

# House Bill 2628

Sponsored by COMMITTEE ON BUSINESS, LABOR AND CONSUMER AFFAIRS (at the request of Oregon Petroleum Association)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Prohibits certain below-cost sales of motor fuel. Creates exceptions. Grants civil remedies to injured competitor and prosecuting attorney. Authorizes prosecuting attorney to serve investigative demand and to accept assurance of voluntary compliance.

## A BILL FOR AN ACT

Relating to motor fuel marketing.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** As used in sections 1 to 10 of this 2005 Act:

(1) "Affiliate" means a person:

(a) The stock of which is more than 50 percent owned by a refiner;

(b) That is controlled by a refiner; or

(c) That is controlled by a person that controls a refiner.

(2) "Competition" means the vying for sales of motor fuel between two sellers in a relevant geographic market.

(3) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person.

(4) "Dealer" means a person, other than a refiner or wholesaler, that sells motor fuel at a retail outlet.

(5) "Direct labor cost" means the personnel costs incurred to sell motor fuel at a retail outlet:

(a) Including, but not limited to, the costs of persons that purchase, store and inventory motor fuel, maintain equipment and comply with environmental obligations.

(b) Excluding the costs of persons that clean up or remediate motor fuel.

(6) "Motor fuel" means a petroleum product used to propel a motor vehicle.

(7) "Motor vehicle" has the meaning given that term in ORS 801.360.

(8) "Nonrefiner" means a person, other than a refiner, that sells motor fuel.

(9) "Posted terminal price" means the price for a grade of motor fuel that a refiner posts at a terminal facility for wholesalers.

(10) "Prosecuting attorney" means the Attorney General or the district attorney of any county in which a violation of section 2 of this 2005 Act is alleged to have occurred.

(11) "Reasonable rental value" means the price that a person would pay in an arm's length transaction for the use of the land and improvements used for the sale of motor fuel at the retail outlet.

(12) "Refiner" means a person or an affiliate of the person that:

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

(a) Stores or exchanges motor fuel at a terminal facility in this state; and

(b) Sells motor fuel through the loading rack at the terminal facility.

(13) "Retail outlet" means premises where a person offers motor fuel for sale to the motoring public.

(14) "Sale" or "sell" has the meaning given that term in ORS 571.505, but does not include exchanges at the wholesale level of distribution.

(15) "Terminal facility" means any fuel storage facility that has marine or pipeline access.

(16) "Wholesaler" means a person, other than a refiner, that purchases motor fuel from a refiner at or below the refiner's posted terminal price.

**SECTION 2.** (1) A refiner may not sell motor fuel at retail below the refiner's cost for the fuel when the effect of the sale is to injure competition.

(2) A nonrefiner may not sell motor fuel at retail below the nonrefiner's cost for the fuel when the effect of the sale is to injure competition.

(3) For purposes of this section, the price at which a refiner or nonrefiner sells motor fuel at retail is the price posted on the pump at the retail outlet less the amount of any rebate, coupon or other concession that reduces the price to the consumer.

(4) Subsections (1) and (2) of this section do not apply to a sale made:

(a) In good faith to meet a retail price in the relevant geographic area that the refiner or nonrefiner reasonably believed was a lawful price;

(b) To discontinue trade in the motor fuel;

(c) Under an order or at the direction of a court;

(d) Under a contract with a unit of government; or

(e) During the first 48 hours of a retail outlet's grand opening.

**SECTION 3.** (1) Unless a refiner establishes by clear and convincing evidence that the refiner's cost for motor fuel is less than the cost as calculated under subsection (2) of this section, the refiner's cost for motor fuel shall be calculated under subsection (2) of this section.

(2) For purposes of sections 1 to 10 of this 2005 Act, a refiner's cost for motor fuel is the sum of:

(a) For the grade of motor fuel delivered to the retail outlet, the lowest posted terminal price reported by the Oil Price Information Service at the terminal facility from which the refiner delivered the motor fuel;

(b) State, federal and local taxes on the motor fuel;

(c) State, federal and local inspection and environmental fees attributable to the motor fuel;

(d) Freight charges to the retail outlet;

(e)(A) For a sale to a wholesaler, eight percent of the total of paragraphs (a), (b), (c) and (d) of this subsection; or

(B) For a sale to a dealer, six percent of the total of paragraphs (a), (b) and (c) of this subsection; and

(f) If the refiner sold the motor fuel in combination with another product, the cost of the product.

(3) When a refiner establishes the refiner's cost for motor fuel under subsection (1) of this section, the refiner shall include the reasonable rental value of the retail outlet and di-

rect labor cost attributable to the sale of the motor fuel.

**SECTION 4.** (1) Unless a nonrefiner establishes by clear and convincing evidence that the nonrefiner's cost for motor fuel is less than the cost as calculated under subsection (2) of this section, the nonrefiner's cost for motor fuel shall be calculated under subsection (2) of this section.

(2) For purposes of sections 1 to 10 of this 2005 Act, a nonrefiner's cost for motor fuel is the sum of:

(a) The price of the motor fuel on the invoice to the nonrefiner less credit card allowances, trade discounts, rebates or any other concessions that the nonrefiner received;

(b) State, federal and local taxes on the motor fuel;

(c) State, federal and local inspection and environmental fees attributable to the motor fuel;

(d) Freight charges to the retail outlet;

(e)(A) For a sale to a wholesaler, eight percent of the total of paragraphs (a), (b), (c) and (d) of this subsection; or

(B) For a sale to a dealer, six percent of the total of paragraphs (a), (b) and (c) of this subsection; and

(f) If the refiner sold the motor fuel in combination with another product, the cost of the product.

(3) When a nonrefiner establishes the nonrefiner's cost for motor fuel under subsection (1) of this section, the nonrefiner shall include the reasonable rental value of the retail outlet and the direct labor cost attributable to the sale of the motor fuel.

**SECTION 5.** (1) A person injured by a violation of section 2 of this 2005 Act may bring a civil action in circuit court for actual damages, a declaratory judgment, exemplary damages or injunctive relief.

(2) A trade organization is a person injured by a violation of section 2 of this 2005 Act if a member of the trade organization is a person injured by a violation of section 2 of this 2005 Act.

(3) The court may award reasonable attorney fees to a person that prevails on a claim under this section.

(4)(a) When a person commences an action under this section, the person shall mail a copy of the complaint to the Attorney General in Salem.

(b) When the court enters judgment in an action under this section, the person that commenced the action shall mail a copy of the judgment to the Attorney General in Salem.

(c) A person's failure to mail a copy of the complaint to the Attorney General does not deprive the court of jurisdiction over the action. The court may not enter judgment for the person that commences the action unless the person provides proof of mailing of the copy of the complaint.

**SECTION 6.** (1)(a) A person establishes a prima facie case of a violation of section 2 of this 2005 Act if the person produces evidence to show that, in the relevant geographic market:

(A) A refiner made a sale at retail below the refiner's cost for the fuel; or

(B) A nonrefiner made a sale at retail below the nonrefiner's cost of the fuel.

(b) If a person establishes a prima facie case, the burden of rebutting the prima facie case by showing justification for the sale is upon the person charged with the violation.

(2) In an action under section 5 or 9 of this 2005 Act, the relevant geographic market is presumed to consist of an area not greater than a radius of two miles from the location of the sale. A person may rebut the presumption by establishing that the area of effective competition is greater than a radius of two miles from the location of the sale.

**SECTION 7.** (1) Notwithstanding ORCP 79, the court shall grant a temporary restraining order or preliminary injunction if the applicant for the order or injunction produces evidence to show:

(a)(A) A violation of section 2 of this 2005 Act injures the applicant; or

(B) The applicant is a prosecuting attorney and a violation of section 2 of this 2005 Act injures a person;

(b) There exists a sufficiently serious question going to the merits of the claim to make the question fair ground for litigation; and

(c) On balance, the hardships imposed on the refiner or nonrefiner by the issuance of the order or injunction will be less than the hardships the applicant would suffer if the court did not issue the order or injunction.

(2)(a) Notwithstanding ORCP 82, the court may issue the order or injunction without requiring the applicant to give security.

(b) If the court requires an applicant to give security, the amount of the security may not exceed \$50,000.

(3)(a) An action under section 5 of this 2005 Act shall be commenced within two years from the date when the violation is first discovered or in the exercise of reasonable care should have been discovered.

(b) An action under section 9 of this 2005 Act shall be commenced within one year from the date when the violation is first discovered or in the exercise of reasonable care should have been discovered.

(4) The remedies provided by this section and sections 5 and 9 of this 2005 Act are in addition to and not exclusive of any other remedy provided by law.

**SECTION 8.** (1) When it appears to a prosecuting attorney that a person has engaged in, is engaging in, or is about to engage in a violation of section 2 of this 2005 Act, the prosecuting attorney may execute and serve an investigative demand on a person the prosecuting attorney believes to have information, documents or physical evidence of the violation.

(2) The demand may require the person:

(a) To give an oath or affirmation;

(b) To appear and testify;

(c) To answer written interrogatories; and

(d) To produce documents or physical evidence.

(3)(a) Before the return date in a demand, or within 20 days after service of the demand, whichever is sooner, the person served with the demand may file a petition to extend the return date or to modify or set aside the demand.

(b) The person may file the petition in the circuit court in the county in which the person resides or the Marion County Circuit Court.

(c) The petition must set forth:

(A) Good cause for the extension, modification or setting aside; and

(B) The information, documents or evidence to which the person claims a privilege from disclosure.

1       **SECTION 9.** (1) A prosecuting attorney who has probable cause to believe that a person  
2 is engaging in, has engaged in, or is about to engage in a violation of section 2 of this 2005  
3 Act may bring an action in the name of the State of Oregon to restrain the person from  
4 engaging in the alleged violation. The prosecuting attorney may bring the action in the cir-  
5 cuit court in the county in which the person resides or the Marion County Circuit Court.

6       (2) Before bringing an action under this section, the prosecuting attorney shall provide  
7 written notice to the person of the action and the relief to be sought. The prosecuting at-  
8 torney shall serve the notice in the manner set forth in ORS 646.622 for the service of in-  
9 vestigative demands.

10       (3) A person has 10 days from the person's receipt of notice within which to execute and  
11 deliver to the prosecuting attorney an assurance of voluntary compliance. The assurance  
12 shall set forth what actions, if any, the person intends to take with respect to the alleged  
13 violation. The assurance may not be considered an admission of a violation for any purpose.  
14 If the prosecuting attorney is satisfied with the assurance, the prosecuting attorney may  
15 submit the assurance to the circuit court in the county in which the person resides or the  
16 Marion County Circuit Court for approval. If the court approves the assurance, the clerk  
17 shall enter the assurance in the register and docket the assurance in the judgment docket.  
18 An assurance that the clerk registers and docket constitutes a judgment in favor of the  
19 State of Oregon. Violation of a term of an assurance that the clerk has registered and  
20 docketed constitutes a contempt of court.

21       (4) Subsection (2) of this section does not apply if:

22       (a) Within the previous two years, a prosecuting attorney accepted an assurance from  
23 the person; or

24       (b) The prosecuting attorney alleges that the prosecuting attorney has reason to believe  
25 that the delay caused by complying with subsection (2) of this section would cause immediate  
26 harm to the public health, safety or welfare.

27       (5)(a) The court may award reasonable attorney fees to the prevailing party in an action  
28 under this section.

29       (b) The court shall award reasonable attorney fees to a prevailing defendant if:

30       (A) The defendant had in good faith submitted a satisfactory assurance to the prosecut-  
31 ing attorney prior to the commencement of the action; or

32       (B) The prosecuting attorney proceeded under subsection (4) of this section without  
33 reasonable grounds to proceed.

34       **SECTION 10.** Sections 1 to 10 of this 2005 Act may be cited as the Motor Fuel Fair Mar-  
35 keting Act.

36       **SECTION 11.** Sections 1 to 10 of this 2005 Act apply to conduct occurring on or after the  
37 effective date of this 2005 Act.