

# HOUSE BILL No. 4949

June 16, 2005, Introduced by Reps. Casperson, Caul, Adamini, Brown, Nofs, Emmons, Vander Veen, Polidori, Gleason, Spade, Booher, Green, Meyer, Gaffney, Hune, Sak, Stahl, Ball, Kahn, Garfield, Hansen, Stewart, Jones, Pastor, Proos, Palsrok, Hildenbrand, Hummel, Kooiman, Schuitmaker, Condino and Van Regenmorter and referred to the Committee on Transportation.

A bill to prevent certain unfair methods of competition and pricing practices in the distribution of motor fuel; to prescribe powers and duties of certain state officers and agencies and the courts; and to provide remedies, fines, and penalties for violations of this act.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1       Sec. 1. This act shall be known and may be cited as the  
2 "petroleum marketing stabilization act".

3       Sec. 2. As used in this act:

4       (a) "Affiliate" means a person who controls, is controlled by,  
5 or is under common control with, any other person, other than by  
6 means of a franchise. The term also includes a person in a business

1 relationship with any other person related to the retail sale of  
2 motor fuel.

3 (b) "Average posted terminal price" means the average posted  
4 rack price, by grade of motor fuel, as published by a petroleum  
5 price reporting service, at which motor fuel is offered for sale at  
6 the close of business on the determination date by all refiners,  
7 suppliers, and wholesalers of motor vehicle fuel at a terminal,  
8 plus any excise, sales, or use taxes imposed on the motor fuel or  
9 on its sale, any cost incurred for transportation, and any other  
10 fees or charges that are not otherwise included in the average  
11 posted rack price. As used in this subdivision, "average" means the  
12 arithmetic mean.

13 (c) "Basic cost" means the lesser of the invoice cost to a  
14 retailer, or the lowest replacement cost to the retailer within 5  
15 days before the date of sale, in the quantity last purchased either  
16 within or before that 5-day period, less customary discounts for  
17 cash, plus the full value of any freight costs, and taxes, if not  
18 already included in the invoice cost to the retailer.

19 (d) "Competition" includes a person who competes with another  
20 person for retail sales of motor fuel in the same market area.

21 (e) "Cost of doing business component" means all costs  
22 incurred in the conduct of business, including, but not limited to,  
23 all labor costs, salaries of executives and officers, fair market  
24 rent value, interest on borrowed capital, depreciation, costs for  
25 maintenance of equipment, credit card fees, all license fees,  
26 taxes, insurance, and advertising costs, at a retail location or an  
27 unattended location, determined in accordance with generally

1 accepted accounting principles.

2 (f) "Customary discount for cash" includes an allowance made  
3 to a retailer when the retailer pays for motor fuel within a  
4 limited or specified time.

5 (g) "Determination date" means 1 of the following:

6 (i) If a retailer sells motor fuel on a day other than the day  
7 on which the retailer last purchased any motor fuel and the sale of  
8 the motor fuel by the retailer occurs no later than 10 days after  
9 its last purchase by the retailer, either the day preceding the day  
10 of the sale of motor fuel by the retailer or the day on which motor  
11 fuel was last purchased by the retailer, as selected by the  
12 retailer.

13 (ii) If subparagraph (i) does not apply, the day preceding the  
14 day of the sale at retail of motor fuel.

15 (h) "Existing price of a competitor" means a lawful price that  
16 is simultaneously offered to a buyer for motor fuel of like quality  
17 and quantity by a person who is a competitor of the retailer and  
18 from whom the buyer can practicably purchase the motor fuel.

19 (i) "Invoice" means either of the following:

20 (i) A document issued by a refiner or supplier to a wholesaler  
21 or retailer evidencing a sale of motor fuel that contains the  
22 invoice cost of the motor fuel.

23 (ii) A document issued by a wholesaler to a retailer evidencing  
24 a sale of motor fuel that contains the invoice cost of the motor  
25 fuel from an invoice issued by a refiner or supplier.

26 (j) "Invoice cost" means 1 of the following:

27 (i) For a sale of motor fuel from a refiner or supplier to a

1 wholesaler or retailer, either the sale price shown on an invoice  
2 from a refiner or supplier to a wholesaler or retailer who is not  
3 its affiliate, or the price generally available from the refiner or  
4 supplier to wholesalers and retailers who are not its affiliates  
5 from a terminal at which the refiner or supplier sells or offers to  
6 sell motor fuel to wholesalers and retailers who are not its  
7 affiliates, whichever is greater.

8 (ii) For a sale of motor fuel by a wholesaler to a retailer,  
9 either the sale price shown on the invoice from the wholesaler to  
10 the retailer, or the price the wholesaler paid the refiner or  
11 supplier for that motor fuel, whichever is greater.

12 (k) "Maximum cost of doing business component" means 3 times  
13 the cost of doing business component.

14 (l) "Maximum selling price" or "maximum sales price" means the  
15 retail sales price measured as the retailer cost, applying the  
16 maximum cost of doing business component.

17 (m) "Motor fuel" means that term as defined in section 4 of  
18 the motor fuel tax act, 2000 PA 403, MCL 207.1004.

19 Sec. 3. As used in this act:

20 (a) "Person" means an individual, partnership, corporation,  
21 association, limited liability company, governmental entity, or  
22 other legal entity.

23 (b) "Petroleum price reporting service" means a wholesale  
24 petroleum product price reporting service that is recognized  
25 nationwide.

26 (c) "Rack" means a mechanism for delivering motor fuel from a  
27 refinery, terminal, or marine vessel into a railroad tank car, a

1 transport truck, a tank wagon, the fuel supply tank of a marine  
2 vessel, or other means of transfer outside of the bulk  
3 transfer/terminal system.

4 (d) "Refiner" means that term as defined in section 5 of the  
5 motor fuel tax act, 2000 PA 403, MCL 207.1005.

6 (e) "Replacement cost" means the cost at which a retailer  
7 could have purchased motor fuel on the determination date if  
8 purchased in the same quantity as the retailer's last purchase of  
9 motor fuel.

10 (f) "Retail location" means a location where a retailer sells  
11 motor fuel and where the presence of an attendant at the time of a  
12 sale is required by law.

13 (g) "Retailer" means a person that meets all of the following:

14 (i) Maintains a storage facility for motor fuel.

15 (ii) Sells motor fuel at a retail location that sells only to  
16 members, at any other retail location, or at an unattended  
17 location.

18 (iii) Sells motor fuel to the end user of the motor fuel.

19 (h) "Retailer cost" means 1 of the following:

20 (i) In a retail sale of motor fuel by a retailer at a retail  
21 location, the lesser of the following:

22 (A) The invoice cost of the motor fuel to the retailer on the  
23 determination date or the replacement cost of the motor fuel on the  
24 determination date, whichever is lower, less customary discounts  
25 for cash, plus any excise, sales, or use taxes imposed on the motor  
26 fuel or on its sale and any cost incurred for transportation and  
27 any other fees or charges not otherwise included in the invoice

1 cost or the replacement cost of the motor fuel, plus the cost of  
2 doing business component.

3 (B) The average posted terminal price on the determination  
4 date at the terminal located closest to the retailer, plus the cost  
5 of doing business component.

6 (ii) In a retail sale of motor fuel by a retailer at an  
7 unattended location, the lesser of the following:

8 (A) The invoice cost of the motor fuel to the retailer on the  
9 determination date or the replacement cost of the motor fuel on the  
10 determination date, whichever is lower, less customary discounts  
11 for cash, plus any excise, sales, or use taxes imposed on the motor  
12 fuel or on its sale and any cost incurred for transportation and  
13 any other fees or charges not otherwise included in the invoice  
14 cost or the replacement cost of the motor fuel, plus the cost of  
15 doing business component.

16 (B) The average posted terminal price on the determination  
17 date at the terminal located closest to the retailer, plus the cost  
18 of doing business component.

19 Sec. 4. As used in this act:

20 (a) "Sell", "sale", or "sold" means a transfer of property for  
21 any consideration. The term includes an advertising or offer to  
22 sell or any transfer of property where title is retained by the  
23 retailer as security for the payment of the purchase price. In  
24 determining a selling price of motor fuel by a retailer under this  
25 act, all fractions of a cent shall be carried to the next full  
26 cent.

27 (b) "Sell at retail", "sale at retail", and "retail sale" mean

1 a transfer for a valuable consideration, made in the ordinary  
2 course of trade or in the usual conduct of a retailer's business,  
3 of title to tangible personal property to a purchaser for  
4 consumption or use other than resale or further processing or  
5 manufacturing.

6 (c) "Supplier" means that term as defined in section 5 of the  
7 motor fuel tax act, 2000 PA 403, MCL 207.1005.

8 (d) "Terminal" means a motor fuel storage and distribution  
9 facility that is supplied by a pipeline or marine vessel, from  
10 which motor fuel may be removed at a rack. If 2 or more terminals  
11 are included in the same geographic area by a petroleum price  
12 reporting service, they are considered 1 terminal for purposes of  
13 this act.

14 (e) "Unattended location" means a location where a retailer  
15 sells motor fuel and where the presence of an attendant at the time  
16 of a sale is not required by law.

17 (f) "Wholesaler" means that term as defined in section 6 of  
18 the motor fuel tax act, 2000 PA 403, MCL 207.1006.

19 Sec. 5. (1) Except as provided in subsection (2), a retailer  
20 engaged in commerce in this state shall not sell or offer to sell  
21 motor fuel below retailer cost at a retail location or unattended  
22 location.

23 (2) It is not a violation of subsection (1) to establish a  
24 sale price for motor fuel in good faith to meet an equally low  
25 lawful price of a competitor that is subject to this act, located  
26 in the same market area, and selling the same or a similar product  
27 of like grade and quality.

1       Sec. 6. A retailer engaged in commerce in this state shall not  
2 sell or offer to sell motor fuel for a price above the maximum sale  
3 price at a retail location or unattended location.

4       Sec. 7. A retailer shall not directly or indirectly give a  
5 rebate, allowance, concession, or benefit of any kind in connection  
6 with a sale of motor fuel at a retail location or an unattended  
7 location that permits any person to obtain motor fuel from the  
8 retailer below the retailer cost.

9       Sec. 8. A retailer or an affiliate of a retailer shall not  
10 engage in any of the following:

11       (a) An advertisement, offer for sale, or sale involving motor  
12 fuel and 1 or more other items at a combined price, if the combined  
13 selling price is below the retailer cost of the motor fuel and the  
14 basic cost of the other item or items.

15       (b) An advertisement, offer of sale, or sale involving motor  
16 fuel that includes the giving of 1 or more coupons for free or  
17 discounted items, or gifts of any kind, if the combined selling  
18 price of the motor fuel and all items for which a coupon or gift is  
19 given is below the sum of the retail cost of the motor fuel, the  
20 face value of any coupons given, and the basic cost of any item  
21 given as a gift.

22       Sec. 9. This act does not apply to a retail sale of motor fuel  
23 that meets any of the following:

24       (a) It is made in an isolated transaction that is not in the  
25 usual course of business.

26       (b) Motor fuel is advertised, offered for sale, or sold in a  
27 bona fide clearance sale for the purpose of discontinuing trade in



1 that motor fuel, and both of the following are met:

2 (i) The advertising, offer to sell, or sale states the reason  
3 for the sale and the quantity of the motor fuel available for sale.

4 (ii) The motor fuel is kept separate from other motor fuel  
5 stocks, and clearly and legibly marked with the reason for the  
6 sale.

7 (c) Motor fuel is advertised, offered for sale, or sold as  
8 imperfect or damaged, and both of the following are met:

9 (i) The advertising, offer of sale, or sale states the reason  
10 for the sale and the quantity of motor fuel available for sale.

11 (ii) The motor fuel is kept separate from other motor fuel  
12 stocks and clearly and legibly marked with the reason for the sale.

13 (d) Motor fuel is sold as part of the final liquidation of a  
14 business.

15 (e) Motor fuel is advertised, offered for sale, or sold by a  
16 fiduciary under the order or direction of a court.

17 (f) Motor fuel is advertised, offered for sale, or sold during  
18 a grand opening to introduce a new or remodeled retail location if  
19 the grand opening meets both of the following:

20 (i) Is held for 3 days or less.

21 (ii) Is held within 60 days after the new or remodeled retail  
22 location begins operations.

23 Sec. 10. An express or implied agreement that violates this  
24 act is void and unenforceable.

25 Sec. 11. An action for violation of this act shall be brought  
26 in a circuit court where venue is proper without regard to the  
27 amount in controversy.

1       Sec. 12. (1) If a prosecuting attorney has reasonable cause to  
2 believe that a person has information or is in possession, custody,  
3 or control of any document or other tangible object relevant to an  
4 investigation for violation of this act, the prosecuting attorney  
5 may serve upon the person, before bringing any action in the  
6 circuit court, a written demand to appear and be examined under  
7 oath, and to produce the document or object for inspection and  
8 copying. The demand shall meet all of the following:

9       (a) Be served upon the person in the manner required for  
10 service of process in this state.

11       (b) Describe the nature of the conduct constituting the  
12 violation under investigation.

13       (c) Describe the document or object with sufficient  
14 definiteness to permit it to be fairly identified.

15       (d) If demanded, contain a copy of the written  
16 interrogatories.

17       (e) Prescribe a reasonable time at which the person must  
18 appear to testify, within which to answer the written  
19 interrogatories, and within which the document or object must be  
20 produced, and advise the person that objections to or reasons for  
21 not complying with the demand may be filed with the prosecuting  
22 attorney on or before that time.

23       (f) Specify a place for the taking of testimony or for  
24 production within the county in which the person resides or  
25 maintains a principal place of business in this state and designate  
26 the person who shall be custodian of the document or object.

27       (g) Contain a copy of subsection (2).

1           (2) If a person objects to or otherwise fails to comply with  
2 the written demand served upon him or her under subsection (1), the  
3 prosecuting attorney may file in the circuit court in the county in  
4 which the person resides or in which the person maintains a  
5 principal place of business within this state an action to enforce  
6 the demand. Notice of hearing the action and a copy of all  
7 pleadings shall be served upon the person, who may appear in  
8 opposition. If the court finds that the demand is proper, that  
9 there is reasonable cause to believe that there may have been or is  
10 presently occurring a violation of this act, and that the  
11 information sought or document or object demanded is relevant to  
12 the investigation, the court shall order the person to comply with  
13 the demand, subject to modification the court may prescribe. Upon  
14 motion by the person and for good cause shown, the court may make  
15 any further order in the proceedings that justice requires to  
16 protect the person from unreasonable annoyance, embarrassment,  
17 oppression, burden, or expense.

18           (3) Any procedure, testimony taken, or material produced shall  
19 be kept confidential by a prosecuting attorney before bringing an  
20 action against a person under this act for the violation under  
21 investigation, unless confidentiality is waived by the person being  
22 investigated and the person who has testified, answered  
23 interrogatories, or produced material, or disclosure is authorized  
24 by the court.

25           Sec. 13. A prosecuting attorney may bring an action for  
26 appropriate injunctive or other equitable relief and civil  
27 penalties in the name of the state for a violation of this act. The

1 court may assess for benefit of the state a civil penalty of not  
2 more than \$2,500.00 for each violation of this act, subject to a  
3 maximum of \$10,000.00 per day if multiple sales violations occur  
4 during any 1 day.

5 Sec. 14. Any person threatened with injury or injured directly  
6 or indirectly in his or her business or property by a violation of  
7 this act may bring an action for appropriate injunctive or other  
8 equitable relief, 3 times the amount of actual damages sustained by  
9 reason of a violation of this act, interest on the damages from the  
10 date of the complaint, taxable costs, and actual attorney fees. All  
11 of the following apply to an action under this section:

12 (a) The court shall grant the equitable relief it determines  
13 is necessary to remedy the effects of any violation of this act,  
14 which may include a declaratory judgment, mandatory or prohibitive  
15 injunctive relief, and interim equitable relief.

16 (b) The court shall grant a temporary restraining order and  
17 preliminary injunction if the plaintiff shows that all of the  
18 following are met:

19 (i) There is reasonable cause to believe that a violation of  
20 the act has occurred.

21 (ii) There exist sufficiently serious questions going to the  
22 merits to make those questions a fair ground for litigation.

23 (iii) The court determines that, on balance, the hardships  
24 imposed upon the defendant by the issuance of a temporary  
25 restraining order or preliminary injunction will be less than the  
26 hardship that would be imposed upon the plaintiff in the absence of  
27 that relief.

1 (c) If the action seeks injunctive or other equitable relief,  
2 the court shall not require the plaintiff to provide a bond.

3 (d) If the action seeks injunctive or other equitable relief,  
4 it is not a defense that the plaintiff's injury or threatened  
5 injury may be adequately remedied by an award of damages.

6 (e) In an action under section 13 or 14, the defendant shall  
7 bear the burden of proof in establishing its cost of doing business  
8 components.

9 Sec. 15. A person who knowingly prepares a false invoice or  
10 causes a false invoice to be prepared or knowingly submits false  
11 information in response to a demand issued under section 12 of this  
12 act is guilty of a misdemeanor punishable by imprisonment of not  
13 more than 6 months or a fine of not more than \$500.00, or both.

14 Sec. 16. A final judgment or decree determining that a person  
15 has violated this act in an action brought by the state under  
16 section 13, other than a consent judgment or decree entered before  
17 any testimony has been taken, is prima facie evidence against the  
18 person in any other action against the person under section 14 as  
19 to all matters with respect to which the judgment or decree would  
20 be an estoppel between the parties to the action.

21 Sec. 17. (1) An action under section 13 or 14 is barred if not  
22 commenced within 1 year after the claim for relief or cause of  
23 action accrues.

24 (2) An action to recover damages under section 14 is barred if  
25 not commenced within 1 year after the claim for relief or cause of  
26 action accrues, or within 1 year after the conclusion of any timely  
27 action brought by the state under section 13 which is based in

1 whole or in part on any matter complained of in the action for  
2 damages, whichever is later.

3 Sec. 18. The remedies provided in this act are cumulative and  
4 in addition to any other remedy available under state law.

5 Sec. 19. If a witness has been or may be called to testify or  
6 provide other information at any proceeding relating to or under  
7 this act, the circuit court for the county in which the proceeding  
8 is or may be held may issue, upon application of a prosecuting  
9 attorney that asserts that in his or her judgment the testimony or  
10 other information may be necessary to the public interest and the  
11 witness has or is likely to refuse to testify, an order requiring  
12 the witness to give testimony or provide other information which  
13 the witness refuses to give or provide on the basis of the  
14 privilege against self-incrimination, if the court provides in its  
15 order that the witness shall not be prosecuted or subjected to any  
16 penalty or forfeiture for, or on account of, any transaction,  
17 occurrence, matter, or thing to which the witness testifies or  
18 provides other information or evidence, documentary or otherwise,  
19 and that the testimony, information, or evidence shall not be used  
20 against the witness, in any criminal investigation, proceeding, or  
21 trial, except a prosecution for perjury for giving a false  
22 statement or for otherwise failing to comply with the order.