

# THE FLORIDA MOTOR FUEL MARKETING PRACTICES ACT (MFMPA)

## BACKGROUND

The Motor Fuel Marketing Practices (MFMPA) was originally enacted in 1985 with the repeal of retail divorcement. In passing the MFMPA (found in Sections 526.301-526.3135, Fla. Stat.), the Legislature specifically stated that fair and healthy competition in the marketing of motor fuel provides maximum benefits to Florida's consumers and that certain marketing practices which impair competition are contrary to the public interest. The Legislature enacted the MFMPA to encourage competition and promote the general welfare of Florida's citizens by prohibiting the unfair practices identified in the MFMPA. The MFMPA was amended in 1987, 1989, 1991 and 1999. In 1992, a Florida appellate court (the Third District Court of Appeal) ruled that the MFMPA was constitutional. In its ruling the court specifically endorsed the pro-competitive, pro-consumer objectives of the Legislature and stated that the MFMPA represents an appropriate way to achieve those objectives.

## OVERVIEW OF THE MFMPA

The MFMPA prohibits below-cost selling at retail and certain types of discriminatory marketing practices, such as price discrimination, the discriminatory allocation of motor fuel and the discriminatory use of rebates. To be prohibited, the conduct must have the effect of injuring competition. Also, the MFMPA contains certain exceptions to otherwise prohibited conduct, the most important of which is the exception for meeting competition.

An important part of the MFMPA is the extensive set of definitions found in Section 526.303, Florida Statutes. (The full text of the MFMPA, including the definitions part, is set out beginning at Tab \_\_\_\_.) Key definitions to be familiar with are "competition," "direct labor cost," "nonrefiner cost," "posted terminal price," "reasonable rental value" and "refiner cost."

The MFMPA provides for public enforcement by the Department of Agriculture and Consumer Services, Division of Standards ("DACS"). DACS has the statutory authority to investigate complaints of alleged violations and to initiate suit against violators to obtain an injunction and to recover a civil penalty. The MFMPA also establishes the right of any person injured as a result of a violation to maintain a private suit to enjoin a violator and to seek damages, which the court may treble, and recover attorneys' fees.

## BELOW-COST RETAIL SALES (Section 526.304)

The MFMPA prohibits the retail sale of motor fuel below cost by anyone selling in competition with others. This prohibition applies to refiners, wholesalers, multistate marketers, chain retailers and dealers.

The MFMPA sets out the manner in which anyone selling at retail determines its motor fuel cost. A refiner's "cost" of motor fuel at its retail location is determined by adding to the refiner's posted terminal price all taxes, freight, direct labor and the reasonable rental value of the retail location attributable to the sale of motor fuel. If a refiner does not have a posted terminal price in the general trade area, then the lowest terminal price in the area will be applied. For all others selling at retail ("nonrefiners"), motor fuel cost is determined by adding to the actual invoice price for the particular grade of motor fuel, less allowances and rebates actually received, taxes, freight, direct labor and reasonable rental value of the retail outlet attributable to the sale of motor fuel. Motor fuel cost is determined for each grade and then compared to the corresponding retail price for each grade. Pooling of product costs is not permitted.

## **DIRECT LABOR COST**

The MFMPA specifically defines “direct labor cost” as:

[T]he personnel costs incurred at a retail outlet attributable to providing motor fuel sales at a retail outlet and includes, without limitation, the personnel costs relating to the purchase, storage, inventory, and sale of motor fuel, the maintenance of equipment, and environmental reporting and compliance, but does not include the costs of environmental cleanup or remediation. In no case shall the direct labor cost be less than the cost of one employee's salary and benefits, based upon that employee's working those hours in which the retail outlet is providing motor fuel available to the public.

Only those personnel costs incurred at the retail outlet are included. Home office personnel expenses are not included; however, the costs of supervisory and managerial personnel assigned to a specific retail outlet(s) are included.

When motor fuel is sold at a retail outlet (i.e., a convenience store) with other products or services, only the direct labor cost attributable to motor fuel is included in statutory cost. The definition of direct labor cost does not specify an allocation method as does the definition of reasonable rental value. A reasonable allocation should be made based on the staffing practices of the specific retail outlet. Any allocation method should recognize the complementary nature of the motor fuel and nonmotor fuel products sold and should avoid shifting too much of the personnel cost to nonmotor fuel sales. To protect against an underallocation of direct labor to motor fuel sales the MFMPA provides that at a minimum direct labor cost for motor fuel sales is the full-time equivalent cost of one employee's salary and benefits based upon the number of hours the retail outlet is open. Once the direct labor cost attributable to motor fuel sales has been calculated, the per-gallon cost is determined by dividing the cost for a specific time period by the total gallons sold (all grades) during the same time period.

### **Example of Minimum Direct Labor Cost Calculation**

For a 24-hour high volume retail outlet (200,000 gallons per month) with an hourly wage for a clerk/cashier at \$6.00/hour, the minimum direct labor cost is calculated as follows:

•	\$6.00/hour plus 15 percent for benefits	=	\$6.90/hour
•	24-hours/day x 30 days/month	=	720 hours/month
•	720 hours/month x \$6.90	=	\$4,968 personnel cost
•	\$4,968 ÷ 200,000 gallons/month	=	2.48¢ per gallon minimum direct labor cost

## **REASONABLE RENTAL VALUE**

The MFMPA defines “reasonable rental value” as–

[T]he bona fide amount of rent which would reasonably be paid in an arm's length transaction for the use of the specific individual retail outlet, including land and improvements, utilized for the sale of motor fuel. The value of the land and improvements shall include the costs of equipment; signage; utilities, property taxes, and insurance, if paid by the owner; and environmental compliance, such as testing, detection, and containment systems; but does not include the costs of environmental cleanup and remediation. In determining the reasonable rental value of the specific retail outlet, the rental amount of comparable retail outlets in the relevant geographic market shall be considered. When motor fuel is sold at the retail level along with other products, the reasonable rental value attributable to the sale of motor fuel at the retail outlet shall be allocated by the percentage of gross sales attributable to motor fuel sales.

A simple way to understand “reasonable rental value” is to think of a lessee’s occupancy cost under a triple net lease. The components of “reasonable rental value” are:

- **Rental value for the land, building and equipment.** An accepted rule of thumb for calculating the monthly rent amount is 1 percent (12 percent per year) of the total cost. Equipment cost includes signage and environmental testing and detection devices.
- **Utilities.**
- **Ad valorem property taxes on the real property and equipment.**
- **Insurance.** If the operator of the retail outlet is self-insured, a reasonable cost of insurance should be used.

Unlike the definition of direct labor cost, the definition of reasonable rental value specifies the method of allocating reasonable rental value to motor fuel sales. The allocation factor is determined by calculating the percentage of dollar sales of motor fuel to the total dollar sales at the retail outlet. The allocation factor is then applied to the total amount for reasonable rental value to obtain the reasonable rental value attributable to motor fuel sales. The per-gallon calculation is done in the same manner as for direct labor cost (total reasonable rental value for motor fuel sales ÷ total gallons (all grades) sold for the corresponding time period).

**Example**

A recently constructed c-store/motor fuel retail outlet selling 200,000 gallons per month:

•	Cost of land, building and equipment:	\$1,000,000
•	Rental value: 1 percent x \$1,000,000 =	\$10,000/month
•	Utilities (electric, water, sewer, telephone) =	\$1,500/month
•	Property taxes =	\$800/month
•	Insurance =	<u>\$800/month</u>
	Total =	\$13,100/month

Allocation factor

•	Total \$ sales (monthly)	=	\$333,000
•	Total \$ motor fuel sales (monthly)	=	\$250,000
•	\$333,000 ÷ \$250,000	=	75 percent factor
•	75 percent of \$13,100/month	=	\$9,825/month

Allocation of reasonable rental value to motor fuel

•	\$9,825 ÷ 200,000 gallons/month	=	4.9¢ per gallon reasonable rental value
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**COMBINATION SALES**

When motor fuel is sold, offered or advertised for sale with another product or service (i.e., discounted carwash), the combined cost of the motor fuel and nonmotor fuel product or service cannot be below the combined retail price of the products. This does not prevent cross-promotions, but only prohibits such tie-ins from doing indirectly what the MFMPA prohibits if done directly.

## THE MEETING COMPETITION DEFENSE

A motor fuel retailer can legally sell below cost to meet (not beat) the retail price of a competitor for the same grade of motor fuel. A retail outlet not in the effective area of competition (this will vary from market to market) is not a “competitor.” If retail outlet B drops its price below cost to meet the price of retail outlet A two blocks away, retail outlet B is meeting competition and not violating the law. If A’s price is below cost, A cannot claim it is meeting B’s price and not violating the law, even if B matches A’s price every day. Although A’s price and B’s price are the same, B came down to meet A. If A increases its price in order to maintain the meeting competition defense, B must increase its price to at least meet A’s, unless at the lower price B is no longer below cost (i.e., falling wholesale price or temporary competitive allowance received from a supplier).

### *An Exception to the Meeting Competition Exemption*

A refiner cannot sell motor fuel at one of its retail outlets lower than the price it sells to a wholesaler or dealer that is competing against the refiner’s retail outlet. This provision only applies to wholesalers or dealers under written contract with the refiner. This provision was added to the MFMPA in 1991 as a result of the retail/rack inversions during the Persian Gulf War. Even if the refiner is meeting competition with a retail price below the refiner’s rack, it must offer the low price to its contract wholesalers and dealers reselling in the same market.

## OTHER EXEMPTIONS

- **An isolated and inadvertent incident.** Sometimes an employee forgets to change prices as instructed or posts an incorrect price. The MFMPA is not intended to penalize mistakes that are corrected quickly. On the other hand, a weekend of below-cost selling may involve only two or three days, but if it is repeated, it no longer qualifies for this exemption. Further, it probably fails the inadvertent requirement if it is planned, even if only for a weekend.
- **Grand Opening.** Sales made during a grand opening for a new or remodeled business not to exceed three days.
- **Liquidation.** A final business liquidation sale.
- **Court Sale.** A sale of the refiner’s motor fuel as a part of a court-ordered sale.

## PRICE DISCRIMINATION (Section 526.305)

The MFMPA prohibits discriminatory pricing in the sale of motor fuel in the distribution chain. Therefore, a supplier of motor fuel cannot sell motor fuel at different prices to purchasers competing in the same market. For purposes of the MFMPA, a sale is deemed to include any transfer from a supplier (refiner or nonrefiner) to its company-operated outlet.

A refiner is prohibited from selling motor fuel to its dealer at a net price which is lower than the price charged its wholesaler if its wholesaler supplies a retail outlet that competes with the refiner-supplied dealer. Net price means that special allowances, rebates and concessions are deducted from the DTW price.

## **Exemptions**

A sale made in good faith to meet an equally low price of a competitor selling motor fuel to resellers is not a violation of the MFMPA. Also, a sale at different prices to persons competing in the same market may be justified if the price difference is due to a difference in the cost of sale or delivery resulting from differing methods or quantities in which the motor fuel is sold or delivered.

## **DISCRIMINATORY ALLOCATION OF MOTOR FUEL (Section 526.306)**

A supplier of motor fuel cannot reduce a reseller's allocation of fuel in successive years because of the supplier's inability to supply contract quantities in the prior year. Furthermore, suppliers of motor fuel cannot reduce an allocation to a reseller for more than five days unless the supplier makes an across-the-board nondiscriminatory reduction to all resellers, including the supplier's own company-operated retail outlets. This provision protects against the favored treatment given to certain channels of distribution during the product shortages of previous decades.

## **DISCRIMINATORY REBATES (Section 526.308)**

A rebate, rent subsidy or concession of any kind offered in connection with the sale of motor fuel must be offered to all persons purchasing for resale in the same geographical market area. Moreover, a wholesaler that receives a rebate or concession must offer the same concession or an equivalent concession to retail outlets supplied by the wholesaler. Image allowances or monies advanced for new builds or rebuilds are not subject to this provision.

Rebates, rent subsidies or concessions may be offered to meet rebates, subsidies or concessions offered by a competitor. Refiners that offer a rebate, concession or rent subsidy to "meet competition" must offer the same concession to all other similarly situated wholesalers and dealers.

## **THE INJURY TO COMPETITION REQUIREMENT**

For there to be a violation of the below-cost pricing or discriminatory practices provisions of the MFMPA, the challenged conduct must have the effect of injuring competition. Although under similar fair marketing statutes in other states there has been much debate over what the "injury to competition" standard means, that is not the case under Florida's statute. In the MFMPA "competition" is defined as:

[T]he vying for motor fuel sales between any two sellers in the same relevant geographic market.

*(Emphasis added.)*

Under this definition, competition is injured when one competitor is injured (i.e., lost volume and profits) as a result of another competitor engaging in conduct prohibited under the MFMPA. Under the MFMPA's "injury to competition" standard, it is not necessary to show that many competitors were injured or will likely be forced out of business. All that is required is proof that at least one competitor has been injured by the prohibited conduct.

## **ENFORCEMENT**

### ***Public Enforcement***

The Division of Standards in the Florida Department of Agriculture and Consumer Services (“DACS”) receives complaints of violations of the MFMPA and investigates the complaints. For a complaint to be acted upon by DACS, it must be submitted on a DACS complaint form, and the complaint must contain all the information required on the form. An improperly completed form or a complaint form containing inaccurate information will not be acted upon. The current version of the DACS complaint form with detailed instructions on how to complete the form and additional information on preparing a complaint appears at Tab G.

To assist in its investigative responsibility, DACS has the authority to issue subpoenas if the entity complained against will not produce all the information requested by DACS.

Upon completion of an investigation, DACS has the authority to file suit if it deems a violation has likely occurred. In such a suit, DACS may seek an immediate injunction to stop the violation and seek a civil penalty against the violator in an amount up to \$10,000 per day per violation with a \$250,000 maximum penalty.

### ***Private Enforcement***

The MFMPA creates the right to institute a private suit for damages and injunctive relief for persons injured as a result of a violation of the Act. The court may award treble damages. Attorneys’ fees are available to the prevailing plaintiff and may be awarded to a prevailing defendant.

### ***Injunctive Relief***

In 1991, a new injunctive relief standard was created for private suits instructing the court to grant a temporary restraining order if the plaintiff shows that: (1) the plaintiff is adversely affected by the alleged violation; (b) there exists sufficient serious question of a violation of the Act to make such question a fair ground for litigation; and (c) the hardship to the public interest will be less than the hardship to the plaintiff if a preliminary injunction were not granted.