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SENATE BILL NO. 458

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Commerce and Labor)

(Patron Prior to Substitute—Senator Hawkins)

Senate Amendments in [] — January 24, 2002

A BILL to amend the Code of Virginia by adding a section numbered 46.2-217.1 and in Title 59.1 a chapter numbered 2.2:2, consisting of sections numbered 59.1-21.18:5 and 59.1-21.18:6, relating to fair marketing of motor fuels; penalty.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 46.2-217.1 and in Title 59.1 a chapter numbered 2.2:2, consisting of sections numbered 59.1-21.18:5 and 59.1-21.18:7, as follows:

§ 46.2-217.1. Below-cost sales of motor fuels; Commissioner's authority.

The Commissioner shall have the authority to enforce the provisions of Chapter 2.2:2 (§ 59.1-21.18:5 et seq.) of Title 59.1 with respect to all licensees and retailers of motor fuels.

CHAPTER 2.2:2.

BELOW-COST SALES OF MOTOR FUELS.

§ 59.1-21.18:5. Definitions.

As used in this chapter:

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

"Lowest terminal of origin price" means the lowest price of motor fuel at the rack as established by refiners or suppliers by grade of motor fuel, as published daily by the Oil Price Information Service, and known in the industry as "OPIS low."

"Motor fuel" has the same meaning as provided in § 58.1-2201.

"Person" has the same meaning as provided in § 58.1-2201.

"Rack" has the same meaning as provided in § 58.1-2201.

"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.

"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 lower of either the lowest terminal of origin price of the motor fuel, by grade, at the terminal from which the motor fuel was delivered to the retail location or the actual cost of the motor fuel, less all discounts or rebates, delivered to the retail location; (ii) all applicable taxes and fees pursuant to federal, state, and local law to the extent not included in the lowest terminal of origin price; and (iii) the lower of the actual transportation costs or the lowest public rate available from a licensed common carrier of motor fuels, from the terminal of origin to the final retail outlet destination.

"Sale" or "sell" means any transfer, gift, sale, offer for sale, or advertisement for sale in any manner or by any means whatsoever.

"Supplier" has the same meaning as provided in § 58.1-2201.

"Terminal" has the same meaning as provided in § 58.1-2201.

§ 59.1-21.18:6. Below-cost sales of motor fuels; civil penalty.

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

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

1. An isolated and inadvertent sale;

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

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

4. A final business liquidation sale;

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

6. Any sales made during a grand opening to introduce a new or remodeled business not to exceed

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60 three days, which grand opening shall be held within thirty days from the date the new or remodeled
61 business begins operations.

62 C. If the Commissioner receives a complaint in writing from another person who sells motor fuel at
63 a retail outlet who believes that the provisions of subsection A are being or have been violated, the
64 Commissioner shall promptly investigate and determine within ten business days of the receipt of the
65 complaint whether the allegations contained in the complaint are true. The retailer that is the subject of
66 a complaint shall promptly provide the Commissioner with all documentation requested in order for the
67 Commissioner to determine the retailer cost of the motor fuel in question. The Commissioner ~~[may find~~
68 ~~that the provisions of subsection A are being or have been violated if he also determines that (i) sales~~
69 ~~have been made below retailer cost and (ii) such sales caused or are likely to cause a disruption in the~~
70 ~~motor fuel market, or some segment thereof, that have caused or are likely to cause a substantial~~
71 ~~reduction in competition so as to adversely affect the public which requires an adequate supply of motor~~
72 ~~fuel at reasonable and fair prices.~~ shall find that the provisions of subsection A have been violated if
73 the retailer sold motor fuel below retailer cost and such sales do not satisfy the exemptions contained in
74 subsection B.] If the Commissioner so finds, he shall send written notice immediately of such findings
75 to the person violating such provisions along with an order to cease and desist such unlawful sales
76 immediately.

77 ~~[D. Any person who the Commissioner determines is in violation of subsection A, fails to provide~~
78 ~~the necessary documentation to the Commissioner or knowingly submits false documentation shall be~~
79 ~~subject to a civil penalty of \$5,000 for the first violation and \$10,000 for each violation thereafter. D.~~
80 ~~The Commissioner shall determine after issuing an order to cease and desist such unlawful sales: (i) if~~
81 ~~such unlawful sales caused a disruption in the motor fuel market, or some segment thereof, or (ii) that~~
82 ~~such unlawful sales have caused or are likely to cause a substantial reduction in competition so as to~~
83 ~~adversely affect the public which requires an adequate supply of motor fuel at reasonable and fair~~
84 ~~prices. Any person the Commissioner determines to have violated subsection A and (i) or (ii) of this~~
85 ~~subsection, shall be subject to a civil fine of \$5,000.00 for the first violation and \$10,000.00 for each~~
86 ~~violation thereafter.~~

87 Any person who fails to provide the necessary documentation to the Commissioner or knowingly
88 submits false documentation to the Commissioner shall be subject to a civil penalty not to exceed
89 \$5,000.00 per violation.]

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