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 BILL ANALYSIS

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Senate Bill 519 (as introduced 5-27-03)  
Sponsor: Senator Mark H. Schauer  
Committee: Commerce and Labor

Date Completed: 1-27-04

### CONTENT

The bill would create the "Petroleum Marketing Stabilization Act" to do all of the following:

- Prohibit a Michigan retailer from selling or offering to sell motor fuel below retailer cost or above the maximum sale price at a retail location or unattended location.
- Allow the Attorney General or a prosecuting attorney to issue a demand to testify or produce evidence in an investigation of a violation.
- Authorize the Attorney General or a prosecuting attorney to bring an action against a violator for a civil penalty or injunctive relief.
- Prescribe a misdemeanor penalty for knowingly preparing a false invoice, or knowingly submitting false information in response to a demand.
- Allow a person whose business or property was injured by a violation to bring an action against the violator.
- Provide for a one-year period of limitations on actions under the proposed Act.
- Authorize the circuit court to compel the testimony of a witness who refused to testify, and grant immunity to the witness.
- Specify that an express or implied agreement that violated the proposed Act would be void and unenforceable.
- Require that an action for a violation be brought in a circuit court where venue was proper, without regard to the amount in controversy.

-- Specify that the remedies provided in the bill would be cumulative and in addition to any other remedy available under State law.

#### Sale Price of Motor Fuel

The bill would prohibit a retailer engaged in commerce in Michigan from selling or offering to sell motor fuel below retailer cost at a retail location or unattended location. It would not be a violation for a retailer to establish a sale price in good faith to meet a competitor's equally low lawful price, if the competitor were subject to the proposed Act, were located in the same market area, and sold the same or a similar product of like grade and quality.

A retailer also could not sell or offer to sell at a retail location or unattended location motor fuel at a price that was above the maximum sale price.

In addition, a retailer could not offer a rebate, offer to give a rebate, or offer a concession of any kind in connection with a sale of motor fuel at a retail or unattended location, if the resulting sale price were below retailer cost. A retailer or an affiliate of a retailer could not advertise, offer for sale, or sell motor fuel and one or more other items at a combined price, if the combined selling price were below the retailer cost of the motor fuel and the basic cost of each item included in the transaction. A retailer or an affiliate of a retailer could not advertise, offer for sale, or sell motor fuel together with a coupon, gift, or concession of any kind, if the combined selling price were below the retailer cost of

the motor fuel and the basic cost of the gift or concession included in the transaction. The bill would not apply to a retail sale of motor fuel if any of the following applied:

- The sale was made in an isolated transaction that was not in the usual course of business.
- Motor fuel was advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in that motor fuel, or was advertised, offered for sale, or sold as imperfect or damaged, and both of the following were met: 1) the advertising, offer, or sale stated the reason for the sale and the quantity of the motor fuel available for sale; and 2) the motor fuel was kept separate from other motor fuel stocks and was clearly and legibly marked with the reason for the sale.
- Motor fuel was sold as part of the final liquidation of a business.
- Motor fuel was advertised, offered for sale, or sold by a fiduciary under a court's order or direction.
- Motor fuel was advertised, offered for sale, or sold during a grand opening to introduce a new or remodeled retail location, if the grand opening were held for three days or less and within 60 days after the new or remodeled retail location began operations.

### Definitions

Under the bill, "motor fuel" would mean that term as defined by the Motor Fuel Tax Act, i.e., "gasoline, diesel fuel, kerosene, a mixture of gasoline, diesel fuel, or kerosene, or a mixture of gasoline, diesel fuel, or kerosene and any other substance".

"Retailer cost", in a retail sale of motor fuel by a retailer at a retail location, would mean the lesser of the following:

- The invoice cost of the motor fuel to the retailer on the determination date or the replacement cost of the motor fuel on the determination date, whichever was lower, less customary discounts for cash, plus any excise, sales, or use taxes imposed on the fuel or its sale and any cost incurred for transportation and any other fees or charges not otherwise

included in the invoice cost or the replacement costs of the fuel, plus a cost of doing business component of 13.38 cents per gallon of motor fuel.

- The average posted terminal price on the determination date at the terminal closest to the retailer, plus a cost of doing business component of 13.38 cents per gallon of motor fuel.

In a retail sale of motor fuel by a retailer at an unattended location, "retailer cost" would have the same meaning, except that the cost of doing business component would be 6.4 cents per gallon.

"Retail location" would mean a location where a retailer sold motor fuel and where the presence of an attendant at the time of a sale was required by law. "Unattended location" would mean a location where a retailer sold motor fuel and where the presence of an attendant at the time of sale was not required by law. "Retailer" would mean a person that maintained a storage facility for motor fuel; sold motor fuel at a retail location that sold only to members, at any other retail location, or at an unattended location; and sold motor fuel to the end user of the fuel.

"Maximum selling price" or "maximum sales price" would mean the retail sales price measured as the retailer cost, applying the "maximum cost of doing business component", which would mean three times the cost of doing business component. "Cost of doing business component" would mean an amount intended to cover a proportionate part of the cost of doing business at a retail location or unattended location.

For a sale of motor fuel from a refiner or supplier to a wholesaler or retailer, "invoice cost" would mean the greater of the following: the sale price shown on the invoice from the refiner or supplier to the wholesaler or retailer, or the price generally available from the refiner or supplier to wholesalers and retailers who were not its affiliates from a terminal at which the refiner or supplier sold or offered to sell motor fuel to wholesalers and retailers who were not its affiliates.

For a sale of motor fuel by a wholesaler to a retailer, "invoice cost" would mean either the sale price shown on the invoice from the wholesaler to a retailer, or the price the wholesaler paid the refiner or supplier for that fuel, whichever was greater.

"Replacement cost" would mean the cost at which a retailer could have purchased motor fuel on the determination date if purchased in the same quantity as the retailer's last purchase of motor fuel.

"Determination date" would mean one of the following:

- If a retailer sold motor fuel on a day other than the day on which the retailer last purchased any motor fuel and the sale occurred within 10 days after the last purchase by the retailer, either the day before the day of the sale by the retailer or the day on which motor fuel was last purchased by the retailer, as selected by the retailer.
- If that did not apply, the day before the day of the sale of motor fuel at retail.

"Average posted terminal price" would mean the average posted rack price, by grade of motor fuel, as published by a petroleum price reporting service, at which motor fuel was offered for sale at the close of business on the determination date by all refiners, suppliers, and wholesalers of motor vehicle fuel at a terminal, plus any excise, sales, or use taxes imposed on the motor fuel or on its sale, any cost incurred for transportation, and any other fees or charges that were not otherwise included in the averaged posted rack price.

"Terminal" would mean a motor fuel storage and distribution facility that was supplied by a pipeline or marine vessel, from which motor fuel could be removed at a rack. If a petroleum price reporting service included two or more terminals in the same geographic area, they would be considered one terminal for purposes of the proposed Act. "Rack" would mean a mechanism for delivering motor fuel from a refinery, terminal, or marine vessel into a railroad tank car, a transport truck, a tank wagon, the fuel supply tank of a marine vessel, or other means of transfer outside of the bulk

transfer/terminal system.

#### Demand to Testify or Produce Evidence

If the Attorney General or a prosecuting attorney had reasonable cause to believe that a person had information or was in possession, custody, or control of any document or other tangible evidence relevant to an investigation for a violation of the proposed Act, the Attorney General or prosecuting attorney, acting with the permission or at the request of the Attorney General, could serve the person with a written demand to appear and be examined under oath and to produce the document or object for inspection and copying.

The demand would have to be served in the manner required for service of process in Michigan, and contain the information listed in the bill, including a copy of the provision described below.

If a person objected to or otherwise failed to comply with the written demand, the Attorney General or prosecuting attorney could file an action to enforce the demand in the circuit court in the county in which the person lived or maintained a principal place of business. Notice of a hearing and a copy of all pleadings would have to be served upon the person, who could appear in opposition. If the court found that the demand was proper, that there was reasonable cause to believe that a violation could have occurred or was occurring, and that the information sought or document or object demanded was relevant to the investigation, the court would have to order the person to comply with the demand, subject to any modification prescribed by the court. Upon a motion by the person and for good cause, the court could make any further order in the proceedings required to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

Any procedure, testimony taken, or material produced would have to be kept confidential by the Attorney General or prosecuting attorney before bringing an action against a person for the violation under investigation, unless the person being investigated and the person who testified, answered

interrogatories, or produced material waived confidentiality, or the court authorized disclosure.

The Attorney General or a prosecuting attorney, acting with the permission or at the request of the Attorney General, could bring an action for appropriate injunctive or other equitable relief and civil penalties in the name of the State for a violation of the proposed Act. The court could assess, for the State's benefit, a civil penalty of up to \$2,500 for each violation, subject to a maximum of \$10,000 per day if multiple sales violations occurred during any one day.

The bill specifies that a final judgment or decree in an action brought by the State that determined that a person had violated the Act would be prima facie evidence against the person in any other action against the person by a private party as to all matters with respect to which the judgment or decree would be an estoppel between the parties to the action. (In other words, generally speaking, the defendant would be precluded from denying the plaintiff's allegations as to the same matters, unless the defendant produced sufficient evidence to refute the claim.) This would not apply if the final judgment or decree were a consent judgment or had been entered before any testimony was taken.

#### Misdemeanor

Knowingly preparing a false invoice or causing a false invoice to be prepared, or knowingly submitting false information in response to a demand, would be a misdemeanor punishable by up to six months' imprisonment, a maximum fine of \$5,000, or both.

#### Action by a Private Party

Any person threatened with injury or injured in his or her business or property by a violation of the proposed Act could bring an action for appropriate injunctive or other equitable relief of three times the amount of actual damages sustained, interest on the damages from the date of the complaint, taxable costs, and actual attorney fees.

The court would have to grant the equitable relief it determined necessary to remedy the effects of any violation, which could include a declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief. The court would have to grant a temporary restraining order (TRO) and preliminary injunction if the plaintiff showed all of the following:

- There was reasonable cause to believe that a violation had occurred.
- There existed sufficiently serious questions going to the merits to make the question a fair ground for litigation.
- The court determined that, on balance, the hardships imposed upon the defendant by issuing a TRO or preliminary injunction would be less than the hardship that would be imposed upon the plaintiff in the absence of relief.

If the action sought injunctive or other equitable relief, the court could not require the plaintiff to provide a bond, and it would not be a defense that the plaintiff's injury or threatened injury could be adequately remedied by an award of damages.

#### Period of Limitations

An action brought by the State or a prosecuting attorney or by a private party would be barred if not commenced within one year after the claim for relief or cause of action accrued.

An action by a private party to recover damages would be barred if not commenced within one year after the claim for relief or cause of action accrued, or within one year after the conclusion of any timely action brought by the State that was based in whole or in part on any matter complained of in the action for damages, whichever was later.

#### Compelled Testimony

If a witness had been or could be called to testify or provide other information at any proceeding relating to or under the proposed Act, the circuit court for the county in which the proceeding was being or could be held could issue an order requiring the witness to testify or provide

other information that he or she refused to give or provide on the basis of the privilege against self-incrimination. The order would have to provide that the witness could not be prosecuted or subjected to any penalty or forfeiture for, or because of, any transaction, occurrence, matter, or thing to which he or she testified or provided other information or evidence. The order also would have to provide that the testimony, information, or evidence could not be used against the witness in any criminal investigation, proceeding, or trial, except for a prosecution for perjury for giving a false statement or for otherwise failing to comply with the order.

An order compelling testimony could be issued only upon application of the Attorney General or a prosecuting attorney acting with the permission or at the request of the Attorney General. The application would have to assert that, in the Attorney General's or prosecutor's judgment, the testimony or other information could be necessary to the public interest and the witness had refused or was likely to refuse to testify.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bill would have an indeterminate impact on the State (the Department of Attorney General) and local prosecuting attorney offices. Enforcement costs and revenue from civil penalties would depend on the number of violations. The Michigan Department of Agriculture reports that, as of September 30, 2003, there were 5,176 retail gasoline outlets in Michigan.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.