

MOTOR FUEL MARKETING ACT

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: David Ure

This act modifies the Motor Fuel Marketing Act. The act amends definitions. The act addresses the requirement to establish and disclose certain prices. The act amends provisions against unlawful sales. The act addresses sales not considered violations. The act transfers civil enforcement authority from the Division of Consumer Protection to the attorney general. The act repeals the rebuttable presumption and the right of a purchaser to obtain price and cost information. The act sets standards for the confidentiality and use of information. The act provides a sunset date.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

13-2-1, as last amended by Chapters 150 and 324, Laws of Utah 1998

13-16-2, as last amended by Chapter 260, Laws of Utah 1991

13-16-3, as last amended by Chapter 189, Laws of Utah 1987

13-16-4, as last amended by Chapter 300, Laws of Utah 1992

13-16-6, as last amended by Chapter 279, Laws of Utah 1994

13-16-7, as last amended by Chapter 260, Laws of Utah 1991

13-16-10, as last amended by Chapter 300, Laws of Utah 1992

13-16-11, as enacted by Chapter 260, Laws of Utah 1991

ENACTS:

13-16-13, Utah Code Annotated 1953

63-55-213, Utah Code Annotated 1953

REPEALS:

13-16-5, as last amended by Chapter 189, Laws of Utah 1987

13-16-8, as last amended by Chapter 189, Laws of Utah 1987

13-16-9, as last amended by Chapter 189, Laws of Utah 1987

13-16-12, as enacted by Chapter 279, Laws of Utah 1994

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-2-1** is amended to read:

13-2-1. Consumer protection division established -- Functions.

There is established within the Department of Commerce the Division of Consumer Protection. The division shall administer and enforce the following:

- (1) Chapter 5, Unfair Practices Act;
- (2) Chapter 10a, Music Licensing Practices Act;
- (3) Chapter 11, Consumer Sales Practices Act;
- (4) Chapter 15, Business Opportunity Disclosure Act;
- ~~[(5) Chapter 16, Motor Fuel Marketing Act;]~~
- ~~[(6)]~~ (5) Chapter 20, New Motor Vehicle Warranties Act;
- ~~[(7)]~~ (6) Chapter 21, Credit Services Organizations Act;
- ~~[(8)]~~ (7) Chapter 22, Charitable Solicitations Act;
- ~~[(9)]~~ (8) Chapter 23, Health Spa Services Protection Act;
- ~~[(10)]~~ (9) Chapter 25a, Telephone and Facsimile Solicitation Act;
- ~~[(11)]~~ (10) Chapter 26, Telephone Fraud Prevention Act; ~~[and]~~
- ~~[(12)]~~ (11) Chapter 28, Prize Notices Regulation Act~~[-]~~; and
- ~~[(13)]~~ (12) Chapter 30, Utah Personal Introduction Services Protection Act.

Section 2. Section **13-16-2** is amended to read:

13-16-2. Definitions.

As used in this chapter:

(1) "Affiliate" means ~~[an entity]~~ a person that owns or controls, or is owned or controlled by, another person, whether through stock ownership or otherwise.

(2) "Cost" means an amount calculated as follows:

(a) (i) if motor fuel is not purchased from an affiliate:

(A) the lowest invoice cost that the seller charged to the purchaser for motor fuel of like grade and quality within five days prior to the date of any alleged unlawful resale by the purchaser;
or

(B) if there was no sale to the purchaser within the preceding five days, the purchaser's last invoice cost for motor fuel of like grade and quality; or

(ii) if motor fuel is purchased or received from an affiliate:

(A) the lowest transfer price that the affiliate charged to the purchaser or receiver for motor fuel of like grade and quality within five days prior to the date of any alleged unlawful resale by the purchaser or receiver; or

(B) if there was no purchase or receipt within the preceding five days, the last transfer price for motor fuel of like grade and quality; [~~less~~]

(b) [~~trade discounts, allowances, or rebates~~] less each of the following that the purchaser receives on the particular invoice or transfer:

(i) a trade discount;

(ii) an allowance; or

(iii) a rebate; [~~plus~~] and

(c) [~~the reasonable cost of doing business as determined by generally accepted accounting principles, which, with respect to retail sales and in the absence of proof of a lesser cost, is presumed to be a margin of 6% of the posted retail price;~~] plus the following if not included in the invoice cost or transfer price:

[~~(d)~~] (i) freight charges [~~and~~];

(ii) all applicable federal, state, and local taxes [~~not already included in the invoice cost or transfer price~~]; and

(iii) charges imposed by a federal, state, or local government that are not taxes.

(3) "Motor fuel" means gasoline, diesel fuel, gasohol, and all other fuels of a type designated for use as a motor fuel in self-propelled vehicles designated primarily for use on public streets, roads, and highways.

(4) "Person" means any individual, partnership, corporation, or legal entity.

(5) (a) "Posted rack price" means the price at which a refiner or other person offers a grade of motor fuel for sale at the rack before:

(i) a reduction for:

(A) a trade discount;

(B) an allowance; or

(C) a rebate; or

(ii) the addition of:

(A) a charge for freight;

(B) a federal, state, or local tax; or

(C) a charge imposed by a federal, state, or local government that is not a tax.

(b) Notwithstanding Subsection (5)(a), the posted rack price for a refiner or other person offering motor fuel for sale at the rack who does not establish a posted rack price shall be the lowest posted rack price of any person for motor fuel of like grade or quality in the geographic area served by the refiner or other person.

(6) "Purchase," "purchases," or "purchased" means the acquisition of motor fuel as a result of a sale or resale.

(7) "Rack" means a deck, platform, or open bay that consists of a series of metered pipes and hoses for the delivery or removal of motor fuel from the refinery or terminal into:

(a) a motor vehicle;

(b) a rail car; or

(c) a vessel.

(8) "Receipt" or "received" has the same meaning as purchase under Subsection (6).

(9) "Resale" or "resales" has the same meaning as sale under Subsection (11).

~~[(5)]~~ (10) "Retail sale" means any sale of motor fuel to a member of the motoring public for consumption.

~~[(6)]~~ (11) (a) "Sale," "sales," "sell," "sells," or "sold" means [any] the transfer of, [gift, sale,] or offer [for sale, or advertisement for sale in any manner or by any means, including any transfer of motor fuel by a person to himself or his affiliate-] to transfer:

(i) ownership, title to, or possession of, motor fuel from one person to another; and

(ii) with or without consideration.

(b) "Sale," "sales," "sell," "sells," or "sold" includes any method by which any person

transfers or offers to transfer ownership, title to, or possession of, motor fuel to itself or an affiliate for resale at another marketing level.

(12) "Terminal" means a facility:

(a) for the storage of motor fuel that is:

(i) part of a refinery; or

(ii) supplied by:

(A) a motor vehicle;

(B) a pipeline; or

(C) a vessel; and

(b) from which motor fuel is removed for distribution at a rack.

[(7)] (13) "Transfer price" means the price used by a refiner [in transferring] in connection with any sale of motor fuel to itself or an affiliate for resale at another marketing level.

Section 3. Section **13-16-3** is amended to read:

13-16-3. Requirement to establish and disclose "transfer prices" and "posted rack prices."

[Each] A refiner engaged in commerce in this state is required to:

(1) establish [and publicly disclose upon request];

(a) its transfer price on all grades of motor fuel [transferred or] sold to itself or an affiliate for resale in this state at a different marketing level of distribution[-]; and

(b) a posted rack price on all grades of motor fuel the refiner or other person sells at the rack in this state; and

(2) at the request of the attorney general, disclose to the attorney general:

(a) any transfer price described in Subsection (1)(a); or

(b) any posted rack price described in Subsection (1)(b).

Section 4. Section **13-16-4** is amended to read:

13-16-4. Unlawful sale by persons engaged in commerce.

(1) It is unlawful for any person engaged in commerce within this state to sell [or offer to sell] motor fuel in this state below cost as defined in Subsection 13-16-2(2) if[-(a)] the intent or

effect of the sale [~~or offer~~] is to:

(a) injure competition; [~~or~~]

(b) [~~the intent and purpose of the sale or offer is to~~] induce the [~~purchase~~] buying of other merchandise[~~;~~~~to~~];

(c) unfairly divert trade from a competitor[~~;~~]; or

(d) otherwise [~~to~~] injure a competitor.

(2) It is unlawful for any person engaged in commerce [~~within~~] in this state, in the course of such commerce, either directly or indirectly, to:

(a) sell motor fuel through an affiliate for retail sale in this state on a different marketing level of distribution at a price lower than the price it charges a person who purchases motor fuel of like grade and quality at reasonably the same time for retail sale in this state on the same level of distribution, if the intent or effect of the sale is to injure competition; or

(b) sell [~~or offer to sell~~] motor fuel for resale in this state at a price lower than the seller charges other persons [~~at the same time and~~] purchasing motor fuel of like grade and quality at reasonably the same time for resale in this state on the same level of distribution, if the intent or effect of the sale [~~or offer~~] is to injure competition.

Section 5. Section **13-16-6** is amended to read:

13-16-6. Sales not considered violations.

(1) It is not a violation of [~~Section~~] Subsection 13-16-4(2) [~~or 13-16-5~~] if:

(a) a difference exists at the same level of distribution between the transfer price or sales price of motor fuel of like grade and quality and the price charged to a person who purchases for resale, including any discount, rebate, allowance, service, or facility granted to any person, including any of a supplier's own marketing operations, who purchases for resale, in excess of those provided to [a] any other person who purchases for resale if the difference [is] makes only due [~~to a difference~~] allowance for differences in the cost of:

(i) manufacturing;

(ii) transportation, shipping, or other delivery method[~~;~~~~transportation;~~]; or

(iii) marketing[~~;~~] or sale[~~;~~~~or~~] resulting from the method or quantity in which the motor fuel

is sold[-] or delivered; or

~~[(2)]~~ (b) ~~[It is not a violation of Section 13-16-4 or 13-16-5 if]~~ a difference exists in transfer price and sales price or between sales prices at the same marketing level if the difference exists because of a good faith effort to meet the equally low price of a competitor or if the sale is exempt under Section 13-5-12.

~~[(3)(a)]~~ (2) It is not a violation of Subsection 13-16-4(1) if ~~[the]~~ a sale below cost is:

(a) the result of a good faith effort to meet the equally low price of a competitor ~~[or if the]~~;
or

(b) a sale ~~[is]~~ exempt under Section 13-5-12.

~~[(b) In determining whether a person has set the price at which motor fuel is sold or offered for sale to meet the price of a competitor, the court shall consider only whether the seller or offeror has set the price of motor fuel to match the price at which a competitor has sold or offered motor fuel without regard to any other items sold or offered in conjunction with the sale or offer for sale of the motor fuel.]~~

Section 6. Section **13-16-7** is amended to read:

13-16-7. Investigations and civil actions authorized -- Expenses -- Jurisdiction and venue.

(1) (a) The attorney general may conduct investigations of violations of this chapter and may issue civil investigative demands as provided in Subsections 76-10-917(1) through (7), and (9), stating the nature of the activities under investigation constituting the alleged violation of this chapter and the applicable provision of law and that any information provided in response to the demand may be used in a civil proceeding. If the ~~[Division of Consumer Protection]~~ attorney general has reason to believe that a person has engaged in acts or practices that violate Section 13-16-4 ~~[or 13-16-5]~~, the ~~[division]~~ attorney general may ~~[request the attorney general or a county attorney to]~~ commence a civil action to enjoin the acts or practices, seek civil penalties as provided in Subsection (1)(b), and upon a proper showing, a temporary restraining order, preliminary injunction, or permanent injunction shall issue without the necessity of a bond.

(b) Any person who violates Section 13-16-4 ~~[or 13-16-5]~~ is liable to the state for a civil

penalty, assessed by a court, not to exceed \$5,000 per day for each business location where a violation occurred.

(2) (a) Any person injured as a result of an act or practice that violates Section 13-16-4 [~~or 13-16-5~~] may bring a civil action for appropriate relief, including an action for a declaratory judgment, injunctive relief, a treble award of actual damages, and exemplary damages.

(b) Any action under this Subsection (2) shall be brought within two years after the alleged violation occurred.

(3) The court, in making an award under Subsection (1) or (2), may award court costs and a reasonable attorney's fee to the prevailing party, except that the court may not award attorney's fees or court costs against the state, a state agency, or a political subdivision of the state.

(4) If the state, a state agency, or a political subdivision of the state prevails in an action under this chapter, it is entitled to an award for reasonable investigative expenses in addition to any other relief granted.

(5) (a) The district courts of this state may hear and determine all cases brought under this section.

(b) Venue lies in any county where the defendant is doing business or in the county where the plaintiff resides.

Section 7. Section **13-16-10** is amended to read:

13-16-10. Recordkeeping -- Civil penalty.

(1) Persons engaged in commerce within this state who sell [~~or offer to sell~~] motor fuel in this state shall maintain records accurately indicating the date and the time of day of each change in the sale price of motor fuel and the identity of the person who recorded the price change. In the event the change in price is to meet a lower price of a competitor, the record shall set forth the competitor by name and address, specifying the price which was met. These records shall be maintained for a period of two years.

(2) The records shall be made available to [~~the Division of Consumer Protection and~~] the attorney general on request.

(3) A person who fails to comply with Subsection (1) is liable to the state for a civil penalty,

assessed by a court, of \$500 per day for each business location where a violation occurred.

Section 8. Section **13-16-11** is amended to read:

13-16-11. Applicability.

[~~(+)~~] Section 13-16-4 applies equally to all persons engaged in commerce in the marketing of motor fuel, regardless of the size of a marketing operation.

~~[(2) Section 13-16-5 applies equally to all refiners engaged in commerce in the marketing of motor fuel, regardless of the size of a marketing operation.]~~

Section 9. Section **13-16-13** is enacted to read:

13-16-13. Confidentiality and use of information.

(1) Any transfer price or posted rack price disclosed to the attorney general pursuant to Subsection 13-16-3(2), any records disclosed to the attorney general pursuant to Section 13-16-10, and any testimony, responses to interrogatories, documents or materials provided to the attorney general pursuant to a civil investigative demand shall be kept confidential by the attorney general unless confidentiality is waived in writing by the person who has:

- (a) provided the transfer price, posted rack price, or records; or
- (b) testified, answered interrogatories, provided documents or materials.

(2) Notwithstanding any other provision of this section, the attorney general may disclose any records, testimony, documents, materials, or other information obtained under this section, without either the consent of the person from whom it was received or the person being investigated, to:

- (a) any court; and
- (b) officers and employees of federal or state law enforcement agencies, provided the person from whom the information, documents, or objects were obtained is notified 20 days prior to disclosure, and the federal or state law enforcement agency certifies that the information will be:
 - (i) maintained in confidence, as required by Subsection 13-16-13(1); and
 - (ii) used only for official law enforcement purposes.

Section 10. Section **63-55-213** is enacted to read:

63-55-213. Repeal dates, Title 13.

Title 13, Chapter 16, Motor Fuel Marketing Act, is repealed July 1, 2006.

Section 11. **Repealer.**

This act repeals:

Section **13-16-5, Unlawful sale by refiner.**

Section **13-16-8, Burden of proof in civil action.**

Section **13-16-9, Right of purchaser to obtain price and cost information from marketer.**

Section **13-16-12, Rulemaking authority.**