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To: Finance

SENATE BILL NO. 2716

1 AN ACT TO CREATE THE "MOTOR FUEL MARKETING PRACTICES ACT"; TO
2 PROHIBIT THE SALE BY A REFINER OF MOTOR FUEL AT A RETAIL OUTLET AT
3 A PRICE WHICH IS BELOW REFINER COST, WHERE THE EFFECT IS TO INJURE
4 COMPETITION; TO PROHIBIT THE SALE OF MOTOR FUEL AT A PRICE WHICH
5 IS BELOW NONREFINER COST, WHERE THE EFFECT IS TO INJURE
6 COMPETITION; TO PROHIBIT THE SALE OF MOTOR FUEL BY A REFINER AT A
7 RETAIL OUTLET AT A PRICE THAT IS BELOW THE PRICE CHARGED BY THAT
8 REFINER TO ANY WHOLESALER OR DEALER TO THE EXTENT THAT THE
9 WHOLESALER OR DEALER RESELLS IN THE RELEVANT GEOGRAPHIC MARKET
10 WHERE THE REFINER'S RETAIL PRICE IS IN EFFECT; TO PROHIBIT THE
11 SALE FOR RESALE OF MOTOR FUEL AT A PRICE LOWER THAN THE PRICE AT
12 WHICH THE SELLER SELLS MOTOR FUEL TO ANOTHER PERSON WITHIN THE
13 SAME RELEVANT GEOGRAPHIC MARKET AS THE PURCHASER, WHERE THE EFFECT
14 IS TO INJURE COMPETITION; TO PROHIBIT THE RECEIPT FOR RESALE OF
15 MOTOR FUEL AT A PRICE LOWER THAN THE PRICE AT WHICH THE SELLER
16 FROM WHICH THE MOTOR FUEL IS PURCHASED OR RECEIVED
17 CONTEMPORANEOUSLY SELLS MOTOR FUEL TO ANOTHER PERSON WITHIN THE
18 SAME RELEVANT GEOGRAPHIC AREA, WHERE THE EFFECT IS TO INJURE
19 COMPETITION; TO PROHIBIT REFINERS FROM SELLING MOTOR FUEL TO A
20 WHOLESALER AT A PRICE WHICH IS HIGHER THAN THE NET PRICE AT WHICH
21 THE REFINER CONTEMPORANEOUSLY SELLS MOTOR FUEL TO A DEALER IN
22 COMPETITION WITH ANY RETAIL OUTLET SUPPLIED BY THE WHOLESALER,
23 WHERE THE EFFECT IS TO INJURE COMPETITION; TO MAKE CERTAIN
24 EXCEPTIONS TO SUCH PROHIBITIONS; TO PROHIBIT CERTAIN
25 DISCRIMINATORY ALLOCATIONS OF MOTOR FUEL; TO MAKE CERTAIN
26 EXCEPTIONS TO THE PROVISIONS OF THIS ACT; TO GIVE THE ATTORNEY
27 GENERAL CERTAIN AUTHORITY TO INVESTIGATE COMPLAINTS REGARDING
28 VIOLATIONS OF THIS ACT AND SEEK CERTAIN CIVIL PENALTIES AND
29 INJUNCTIVE RELIEF FOR VIOLATIONS OF THIS ACT; TO GIVE PERSONS
30 INJURED AS A RESULT OF VIOLATIONS OF THIS ACT THE RIGHT TO BRING
31 ACTIONS TO ENJOIN SUCH VIOLATIONS; AND FOR RELATED PURPOSES.

32 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

33 SECTION 1. This act may be cited as the "Motor Fuel
34 Marketing Practices Act."

35 SECTION 2. The Legislature finds that marketing of motor
36 fuel is affected with the public interest and that fair and
37 healthy competition in the marketing of motor fuel provides
38 maximum benefits to consumers in this state. The Legislature
39 further finds that independent motor fuel wholesalers and dealers
40 are vital to maintaining healthy competition in the marketing of

41 motor fuel. Certain marketing practices which impair such
42 competition are contrary to the public interest. Under certain
43 circumstances, below cost selling and discriminatory practices are
44 unfair trade practices and restraints which adversely affect motor
45 fuel competition, competitors and ultimately consumers. It is the
46 intent of the Legislature to encourage competition and promote the
47 general welfare of citizens of this state by prohibiting such
48 unfair practices. It is further the intent of the Legislature
49 that this act be construed liberally to effectuate its remedial
50 purpose and without regard to judicial decisions under the federal
51 antitrust laws pertaining to predatory pricing, injury to
52 competition or antitrust injury.

53 SECTION 3. As used in this act:

54 (a) "Affiliate" means any person whose stock is more
55 than fifty percent (50%) owned by, or who, regardless of stock
56 ownership, is controlled by, or who, regardless of stock
57 ownership, is under common control with, any refiner.

58 (b) "Competition" means the vying for motor fuel sales
59 between two (2) or more sellers in the same relevant geographic
60 market and includes any person who competes with another person
61 for such sales in the same relevant geographic market.

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

65 (d) "Delivered product cost" means:

66 (i) For a refiner, a refiner's posted terminal
67 price per grade; plus all federal, state and local taxes and fees
68 applicable to motor fuel, and freight charges to the retail
69 outlet; and

70 (ii) For a nonrefiner, the per grade invoice cost
71 to the nonrefiner net of any discounts shown on the invoice, which
72 shall not be less than the posted terminal price of the
73 nonrefiner's supplier; plus all federal, state and local taxes and
74 fees applicable to motor fuel, and freight charges to the retail
75 outlet.

76 Delivered product cost is to be determined separately
77 for each grade of motor fuel.

78 (e) "Direct facilities cost" means the sum of the bona
79 fide amount of rent which would reasonably be charged or paid in
80 an arm's length transaction for the use of the specific individual
81 retail outlet, including land, improvements and the equipment
82 utilized for the sale of motor fuel; maintenance expenses; cost of
83 signage; utilities; property taxes; insurance; and environmental
84 compliance, such as testing, detection and containment systems;
85 but not the costs of environmental cleanup and remediation. In
86 determining a reasonable rental value for a specific retail
87 outlet, the commercially acceptable rental rate of return for
88 similar commercial properties and the prevailing rental amounts
89 for comparable retail outlets in the relevant geographic market
90 shall be considered. When motor fuel and other products or
91 services are sold at a retail outlet, the direct facilities cost
92 shall be determined based on the percentage of gross dollar
93 receipts for motor fuel sales to the total gross dollar receipts.

94 Direct facilities cost per gallon shall be determined by dividing
95 the direct facilities cost by the gallons of all grades of motor
96 fuel sold.

97 (f) "Direct labor cost" means the personnel costs
98 incurred attributable to providing motor fuel sales at a retail
99 outlet and includes, without limitation, the personnel costs
100 relating to the purchase, storage, inventory, and sale of motor
101 fuel, and environmental reporting and compliance, but does not
102 include the costs of environmental cleanup or remediation. Except
103 for unattended retail outlets where allowed by statute or local
104 ordinances, the direct labor cost attributable to the sale of
105 motor fuel shall not be less than the cost of one (1) employee's
106 salary and benefits, based upon that employee's working those
107 hours in which the retail outlet is providing motor fuel available
108 to the public. When motor fuel is sold at the retail level along
109 with other products or services, the direct labor cost
110 attributable to the sale of motor fuel at the retail outlet shall

111 be allocated based on the percentage of gross dollar receipts for
112 motor fuel sales to total gross dollars sales receipts. Direct
113 labor cost per gallon shall be determined by dividing the direct
114 labor costs by the total gallons of all grades of motor fuel sold.

115 (g) "Motor fuel" means any petroleum product, including
116 any special fuel, which is used for the propulsion of motor
117 vehicles.

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

120 (i) "Nonrefiner cost" means the nonrefiner's delivered
121 product cost, plus direct labor cost and the reasonable rental
122 value of the retail outlet attributable to the sale of motor fuel
123 by the nonrefiner. If motor fuel is sold with another item at a
124 combined price, nonrefiner motor fuel cost shall also include the
125 cost of the other item and the direct labor costs and the
126 reasonable rental value of the retail outlet attributable to the
127 retail sale of the item by the nonrefiner. Nonrefiner cost is to
128 be determined separately for each grade of motor fuel.

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

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

142 (l) "Refiner cost" means a refiner's delivered product
143 cost, plus direct labor cost and direct facilities cost of the

144 retail outlet attributable to the retail sale of motor fuel by the
145 refiner. If motor fuel is sold with another item, at a combined
146 price, refiner cost shall also include the cost of the other item
147 and direct labor costs and direct facilities cost of the retail
148 outlet attributable to the retail sale of the item by the refiner.
149 Refiner's cost is to be determined separately for each grade of
150 motor fuel.

151 (m) "Relevant geographic market" means the geographic
152 area of effective competition, with the price surveys maintained
153 by competitors as a factor to be considered in determining such
154 geographic area.

155 (n) "Rent" means the payment of an amount by an
156 individual or agency in return for the right to occupy or use the
157 property of another.

158 (o) "Retail outlet" means a facility, including land
159 and improvements, where motor fuel is offered for sale at retail
160 to the general public; to include facilities operating as a part
161 of or in conjunction with an establishment selling nonmotor fuel
162 products only to members.

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

169 (q) "Terminal facility" means any inland, waterfront or
170 offshore appurtenance on land used for the purpose of storing,
171 handling or transferring motor fuel, but does not include bulk
172 storage facilities owned or operated by a wholesaler.

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

176 SECTION 4. (1) (a) It is unlawful for any refiner engaged

177 in commerce in this state to sell any grade or quality of motor
178 fuel at a retail outlet at a price which, after deducting any
179 discounts received at the time of purchase, is below refiner cost,
180 where the effect is to injure competition.

181 (b) It is unlawful for any nonrefiner engaged in
182 commerce in this state to sell any grade or quality of motor fuel
183 at a price which, after deducting any discounts received at the
184 time of purchase, is below nonrefiner cost, where the effect is to
185 injure competition.

186 (2) (a) An isolated, inadvertent incident involving
187 activity prohibited pursuant to subsections (1) or (3) of this
188 section shall not be a violation of this act.

189 (b) A refiner's sale below refiner cost or a
190 nonrefiner's sale below nonrefiner cost made in good faith to meet
191 an equally low retail price, net of any discounts received at the
192 time of sale, of a competitor selling motor fuel of like grade in
193 the same relevant geographic market, or of the same or similar
194 items in combination with motor fuel of like grade, is not a
195 violation of this act.

196 (3) Notwithstanding any other provision of law to the
197 contrary, it is unlawful for a refiner, to sell any grade of motor
198 fuel at a retail outlet at a price, net of any discount received
199 at the time of purchase, that is below the price charged by that
200 refiner to any wholesaler or dealer under written contract for the
201 like grade and quality of motor fuel, to the extent that the
202 wholesaler or dealer resells in the relevant geographic market
203 where the refiner's retail price is in effect.

204 SECTION 5. (1) It is unlawful for any person engaged in
205 commerce in this state:

206 (a) To sell for resale any grade of motor fuel at a
207 price lower than the price at which the seller contemporaneously
208 sells motor fuel of like grade and quality to another person
209 within the same relevant geographic market as the purchaser; where

210 the effect is to injure competition; or

211 (b) To knowingly receive for resale any grade of motor
212 fuel at a price lower than the price at which the seller from
213 which the motor fuel is purchased or received contemporaneously
214 sells motor fuel of like grade and quality to another person and
215 within the same relevant geographic market as the purchaser; where
216 the effect is to injure competition.

217 (2) A sale of motor fuel of like grade and quality at
218 different prices to persons within the same relevant geographic
219 market is not a violation of this section if the difference in
220 price is due to:

221 (a) A difference in the cost of sale or delivery
222 resulting from differing methods or quantities in which the grade
223 of motor fuel is sold or delivered; or

224 (b) A material difference in the seller's investment in
225 equipment or improvements at the retail outlets.

226 (3) A sale made in good faith to meet an equally low price
227 of a competitor selling motor fuel of like grade is not a
228 violation of this section.

229 (4) It is unlawful for a refiner to sell any grade of motor
230 fuel to a wholesaler under written contract at a price which,
231 after adding federal, state and local taxes and inspection fees,
232 is higher than the net price, after deducting all allowances,
233 rebates and discounts, at which the refiner contemporaneously
234 sells motor fuel of like grade and quality to a dealer in
235 competition with any retail outlet supplied by such wholesaler,
236 where the effect is to injure competition; except to the extent
237 that the difference in price is attributable to a rebate, rent
238 subsidy or other concession which is offered to the wholesaler on
239 proportionately equal or comparable terms.

240 (5) An isolated, inadvertent incident involving the activity
241 prohibited pursuant to subsection (1) or (4) of this section shall
242 not be a violation of this act.

243 SECTION 6. (1) It is unlawful for a supplier engaged in
244 commerce in this state to limit or allocate the quantity of motor
245 fuel available to a reseller purchasing under contract from such
246 supplier because such reseller was prevented by such supplier from
247 purchasing the minimum quantities such reseller was obligated to
248 purchase from such supplier in the immediately preceding year,
249 unless the limitations or allocations are applied in a reasonable
250 and nondiscriminatory manner among all resellers supplied by such
251 supplier under contract in a general trade area and the supplier's
252 own retail outlets.

253 (2) It is unlawful for a supplier to limit or allocate the
254 quantity of motor fuel available to a reseller purchasing under
255 contract from such supplier, unless the limitations or allocations
256 are applied in a reasonable and nondiscriminatory manner among all
257 resellers supplied by such supplier under contract in a general
258 trade area and the supplier's own retail outlets.

259 SECTION 7. The provisions of this act shall not apply to the
260 following retail sales:

261 (a) A bona fide clearance or a final business
262 liquidation sale of existing motor fuel inventory at the retail
263 outlet for the purpose of discontinuing trade in such motor fuel.

264 (b) A sale of the existing motor fuel inventory at a
265 retail outlet by a fiduciary or other officer under the order or
266 direction of any court.

267 (c) Sales made during a grand opening to introduce a
268 new or remodeled business not to exceed three (3) days, which
269 grand opening shall be held within sixty (60) days from the date
270 the new or remodeled business begins operations.

271 SECTION 8. (1) Any person who knowingly violates this act
272 shall be subject to a civil penalty not to exceed Five Thousand
273 Dollars (\$5,000.00) per violation. Each day that a violation of
274 this act occurs shall be considered a separate violation, but no
275 civil penalty shall exceed One Hundred Fifty Thousand Dollars

276 (\$150,000.00). Any such person shall also be liable for
277 attorneys' fees and shall be subject to an action for injunctive
278 relief.

279 (2) The Attorney General shall have the authority to
280 investigate any complaints regarding violations of this act and
281 may issue subpoenas to require the production of documents and
282 records as part of its investigation of a complaint. If any
283 person shall refuse to comply with a subpoena issued under this
284 section, the Attorney General may petition a court of competent
285 jurisdiction to enforce the subpoena and assess such sanctions as
286 the court may direct. Refiners shall provide the Attorney General
287 reasonable access to the refiners' posted terminal price.

288 (3) The Attorney General may bring a civil action in any
289 court of competent jurisdiction to seek a civil penalty or
290 injunctive relief authorized by this section. If the Attorney
291 General prevails in a civil action, the court shall award
292 reasonable attorneys' fees as it deems appropriate. All funds
293 recovered by the Attorney General shall be deposited in the
294 General Fund.

295 SECTION 9. (1) Any person injured as a result of an act or
296 practice which violates this act may bring an action in chancery
297 court to prevent, restrain or enjoin such violation or threatened
298 violation. Such action shall be brought in the county where the
299 act or practice complained of has occurred or is occurring.

300 (2) Upon proper application by the plaintiff, the court
301 shall grant preliminary injunctive relief if the plaintiff shows:

302 (a) That he is a proper person to seek the relief
303 requested.

304 (b) There exist sufficiently serious questions going to
305 the merits to make such questions a fair ground for litigation;
306 and the court determines, on balance, the hardships imposed on the
307 defendant and the public interest by the issuance of such
308 preliminary injunctive relief will be less than the hardship which

309 would be imposed on the plaintiff if such preliminary injunctive
310 relief were not granted. A showing of irreparable injury or
311 inadequate remedy at law is not required.

312 (c) The standards specified in paragraphs (a) and (b)
313 of this subsection shall also apply to actions for injunctive
314 relief brought by the Attorney General under Section 8 of this
315 act.

316 (3) In issuing a temporary restraining order or a
317 preliminary injunction, the court, in its discretion, and having
318 due regard for the public interest, may require or dispense with
319 the requirement of a bond, with or without surety, as conditions
320 and circumstances may require. If a bond is required the amount
321 shall not be greater than Fifty Thousand Dollars (\$50,000.00).

322 (4) In an action brought under this section, it shall not be
323 necessary that the amount of actual damages to the plaintiff be
324 alleged or proved, but where such actual damages are alleged and
325 proved, the plaintiff in the action, in addition to such
326 injunctive relief and reasonable attorneys' fees, shall be
327 entitled to recover from the defendant the actual damages
328 sustained by the plaintiff. If the court finds that the
329 defendant's violation was willful or part of a pattern and
330 practice of conduct in violation of this act, the court shall
331 treble the amount of actual damages awarded to the plaintiff. The
332 court shall award a reasonable attorney's fee to the prevailing
333 plaintiff and may award a reasonable attorney's fee to the
334 prevailing defendant if the court finds that the action brought
335 lacked a reasonable basis in law or fact.

336 (5) In the event that no injunctive relief is sought or
337 required, any person injured by a violation of this act may
338 maintain an action in a court of general jurisdiction in the
339 county in which the alleged violation has occurred for actual and
340 treble damages and the other noninjunctive relief set forth in
341 subsection (4) of this section.

342 SECTION 10. Any action brought by the Attorney General shall
343 be brought within two (2) years after the alleged violation
344 occurred or should reasonably have been discovered. Any action
345 brought by any other person shall be brought within one (1) year
346 after the alleged violation occurred or should reasonably have
347 been discovered, except that a private action brought under
348 Section 9 of this act for unlawful price discrimination shall be
349 brought within two (2) years from the date the alleged violation
350 occurred or should reasonably have been discovered.

351 SECTION 11. This act shall take effect and be in force from
352 and after July 1, 2000.