

STATE OF NEW YORK

S. 4974

A. 8398

2003-2004 Regular Sessions

SENATE - ASSEMBLY

May 5, 2003

IN SENATE -- Introduced by Sen. NOZZOLIO -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- (at request of M. of A. Tonko) -- read once and referred to the Committee on Economic Development, Job Creation, Commerce and Industry

AN ACT to amend the general business law and the executive law, in relation to enacting the "New York motor fuel marketing act"; and providing for the repeal of such provisions upon the expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The general business law is amended by adding a new article

2 24-B to read as follows:

3

ARTICLE 24-B

4

MOTOR FUEL MARKETING PRACTICES ACT

5

Section 370. Short title.

6

370-a. Legislative findings and intent.

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370-b. Definitions.

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370-c. Predatory practices unlawful; exceptions.

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370-d. Discriminatory practices unlawful; exceptions.

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370-e. Discriminatory allocations unlawful.

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370-f. Unfair practices unlawful.

12

370-g. Certain rebates unlawful.

13

370-h. Exempt sales.

14

370-i. Enforcement; civil penalties.

15

370-j. Limitations period for actions.

16 § 370. Short title. This act shall be known and may be
cited as the
17 "New York motor fuel marketing practices act".

EXPLANATION--Matter in *italics* (underscored) is new; matter in
brackets

[-] is old law to be omitted.

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1 § 370-a. Legislative findings and intent. The legislature
finds that
2 fair and healthy competition in the marketing of motor fuel
provides
3 maximum benefits to consumers in this state and that certain
marketing
4 practices which impair such competition are contrary to
the public
5 interest. Predatory practices and, in certain circumstances,
discrimina-
6 tory practices constitute unfair trade practices and anti-
competitive
7 restraints which reduce motor fuel industry competition and, if
left to
8 continue unabated, will ultimately threaten or harm the
consuming
9 public. It is the intent of the legislature to promote and
encourage
10 competition to ensure the general welfare of citizens of this
state by
11 prohibiting such unfair practices.

12 § 370-b. Definitions. As used in this article:

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

16 (b) "Competition" means the vying for motor fuel sales
between any two

17 or more sellers in the same relevant geographic market.

18 (c) "Dealer" means any person, other than a refiner or
wholesaler, who

19 is engaged in the business of selling motor fuel at a retail
outlet.

20 (d) "Direct labor cost" means the personnel costs incurred
and attrib-

21 utable to providing motor fuel sales at a retail outlet and
includes,

22 without limitation, the personnel costs relating to the
purchase, stor-

23 age, inventory, and sale of motor fuel, the maintenance of
equipment,

24 and environmental reporting and compliance, but does not
include the

25 costs of environmental cleanup or remediation. In no case
26 shall the
27 direct labor cost be less than the cost of one employee's
28 salary and
29 benefits, based upon that employee's working those hours in
30 which the
31 retail outlet is providing motor fuel available to the public.
32 (e) "Motor fuel" means any petroleum product including
33 any special
34 fuel which is used for the propulsion of any motor vehicle.
35 (f) "Nonrefiner" means any person, other than a refiner,
36 engaged in
37 the sale of motor fuel.
38 (g) "Nonrefiner cost" means the nonrefiner's invoice cost of
39 the motor
40 fuel, by grade, less credit card allowances, trade
41 discounts, and
42 rebates actually received, to which shall be added federal,
43 state, and
44 local taxes and fees applicable to motor fuel; freight
45 charges to the
46 retail outlet; and direct labor costs and the reasonable rental
47 value of
48 the retail outlet attributable to the sale of motor fuel by the
49 nonrefi-
50 ner. If motor fuel is sold with another item at a combined
51 price, nonre-
52 finer motor fuel cost shall also include the cost of the other
53 item and
54 the direct labor costs and the reasonable rental value of
55 the retail
56 outlet attributable to the retail sale of the item by the
57 nonrefiner.
58 (h) "Persons" means any individual, public or private
59 corporations or
60 limited liability corporations, companies, associations,
61 societies,
62 firms, partnerships, limited liability partnerships, joint
63 stock compa-
64 nies, the United States, the state of New York and any of its
65 political
66 subdivisions or agents.
67 (i) "Posted terminal price" means a refiner's posted price at
68 a termi-
69 nal, by grade of motor fuel, to the wholesale class of trade
70 within a
71 general trade area. If a refiner does not have a posted
72 terminal price
73 in a general trade area, such refiner's posted terminal price
74 shall be
75 deemed to be no lower than the lowest posted terminal price
76 of motor
77 fuel of like grade and quality of any other refiner selling
78 to the
79 wholesale class of trade in the general trade area.
80 (j) "Reasonable rental value" means the bona fide amount of
81 rent which

56 would reasonably be paid in an arm's length transaction for
the use of

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1 the specific individual retail outlet, including land and
improvements,
2 utilized for the sale of motor fuel. The value of the land and
improve-
3 ments shall include the costs of equipment, signage, utilities,
property
4 taxes, and insurance, if paid by the owner; environmental
compliance,
5 such as testing, detection, and containment systems; but
does not
6 include the costs of environmental cleanup and remediation. In
determin-
7 ing the reasonable rental value of the specific retail
outlet, the
8 rental amount of comparable retail outlets in the relevant
geographic
9 market shall be considered. When motor fuel is sold at the
retail level
10 along with other products, the reasonable rental value
attributable to
11 the sale of motor fuel at the retail outlet shall be
allocated by the
12 percentage of gross sales attributable to motor fuel sales.
13 (k) "Refiner" means any person who produces and stores or
exchanges
14 motor fuel at a terminal facility and who sells or transfers
motor fuel
15 through the loading rack at such terminal facility, and
includes an
16 affiliate of such refiner with respect to such affiliate's sale
of motor
17 fuel.
18 (l) "Refiner cost" means a refiner's posted terminal price
plus feder-
19 al, state, and local taxes and fees applicable to motor
fuel; freight
20 charges to its retail outlet; and direct labor costs and
reasonable
21 rental value of the retail outlet attributable to the
retail sale of
22 motor fuel by the refiner. If motor fuel is sold with another
item at a
23 combined price, refiner cost shall also include the cost of
the other
24 item and direct labor costs and reasonable rental value of
the retail
25 outlet attributable to the retail sale of the item by the
refiner.
26 (m) "Relevant geographic market" means the geographic area
of effec-
27 tive competition.

28 (n) "Rent" means the payment of an amount by any person in
return for
29 the right to occupancy or use of the property of another.
30 (o) "Reseller" means any person who purchases motor fuel for
resale to
31 another person regardless whether such subsequent sale is at
retail or
32 to another reseller.
33 (p) "Retail outlet" means a facility, including land and
improvements,
34 where motor fuel is offered for sale at retail to the public.
35 (q) "Sale" or "sell" means any transfer, gift, barter, sale,
offer for
36 sale, or advertisement for sale in any manner or by any means
whatsoev-
37 er, including any transfer of motor fuel from a person to
itself or an
38 affiliate at another level of distribution, but does not
include product
39 exchanges at the wholesale level of distribution.
40 (r) "Supplier" means any person who conveys, transports or
otherwise
41 causes motor fuel to be delivered to another person except
that any
42 person who conveys, transports or otherwise causes motor
fuel to be
43 delivered as part of a retail sale shall not be considered a
supplier.
44 (s) "Terminal facility" means any inland, waterfront, or
offshore
45 appurtenance on land used for the purpose of receiving,
storing, handl-
46 ing, or transferring motor fuel, but does not include
bulk storage
47 facilities owned or operated by a wholesaler.
48 (t) "Wholesaler" means any person, other than a refiner or
dealer, who
49 purchases motor fuel at a terminal facility and supplies motor
fuel to
50 retail outlets.

51 § 370-c. Predatory practices unlawful; exceptions.
(a)(1) It is
52 unlawful for any refiner engaged in commerce in this state to
sell any
53 grade or quality of motor fuel at a retail outlet at a price
which is
54 less than ninety-eight percent of the refiner cost where the
effect is
55 to injure competition.

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1 (2) It is unlawful for any nonrefiner engaged in
commerce in this
2 state to sell any grade or quality of motor fuel at a retail
outlet at a

3 price which is less than ninety-eight percent of the
4 nonrefiner cost

4 where the effect is to injure competition.

5 (b) It is unlawful for any refiner, including any affiliate
6 or agent

6 thereof, to sell any grade or quality of motor fuel at a
7 retail outlet

7 at a price that is less than ninety-eight percent of the
8 price charged

8 by that refiner to any wholesaler or dealer under written
9 contract for

9 the like grade and quality of motor fuel, to the extent that
10 the whole-

10 saler or dealer resells in the relevant geographic market
11 where the

11 refiner's retail price is in effect.

12 (c) (1) An isolated, inadvertent incident involving activity
13 prohibit-

13 ed pursuant to subdivision (a) or (b) of this section shall
14 not be a

14 violation of this article.

15 (2) A refiner's sale at a price which is less than
16 ninety-eight

16 percent of the refiner cost or a nonrefiner's sale at a price
17 which is

17 less than ninety-eight percent of the nonrefiner cost made in
18 good faith

18 to meet an equally low retail price of a competitor selling
19 motor fuel

19 of like grade or quality in the same relevant geographic
20 market which

20 can be used in the same motor vehicle, or of the same or
21 similar items

21 in combination with motor fuel of like grade or quality
22 which can be

22 used in the same motor vehicle, is not a violation of this
23 article.

23 § 370-d. Discriminatory practices unlawful; exceptions.
24 (a) It is

24 unlawful for any person engaged in commerce in this state:

25 (1) To sell for resale any grade or quality of motor fuel
26 at a price

26 which is less than ninety-eight percent of the price at which
27 the seller

27 contemporaneously sells motor fuel of like grade or quality to
28 another

28 person on the same level of distribution, in the same class
29 of trade,

29 and within the same relevant geographic market as the
30 purchaser where

30 the effect is to injure competition.

31 (2) To knowingly receive for resale any grade or quality of
32 motor fuel

32 at a price which is less than ninety-eight percent of the price
33 at which

33 the seller from which the motor fuel is purchased or received
contempo-

34 randomly sells motor fuel of like grade or quality to any
35 person on the
36 same level of distribution, in the same class of trade, and
37 within the
38 same relevant geographic market as the purchaser where the
39 effect is to

40 injure competition.

41 (b) A sale of motor fuel of like grade and quality at
42 different prices
43 to persons at the same level of distribution is not a violation
44 of this

45 section if the difference in price is due to a difference in
46 the cost of
47 sale or delivery resulting from differing methods or quantities
48 at which

49 the grade of motor fuel is sold or delivered.

50 (c) Subject to the limitations of subdivision (b) of
51 section three
52 hundred seventy-c of this article, a sale made in good faith to
53 meet an

54 equally low price of a competitor selling motor fuel of like
55 grade and

56 quality which can be used in the same motor vehicle is not a
57 violation

58 of this section.

59 (d) It is unlawful for a refiner to sell any grade or quality
60 of motor

61 fuel to a wholesaler under written contract at a price,
62 after adding

63 federal, state, and local taxes and fees, which is higher than
64 the net

65 price, after deducting all allowances, rebates, and discounts,
66 at which

67 the refiner contemporaneously sells motor fuel of like grade
68 and quality

69 to a dealer in competition with any retail outlet supplied
70 by such

71 wholesaler, where the effect is to injure competition,
72 except to the

73 extent that the difference in price is attributable to a
74 rebate, rent

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1 subsidy, or other concession which is offered to the
2 wholesaler on

3 proportionately equal or comparable terms.

4 (e) An isolated, inadvertent incident involving the activity
5 prohibit-

6 ed pursuant to subdivision (a) or (d) of this section shall
7 not be a

8 violation of this article.

9 § 370-e. Discriminatory allocations unlawful. (a) It is
10 unlawful for

11 any person supplying motor fuel in this state to limit or
12 allocate the

8 quantity of motor fuel available to a reseller purchasing under
9 contract
10 from such supplier because such reseller was prevented by such
11 supplier
12 from purchasing the minimum quantities such reseller was
13 obligated to
14 purchase from such supplier in the immediately preceding
15 year, unless
16 the limitations or allocations are applied in a reasonable
17 and nondis-
18 crimatory manner among all resellers supplied by such
19 supplier under
20 contract in a general trade area and the supplier's own retail
21 outlets.
22 (b) It is unlawful for a supplier to limit or allocate for
23 more than
24 five consecutive days the quantity of motor fuel available to a
25 reseller
26 purchasing under contract from such supplier, unless the
27 limitations or
28 allocations are applied in a reasonable and
29 nondiscriminatory manner
30 among all resellers supplied by such supplier under contract in
31 a gener-
32 al trade area and the supplier's own retail outlets.
33 § 370-f. Unfair practices unlawful. (a) It shall be
34 unlawful for a
35 refiner or other supplier to fix or maintain the retail price
36 of motor
37 fuel at a retail outlet supplied by that refiner or supplier.
Nothing in
24 this section shall be construed to prevent a refiner or
25 supplier from
26 counseling concerning retail prices, provided no threat or
27 coercion is
28 used in the counseling. This subdivision shall not apply
29 to retail
30 outlets operated by the refiner or supplier.
31 (b) It is unlawful for any person who supplies motor fuel to
32 a dealer
33 for resale and who leases a retail outlet to the dealer to
34 impose any
35 material modification in the contractual arrangements during
36 the term of
37 the contract, including a material modification of the
38 leased retail
39 outlet, unless such modification is made in good faith and
40 based upon
41 reasonable business practices.
42 § 370-g. Certain rebates unlawful. It is unlawful for any
43 person sell-
44 ing motor fuel to offer or give a rebate, rent subsidy, or
45 concession of
46 any kind in connection, either directly or indirectly, with
47 the sale of
48 motor fuel to a person for resale when the seller does not
49 provide, on

38 proportionately equal terms, the same rebate, rent subsidy,
or conces-
39 sion, or the equivalent of the rebate, rent subsidy, or
concession, to
40 all persons purchasing for resale in the relevant
geographic market,
41 where the effect is to injure competition. If a wholesaler
receives a
42 rebate, rent subsidy, or concession, the wholesaler must
offer on
43 proportionately equal terms, the rebate, rent subsidy, or
concession, or
44 the equivalent of the rebate, rent subsidy, or concession, to
any retail
45 outlet supplied by such wholesaler to the extent the
wholesaler passes
46 through such rebate, rent subsidy or concession. However, a
rebate, rent
47 subsidy, or concession made in good faith to meet the same or a
compara-
48 ble rebate, rent subsidy, or concession of a competitor shall
not be a
49 violation of this article, provided that any person who sells
motor fuel
50 to any wholesaler or dealer under written contract for resale
in the
51 relevant geographic market shall offer the rebate, rent
subsidy, or
52 concession, or the equivalent of such rebate, rent subsidy, or
conces-
53 sion, to all other similarly situated wholesalers and dealers
on propor-
54 tionately equal terms.
55 § 370-h. Exempt sales. The provisions of this article shall
not apply
56 to the following retail sales by a refiner:
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1 (a) A bona fide clearance sale for the purpose of
discontinuing trade
2 in such motor fuel;
3 (b) A final business liquidation sale;
4 (c) A sale of the refiner's motor fuel by a fiduciary or
other officer
5 under the order or direction of any court; or
6 (d) Sales made during a grand opening to introduce a new or
remodeled
7 business not to exceed three days, which grand opening shall
be held
8 within sixty days from the date the new or remodeled
business begins
9 operations.
10 § 370-i. Enforcement; civil penalties. (a) Any person who
knowingly
11 violates this article shall be subject to a civil penalty not
to exceed

12 ten thousand dollars per violation. Each day that a violation
13 of this
14 article occurs shall be considered a separate violation, but
15 no civil
16 penalty shall exceed two hundred fifty thousand dollars.
17 (b) Any complaints regarding violations of this article shall
18 be first
19 filed with the state consumer protection board who shall
20 conduct an
21 investigation and may request in writing the production of
22 documents and
23 records as part of its investigation. Trade secrets and
24 proprietary
25 business information contained in the documents or records
26 received by
27 the state consumer protection board pursuant to a written
28 request or a
29 subpoena are confidential. If the person upon whom such request
30 was made
31 fails to produce the documents or records within thirty days
32 after the
33 date of the request, the state consumer protection board may
34 issue and
35 serve subpoenas to compel the production of such documents and
36 records.
37 If any person shall refuse to comply with a subpoena issued
38 under this
39 section, the state consumer protection board may petition a
40 court of
41 competent jurisdiction to enforce the subpoena and such
42 sanctions as the
43 court may direct. Refiners shall afford the state consumer
44 protection
45 board reasonable access to the refiners' posted terminal
46 price. After
47 completion of an investigation, the state consumer
48 protection board
49 shall either: (i) dismiss the complaint following a
50 determination that
51 no violation occurred; (ii) dismiss the complaint following a determi-
52 nation that there has been a de minimus injury to competition;
53 or (iii)
54 determine that a violation has likely occurred and, if so,
55 shall attempt
56 to resolve the matter by settlement. If no settlement is
57 achieved, then
58 the matter shall be referred to the attorney general for
59 further
60 proceedings, including, if necessary, legal action.
61 (c) Any records, documents, papers, maps, books, tapes,
62 photographs,
63 files, sound recordings, or other business material, regardless
64 of form
65 or characteristics, obtained by the state consumer
66 protection board

41 pursuant to subpoena are confidential. At the conclusion of an
investi-
42 gation, any matter determined by the state consumer
protection board,
43 the attorney general, or by a federal or state judicial or
administra-
44 tive body, to be a trade secret or proprietary confidential
business
45 information held by either the state consumer protection board
or the
46 attorney general pursuant to such investigation shall be
considered
47 confidential. Such materials may be used in any administrative
or judi-
48 cial proceeding so long as the confidential or proprietary
nature of the
49 material is maintained.
50 (d) The civil penalty imposed under this section and/or any
injunctive
51 relief may be sought in a civil action brought by the
attorney general
52 in any court of competent jurisdiction. If the attorney general
prevails
53 in a civil action, the court may award the attorney general
reasonable
54 attorneys' fees as it deems appropriate.

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1 § 370-j. Limitations period for actions. Any action
brought by the
2 attorney general shall be commenced within two years after the
alleged
3 violation occurred or should reasonably have been discovered.
4 § 2. Subdivision 2 of section 553 of the executive law, as
amended by
5 chapter 650 of the laws of 1974, is amended to read as follows:
6 2. The executive director shall have the power and duty to:
7 a. receive complaints of consumers and refer them to the
appropriate
8 federal, state or local agency authorized by law for
appropriate action
9 on such complaints;
10 b. advise and make recommendations to the governor on matters
affect-
11 ing the consumers of the state and promote and encourage the
protection
12 of the legitimate interests of consumers within the state;
[and]
13 c. on behalf of the board, initiate, intervene in, or
participate in
14 any proceedings before the public service commission, to
the extent
15 authorized by [~~sections~~] section twenty-four-a, seventy-one,
eighty-four
16 or ninety-six of the public service law or any other
applicable

17 provision of law, where he deems such initiation,
intervention or
18 participation to be necessary or appropriate[-]; and
19 d. on behalf of the board, initiate, investigate, attempt to
resolve,
20 and if necessary refer to the attorney general any matters or
complaints
21 received pursuant to article twenty-four-B of the general
business law
22 as provided in such article.
23 § 3. This act shall take effect immediately and shall expire
and be
24 deemed repealed 3 years after such date.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A8398

SPONSOR: Rules (Tonko)

TITLE OF BILL: An act to amend the general business law and the executive law, in relation to enacting the "New York motor fuel marketing practices act"; and providing for the repeal of such provisions upon the expiration thereof

PURPOSE: This legislation would preserve and promote competition in the marketing of motor fuel in New York State

SUMMARY OF PROVISIONS: Section one of this measure amends the General Business Law by adding a new article 24-B, entitled the "Motor Fuel Marketing Practices Act," which outlines and makes unlawful certain predatory and discriminatory pricing practices and rebates, exempts certain sales and sets civil penalties and enforcement. Section two of this measure amends subdivision two of § 553 of the Executive Law, authorizing the Executive Director of the Consumer Protection Board to initiate, investigate, attempt to resolve and if necessary refer to the Attorney General, any complaint received regarding these provisions.

JUSTIFICATION: A key component of the petroleum market in New York State is independent marketers who do not manufacture their own motor fuel (gasoline, diesel fuel) but provide the marketplace with an aggressive, innovative and price competitive sector. In the past these marketers have provided an effective yardstick keeping prices competitive by seeking lower cost supply and bringing entrepreneurial cost-efficiencies to the market. This legislation would prohibit pricing practices designed to diminish or eliminate the independent sector which, over

time would yield higher prices and an overall less efficient marketplace.

Independent marketers of motor fuel are vital to a healthy, competitive marketplace, but are unable to survive subsidized below cost pricing at the retail level by non-independent sectors of the market. Fair and healthy competition in the marketing of motor fuel provides maximum benefits to the consumers of the state, and certain market practices which impair such competition are contrary to the public interest. Predatory pricing practices are unfair trade practices and restraints that adversely affect motor fuel competition. Subsidized pricing is inherently predatory because it is unfair and destructive to, and reduces competition in, the motor fuel marketing industry. Independent marketers must be protected from subsidized and predatory pricing.

LEGISLATIVE HISTORY: S.4522-B of 2002, S.777 of 2000, S.2772-A of 1998, S.7299 of 1996.

FISCAL IMPLICATIONS: None.

EFFECTIVE DATE: This act shall take effect immediately and shall expire and be deemed repealed three years after the effective date.
