

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

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

12  
13           Section 3. [*Definitions.*] As used in this Act:

14           (a) "Affiliate" means any person whose stock is more than [fifty percent] owned by, or  
15 who, regardless of stock ownership, is controlled by or is under common control with, any other  
16 person.

17           (b) "Competition" means the vying for motor fuel sales between any [two or more] sellers  
18 in the same relevant geographic market.

19           (c) "Dealer" means any person, other than a refiner or wholesaler, who is engaged in the  
20 business of selling motor fuel at a retail outlet.

21           (d) "Direct labor cost" means the personnel costs incurred and attributable to providing  
22 motor fuel sales at a retail outlet and includes, without limitation, the personnel costs relating to  
23 the purchase, storage, inventory, and sale of motor fuel, the maintenance of equipment, and  
24 environmental reporting and compliance, but does not include the costs of environmental  
25 cleanup or remediation. In no case shall the direct labor cost be less than the cost of one  
26 employee's salary and benefits, based upon that employee's working those hours in which the  
27 retail outlet is providing motor fuel available to the public.

28           (e) "Motor fuel" means any petroleum product including any special fuel that is used for  
29 the propulsion of any motor vehicle.

30           (f) "Nonrefiner" means any person, other than a refiner, engaged in the sale of motor fuel.

31           (g) "Nonrefiner cost" means the nonrefiner's invoice cost of the motor fuel, by grade, less  
32 credit card allowances, trade discounts, and rebates actually received, to which shall be added  
33 federal, state, and local taxes and fees applicable to motor fuel; freight charges to the retail

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

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

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

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

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

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

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

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

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

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

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

79 (r) "Supplier" means any person who conveys, transports or otherwise causes motor fuel  
80 to be delivered to another person except that any person who conveys, transports or otherwise  
81 causes motor fuel to be delivered as part of a retail sale shall not be considered a supplier.

82 (s) "Terminal facility" means any inland, waterfront, or offshore appurtenance on land  
 83 used for the purpose of receiving, storing, handling, or transferring motor fuel, but does not  
 84 include bulk storage facilities owned or operated by a wholesaler.

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

87  
 88 Section 4. [*Predatory Practices Unlawful; Exceptions.*]

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

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

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

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

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

108  
 109 Section 5. [*Discriminatory Practices Unlawful; Exceptions.*]

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

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

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

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

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

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

131 refiner contemporaneously sells motor fuel of like grade and quality to a dealer in competition  
132 with any retail outlet supplied by such wholesaler, where the effect is to injure competition,  
133 except to the extent that the difference in price is attributable to a rebate, rent subsidy, or other  
134 concession which is offered to the wholesaler on proportionately equal or comparable terms.

135 (e) An isolated, inadvertent incident involving the activity prohibited pursuant to  
136 subdivision (a) or (d) of this section shall not be a violation of this Act.

137  
138 Section 6. [*Discriminatory Allocations Unlawful.*]

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

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

151  
152 Section 7. [*Unfair Practices Unlawful.*]

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

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

163  
164 Section 8. [*Certain Rebates Unlawful.*] It is unlawful for any person selling motor fuel to  
165 offer or give a rebate, rent subsidy, or concession of any kind in connection, either directly or  
166 indirectly, with the sale of motor fuel to a person for resale when the seller does not provide, on  
167 proportionately equal terms, the same rebate, rent subsidy, or concession, or the equivalent of the  
168 rebate, rent subsidy, or concession, to all persons purchasing for resale in the relevant geographic  
169 market, where the effect is to injure competition. If a wholesaler receives a rebate, rent subsidy,  
170 or concession, the wholesaler must offer on proportionately equal terms, the rebate, rent subsidy,  
171 or concession, or the equivalent of the rebate, rent subsidy, or concession, to any retail outlet  
172 supplied by such wholesaler to the extent the wholesaler passes through such rebate, rent subsidy  
173 or concession. However, a rebate, rent subsidy, or concession made in good faith to meet the  
174 same or a comparable rebate, rent subsidy, or concession of a competitor shall not be a violation  
175 of this Act, provided that any person who sells motor fuel to any wholesaler or dealer under  
176 written contract for resale in the relevant geographic market shall offer the rebate, rent subsidy,  
177 or concession, or the equivalent of such rebate, rent subsidy, or concession, to all other similarly  
178 situated wholesalers and dealers on proportionately equal terms.

179

180 Section 9. [*Exempt Sales.*] The provisions of this Act shall not apply to the following  
181 retail sales by a refiner:

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

189

190 Section 10. [*Enforcement; Civil Penalties.*]

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

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

- 208 (i) Dismiss the complaint following a determination that no violation occurred;
- 209 (ii) Dismiss the complaint following a determination that there has been a de  
210 minimus injury to competition; or

211 (iii) Determine that a violation has likely occurred and, if so, shall attempt to  
212 resolve the matter by settlement. If no settlement is achieved, then the matter shall be referred to  
213 the [attorney general] for further proceedings, including, if necessary, legal action.

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

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

227

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

231

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

236

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

238

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

240

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