alleged violation occurred or should reasonably have been discovered.

Section 12. [*Consumer Complaints.*] The [executive director of the state consumer protection board] shall have the power and duty on behalf of the [board], to initiate, investigate, attempt to resolve, and if necessary refer to the [attorney general] any matters or complaints received pursuant to this Act.

Section 13. [*Severability.*] [Insert severability clause.]

Section 14. [*Repealer.*] [Insert repealer clause.]

Section 15. [*Effective Date.*] [Insert effective date.]