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SENATE BILL NO. 458

Offered January 9, 2002

Prefiled January 9, 2002

A BILL to amend and reenact § 58.1-2201 of the Code of Virginia and to amend the Code of Virginia by adding in Title 58.1 sections numbered 58.1-2202.1 and 58.1-2270.1, relating to fair marketing of motor fuels; penalty.

Patrons—Hawkins, Barry, Byrne, Colgan, Edwards, Hanger, Houck, Lambert, Marsh, Marye, Maxwell, Miller, K.G., Puckett, Puller, Quayle, Reynolds, Ruff and Trumbo; Delegates: Amundson, Armstrong, Barlow, Bloxom, Bolvin, Bryant, Byron, Christian, Dudley, Gear, Hamilton, Ingram, Jones, S.C., Keister, Kilgore, Louderback, Miles, Parrish, Phillips, Stump and Woodrum

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-2201 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding in Title 58.1 sections numbered 58.1-2202.1 and 58.1-2270.1, as follows:

§ 58.1-2201. Definitions.

As used in this chapter, unless the context requires otherwise:

"Alternative fuel" means a combustible gas, liquid or other energy source that can be used to generate power to operate a highway vehicle and that is not a motor fuel.

"Assessment" means a written determination by the Department of the amount of taxes owed by a taxpayer. Assessments made by the Department shall be deemed to be made when a written notice of assessment is delivered to the taxpayer by the Department or is mailed by certified or registered mail to the taxpayer at the last known address appearing in the Commissioner's files.

"Average posted terminal price" means the average of the terminal prices of both branded and unbranded motor fuel to the wholesale class of trade, as established by refiners or suppliers by grade of motor fuel, within an area routinely and customarily served by the terminal, as published daily by the Oil Price Information Service or any other pricing service or source regularly used and accepted by the petroleum industry.

"Aviation consumer" means any person who uses in excess of 100,000 gallons of aviation jet fuel in any fiscal year and is licensed pursuant to Article 2 (§ 58.1-2204 et seq.) of this chapter.

"Aviation fuel" means aviation gasoline or aviation jet fuel.

"Aviation gasoline" means fuel designed for use in the operation of aircraft other than jet aircraft, and sold or used for that purpose.

"Aviation jet fuel" means fuel designed for use in the operation of jet or turbo-prop aircraft, and sold or used for that purpose.

"Blended fuel" means a mixture composed of gasoline or diesel fuel and another liquid, other than a de minimus amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a fuel in a highway vehicle.

"Blender" means a person who produces blended fuel outside the terminal transfer system.

"Bonded aviation jet fuel" means aviation jet fuel held in bonded storage under United States Customs Law and delivered into a fuel supply tank of aircraft operated by certificated air carriers on international flights.

"Bonded importer" means a person, other than a supplier, who imports, by transport truck or another means of transfer outside the terminal transfer system, motor fuel removed from a terminal located in another state in which (i) the state from which the fuel is imported does not require the seller of the fuel to collect motor fuel tax on the removal either at that state's rate or the rate of the destination state; (ii) the supplier of the fuel is not an elective supplier; or (iii) the supplier of the fuel is not a permissive supplier.

"Bulk plant" means a motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.

"Bulk user" means a person who maintains storage facilities for motor fuel and uses part or all of the stored fuel to operate a highway vehicle, watercraft, or aircraft.

"Bulk user of alternative fuel" means a person who maintains storage facilities for alternative fuel and uses part or all of the stored fuel to operate a highway vehicle.

"Commercial watercraft" means a watercraft employed in the business of commercial fishing, transporting persons or property for compensation or hire, or any other trade or business unless the

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56 watercraft is used in an activity of a type generally considered entertainment, amusement, or recreation.

57 "Commissioner" means the Commissioner of the Department of Motor Vehicles.

58 "Corporate or partnership officer" means an officer or director of a corporation, partner of a
59 partnership, or member of a limited liability company, who as such officer, director, partner or member
60 is under a duty to perform on behalf of the corporation, partnership, or limited liability company the tax
61 collection, accounting, or remitting obligations.

62 "Department" means the Department of Motor Vehicles, acting directly or through its duly authorized
63 officers and agents.

64 "Designated inspection site" means any state highway inspection station, weigh station, agricultural
65 inspection station, mobile station, or other location designated by the Commissioner to be used as a fuel
66 inspection site.

67 "Destination state" means the state, territory, or foreign country to which motor fuel is directed for
68 delivery into a storage facility, a receptacle, a container, or a type of transportation equipment for the
69 purpose of resale or use. The term shall not include a tribal reservation of any recognized Native
70 American tribe.

71 "Diesel fuel" means any liquid that is suitable for use as a fuel in a diesel-powered highway vehicle
72 or watercraft. The term shall include undyed #1 fuel oil and undyed #2 fuel oil, but shall not include
73 gasoline or aviation jet fuel.

74 "Distributor" means a person who acquires motor fuel from a supplier or from another distributor for
75 subsequent sale.

76 "Dyed diesel fuel" means diesel fuel that meets the dyeing and marking requirements of 26 U.S.C.
77 § 4082.

78 "Elective supplier" means a supplier who (i) is required to be licensed in the Commonwealth and (ii)
79 elects to collect the tax due the Commonwealth on motor fuel that is removed at a terminal located in
80 another state and has Virginia as its destination state.

81 "End seller" means the person who sells fuel to the ultimate user of the fuel.

82 "Export" means to obtain motor fuel in Virginia for sale or other distribution in another state,
83 territory, or foreign country. Motor fuel delivered out-of-state by or for the seller constitutes an export
84 by the seller, and motor fuel delivered out-of-state by or for the purchaser constitutes an export by the
85 purchaser.

86 "Fuel" includes motor fuel and alternative fuel.

87 "Fuel alcohol" means methanol or fuel grade ethanol.

88 "Fuel alcohol provider" means a person who (i) produces fuel alcohol or (ii) imports fuel alcohol
89 outside the terminal transfer system by means of a marine vessel, a transport truck, or a railroad tank
90 car.

91 "Gasohol" means a blended fuel composed of gasoline and fuel grade ethanol.

92 "Gasoline" means (i) all products that are commonly or commercially known or sold as gasoline and
93 are suitable for use as a fuel in a highway vehicle, aircraft, or watercraft, other than products that have
94 an American Society for Testing Materials octane number of less than seventy-five as determined by the
95 motor method; (ii) a petroleum product component of gasoline, such as naptha, reformate, or toluene;
96 (iii) gasohol; and (iv) fuel grade ethanol. The term does not include aviation gasoline sold for use in an
97 aircraft engine.

98 "Governmental entity" means (i) the Commonwealth or any political subdivision thereof or (ii) the
99 United States or its departments, agencies, and instrumentalities.

100 "Gross gallons" means an amount of motor fuel measured in gallons, exclusive of any temperature,
101 pressure, or other adjustments.

102 "Heating oil" means any combustible liquid, including but not limited to dyed #1 fuel oil, dyed #2
103 fuel oil, and kerosene, that is burned in a boiler, furnace, or stove for heating or for industrial
104 processing purposes.

105 "Highway" means every way or place of whatever nature open to the use of the public for purposes
106 of vehicular travel in the Commonwealth, including the streets and alleys in towns and cities.

107 "Highway vehicle" means a self-propelled vehicle designed for use on a highway.

108 "Import" means to bring motor fuel into Virginia by any means of conveyance other than in the fuel
109 supply tank of a highway vehicle. Motor fuel delivered into Virginia from out-of-state by or for the
110 seller constitutes an import by the seller, and motor fuel delivered into Virginia from out-of-state by or
111 for the purchaser constitutes an import by the purchaser.

112 "In-state-only supplier" means (i) a supplier who is required to have a license and who elects not to
113 collect the tax due the Commonwealth on motor fuel that is removed by that supplier at a terminal
114 located in another state and has Virginia as its destination state or (ii) a supplier who does business only
115 in Virginia.

116 "Licensee" means any person licensed by the Commissioner pursuant to Article 2 (§ 58.1-2204 et
117 seq.) of this chapter or § 58.1-2244.

- "Liquid" means any substance that is liquid above its freezing point.
- "Motor fuel" means gasoline, diesel fuel, blended fuel, and aviation fuel.
- "Motor fuel transporter" means a person who transports motor fuel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a marine vessel.
- "Net gallons" means the amount of motor fuel measured in gallons when adjusted to a temperature of sixty degrees Fahrenheit and a pressure of 14.7 pounds per square inch.
- "Occasional importer" means any person who (i) imports motor fuel by any means outside the terminal transfer system and (ii) is not required to be licensed as a bonded importer.
- "Permissive supplier" means an out-of-state supplier who elects, but is not required, to have a supplier's license under this chapter.
- "Person" means any individual; firm; cooperative; association; corporation; limited liability corporation; trust; business trust; syndicate; partnership; limited liability partnership; joint venture; receiver; trustee in bankruptcy; club, society or other group or combination acting as a unit; or public body, including but not limited to the Commonwealth, any other state, and any agency, department, institution, political subdivision or instrumentality of the Commonwealth or any other state.
- "Position holder" means a person who holds an inventory position of motor fuel in a terminal, as reflected on the records of the terminal operator. A person holds an "inventory position of motor fuel" when he has a contract with the terminal operator for the use of storage facilities and terminaling services for fuel at the terminal. The term includes a terminal operator who owns fuel in the terminal.
- "Principal" means (i) if a partnership, all its partners; (ii) if a corporation, all its officers, directors, and controlling direct or indirect owners; (iii) if a limited liability company, all its members; and (iv) or an individual.
- "Provider of alternative fuel" means a person who (i) acquires alternative fuel for sale or delivery to a bulk user or a retailer; (ii) maintains storage facilities for alternative fuel, part or all of which the person sells to someone other than a bulk user or a retailer to operate a highway vehicle; (iii) sells alternative fuel and uses part of the fuel acquired for sale to operate a highway vehicle by means of a fuel supply line from the cargo tank of the vehicle to the engine of the vehicle; or (iv) imports alternative fuel into Virginia, by a means other than the usual tank or receptacle connected with the engine of a highway vehicle, for sale or use by that person to operate a highway vehicle.
- "Rack" means a facility that contains a mechanism for delivering motor fuel from a refinery, terminal, or bulk plant into a transport truck, railroad tank car, or other means of transfer that is outside the terminal transfer system.
- "Refiner" means any person who owns, operates, or otherwise controls a refinery.
- "Refinery" means a facility for the manufacture or reprocessing of finished or unfinished petroleum products usable as motor fuel and from which motor fuel may be removed by pipeline or marine vessel or at a rack.
- "Removal" means a physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or other means of conveyance outside the terminal transfer system is complete upon delivery into the means of conveyance.
- "Retailer" means a person who (i) maintains storage facilities for motor fuel and (ii) sells the fuel at retail or dispenses the fuel at a retail location, *which includes, but is not limited to, any facility that sells only to members.*
- "Retailer cost" means the total of (i) the average posted terminal price of the motor fuel, by grade, at the terminal from which the motor fuel was delivered to the retailer; (ii) all applicable taxes and fees pursuant to federal, state and local law to the extent not included in the average posted terminal price; and (iii) the actual freight charges to the retail outlet.*
- "Retailer of alternative fuel" means a person who (i) maintains storage facilities for alternative fuel and (ii) sells the fuel at retail or dispenses the fuel at a retail location.
- "Sale" or "sell" means any transfer, gift, sale, offer for sale, or advertisement for sale in any manner or by any means whatsoever.*
- "Supplier" means (i) a position holder, (ii) a person who receives motor fuel pursuant to a two-party exchange, or (iii) a fuel alcohol provider. A licensed supplier includes a licensed elective supplier and licensed permissive supplier.
- "System transfer" means a transfer (i) of motor fuel within the terminal transfer system or (ii) of fuel grade ethanol by transport truck or railroad tank car.
- "Tank wagon" means a straight truck or straight truck/trailer combination designed or used to carry fuel and having a capacity of less than 6,000 gallons.
- "Terminal" means a motor fuel storage and distribution facility (i) to which a terminal control number has been assigned by the Internal Revenue Service, (ii) to which motor fuel is supplied by pipeline or marine vessel, and (iii) from which motor fuel may be removed at a rack.
- "Terminal operator" means a person who owns, operates, or otherwise controls a terminal.

179 "Terminal transfer system" means a motor fuel distribution system consisting of refineries, pipelines,
180 marine vessels, and terminals, and which is a "bulk transfer/terminal system" under 26 C.F.R. Part
181 48.4081-1.

182 "Transmix" means (i) the buffer or interface between two different products in a pipeline shipment or
183 (ii) a mix of two different products within a refinery or terminal that results in an off-grade mixture.

184 "Transport truck" means a tractor truck/semitrailer combination designed or used to transport cargoes
185 of motor fuel over a highway.

186 "Trustee" means a person who (i) is licensed as a supplier, an elective supplier, or a permissive
187 supplier and receives tax payments from and on behalf of a licensed or unlicensed distributor, or other
188 person pursuant to § 58.1-2231 or (ii) is licensed as a provider of alternative fuel and receives tax
189 payments from and on behalf of a bulk user of alternative fuel, retailer of alternative fuel or other
190 person pursuant to § 58.1-2252.

191 "Two-party exchange" means a transaction in which fuel is transferred from one licensed supplier to
192 another licensed supplier pursuant to an exchange agreement, which transaction (i) includes a transfer
193 from the person who holds the inventory position in taxable motor fuel in the terminal as reflected on
194 the records of the terminal operator and (ii) is completed prior to removal of the product from the
195 terminal by the receiving exchange partner.

196 "Undyed diesel fuel" means diesel fuel that is not subject to the United States Environmental
197 Protection Agency or Internal Revenue Service fuel-dyeing requirements.

198 "Use" means the actual consumption or receipt of motor fuel by any person into a highway vehicle,
199 aircraft, or watercraft.

200 "Watercraft" means any vehicle used on waterways.

201 *§ 58.1-2202.1. Below-cost sales of motor fuels; Commissioner's authority.*

202 *The Commissioner shall have the authority to enforce the provisions of § 58.1-2270.1 on all licensees*
203 *and retailers of motor fuels.*

204 *§ 58.1-2270.1. Below-cost sales of motor fuels; civil penalty.*

205 *A. Except as provided in subsection B, any person who sells any grade or quality of motor fuel at a*
206 *retail outlet in the Commonwealth at a price that is below retailer cost, after deducting any discounts*
207 *received at the time of purchase of the motor fuel at the retail outlet, shall be subject to the penalties*
208 *described hereinafter.*

209 *B. The provisions of subsection A shall not apply to the following sales below retailer cost:*

210 *1. An isolated and inadvertent sale;*

211 *2. A sale made in good faith to meet an equally low retail price, net of any discounts received at the*
212 *time of sale, of a competitor selling motor fuel of like grade as required by federal or state law, within*
213 *the same or adjacent county, city or town;*

214 *3. A bona fide clearance sale for the purpose of discontinuing trade in such motor fuel;*

215 *4. A final business liquidation sale;*

216 *5. A sale of the refiner's motor fuel by a fiduciary or other office under the order or direction of any*
217 *court; and*

218 *6. Any sales made during a grand opening to introduce a new or remodeled business not to exceed*
219 *three days, which grand opening shall be held within thirty days from the date the new or remodeled*
220 *business begins operations.*

221 *C. If the Commissioner receives a complaint in writing from another person who sells motor fuel at*
222 *a retail outlet that the provisions of subsection A are being or have been violated, the Commissioner*
223 *shall investigate and determine within ten business days of the receipt of the complaint whether the*
224 *allegations contained in the complaint are true. If the Commissioner finds that the provisions of*
225 *subsection A are being or have been violated, the Commissioner shall send written notice immediately of*
226 *such finding to the person violating such provisions along with an order to cease and desist such*
227 *unlawful sales immediately.*

228 *D. Any person that the Commissioner determines is in violation of subsection A shall be subject to a*
229 *civil penalty of \$5,000 for the first violation and \$10,000 for each violation thereafter.*

230 *E. No person by action or agreement, pursuant to Chapter 2.2 (§ 59.1-21.8 et seq.) of Title 59.1,*
231 *shall impose requirements on a retailer that result in a violation of this section.*