

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 805 Motor Fuels
SPONSOR(S): Avila and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 906

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee		Butler	Anstead
2) Agriculture & Natural Resources Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

Following the Arab Oil Embargo of 1973, and the subsequent federal price control and allocation restrictions of liquid petroleum (also known as gasoline or a motor fuel), petroleum refiners and producers were accused of unfairly distributing the limited supply of motor fuel to their own retail operations over the retail operations of franchisees.

In response to these accusations, several states, including Florida, passed restrictions on the ownership of retail assets by petroleum refiners and producers. This practice, known as “divorcement,” prevents the vertical integration of petroleum suppliers and petroleum retailers, and prevents petroleum refiners from selling directly to customers.

Although originally passed in 1974, due to uncertainty over the constitutionality of petroleum divorcement, Florida’s petroleum divorcement law was never actually enforced before it was repealed in 1985.

The bill would reinstate the “divorcement” of petroleum refiner and retail operations and provides that a producer, refiner, or a subsidiary of any producer or refiner may not operate a retail outlet selling petroleum products under its own brand or a secondary brand name. The bill requires any producer, refiner, or any subsidiary to come into compliance with this mandate by October 1, 2016.

The bill amends the definition of “refiner,” to mean “any person engaged in the refining of crude oil to produce motor fuel and includes any affiliate of such person.”

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Motor Fuel and Liquid Petroleum Gasoline Regulation

Petroleum Marketing Practices Act

The Petroleum Marketing Practices Act (PMPA) regulates the contracts between gasoline refiners or distributors and their retailers by prohibiting, with some exceptions, franchisors terminating or failing to renew a franchise.¹ The PMPA is intended to protect distributors and retailers, and preempts state and local laws related to the termination or non-renewal of a franchise.

Motor Fuel Marketing Practices Act

The Motor Fuel Marketing Practices Act, ss. 526.301 through 526.313, F.S., and the rest of ch. 526, F.S., (collectively referred to as “the Act”) regulate the motor fuel and liquid petroleum industries to encourage fair and healthy competition in the marketing of motor fuel and discourage certain predatory, discriminatory, and unfair marketing practices which impair competition. As part of the Act and subject to certain exceptions, it is unlawful to resell motor fuel below the “acquisition cost” of the motor fuel, where the effect is to injure competition.²

The Florida Department of Agriculture and Consumer Services (Department) is charged by the Act to investigate any complaints of unfair and anticompetitive business practices that are restricted by the Act. The Department may impose civil sanctions for violations of the Act.

The Act also provides a private cause of action for persons injured as a result of an act or practice that violates the Act. A person can pursue declarative and injunctive relief for violations, and a person that proves actual damages as a result of a violation of the act may recover treble damages.

1973 Arab Oil Embargo Crisis and Divorcement

Beginning in October 1973, several members of the Organization of the Petroleum Exporting Countries (OPEC), proclaimed an oil embargo in response to American involvement in the 1973 Yom Kippur War.³ During the crisis, suspicions arose that major refiners were holding back on providing gas to affiliate and franchised stations and giving preference of their limited supply to refiner owned stations.⁴

In response to these suspicions and federal price control and allocation regulations, the Legislature passed restrictions on refiners of petroleum products that severely reduced the number of retail locations a refiner could own and operate, codified as s. 526.151, F.S.⁵ This practice, commonly referred to as “divorcement,” restricts vertical integration within the industry and forces entities currently operating as a refiner and a retailer to separate, or divorce, the ownership and operation of the retail and refiner aspects of the organization.

¹ 15 U.S.C. §§ 2801 to 2807 (2012).

² s. 526.304, F.S., (subsection (1)(a) restricts a refiner from selling motor fuel below the refiner’s cost and subsection (1)(b) restricts and nonrefiner from selling motor fuel below nonrefiner cost).

³ NELSON INSTITUTE CENTER FOR CULTURE, HISTORY, AND ENVIRONMENT, *A CHE Primer on Energy: Responding to Crisis*, <http://nelson.wisc.edu/che/events/place-based-workshops/2010/project/energy-perspectives/crisis.php> (last visited Jan. 6, 2016).

⁴ Al Hall, *Gasoline divorcement law still meets opposition*, GAINESVILLE SUN, Feb. 13, 1985, at 5D (archived on GoogleNews at <https://news.google.com/newspapers?id=njtWAAAIBAJ&sjid=mekDAAAIBAJ&pg=6650%2C4404852>).

⁵ Ch. 74-387, Laws of Fla., codified as s. 526.151, F.S., and subsequently repealed by Ch. 85-74, Laws of Fla.

Petroleum divorcement was ruled unconstitutional under the United States Constitution by a Florida circuit court in 1975;⁶ however, after a similar law related to petroleum divorcement from Maryland was upheld as constitutional by the U.S. Supreme Court in 1978,⁷ Florida's First District Court of Appeal reversed the earlier circuit court decision and certified several questions of the constitutionality of petroleum divorcement under the Florida and U.S. Constitution to the Florida Supreme Court in 1984.⁸ Prior to the Florida Supreme Court considering the certified questions, the Florida Legislature repealed the petroleum divorcement statute in 1985, rendering the questions moot.⁹

Ownership Structure of Retail Locations in Florida

Currently in Florida, the majority of gasoline stations are independently owned and operated by nonrefiners.¹⁰ One notable exception is the Marathon Petroleum Corporation, whose wholly owned subsidiary Speedway LLC recently completed a \$2.6 billion acquisition of Hess's retail locations, including 248 in Florida.¹¹ Marathon finished converting the former Hess locations in Florida to their Speedway brand in 2015.¹²

Effect of the Bill

The bill amends the definition of "refiner" in s. 526.303, F.S., to mean "any person engaged in the refining of crude oil to produce motor fuel and includes any affiliate of such person."

The bill prohibits a producer, refiner, or a subsidiary of any producer or refiner from operating a retail outlet selling its petroleum products under its own brand or a secondary brand name. The bill requires any producer, refiner, or any subsidiary to come into compliance with this mandate by October 1, 2016.

B. SECTION DIRECTORY:

Section 1 amends s. 526.303, F.S., revising the definition of "refiner."

Section 2 amends s. 526.304, F.S., providing that a producer, refiner, or subsidiary may not operate a retail outlet for petroleum products after October 1, 2016.

Section 3 and **Section 4** reenact ss. 526.311 & 526.312, F.S., confirming cross references.

Section 5 provides and effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

⁶ See State ex rel. Gas Kwick, Inc. v. Conner, 453 So. 2d 863, 864 (Fla. 1d DCA 1984) (stating that the decision declaring s. 526.151, F.S. unconstitutional in *Exxon Corporation, Shell Oil Company, Union Oil Company of California, and Phillips Petroleum Company v. Conner*, Cases No. 74-1449, 74-1577, and 74-1772, Circuit Court of the Second Judicial Circuit in and for Leon County [January 23, 1975] was unreported and never appealed).

⁷ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 120-21 (1978).

⁸ *Gas Kwick, Inc.*, 453 So. 2d at 864.

⁹ Ch. 85-74, Laws of Fla.

¹⁰ Testimony of Max Alvarez, Retail Gasoline Station Owner, at the Senate Appropriations Subcommittee on Transportation, Tourism, and Economic Development Subcommittee Meeting (April 4, 2015).

¹¹ Susan Salisbury, *Marathon stations on the increase; Hess brand is gone*, PALM BEACH POST, (Aug 5, 2015), <http://www.palmbeachpost.com/news/business/marathon-stations-on-the-increase-hess-brand-is-go/nnDYZ/>.

¹² Id.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Industry Effect of Divorcement

Marathon Petroleum, owners of Speedway, LCC, claim that should this bill become law, their operations in Florida would be adversely effected. Marathon acquired the retail locations of Hess Corporation in Florida in 2014, and has spent the last two years converting the former Hess locations to Speedway locations. Should this bill become law, Marathon would be forced to either sell or close their company-owned 248 Speedway retail locations in Florida by October 1, 2016, which employ 2,454 employees statewide.¹³

Several states have explored divorcement of retail and refiner operations in the motor fuel industry, including Virginia and Maryland.¹⁴ Several economists argue that divorcement in the motor fuel market has reduced choice among consumers and had the effect of raising the price of gas in markets that have divorcement legislation.¹⁵ Proponents for petroleum divorcement argue that the economic inefficiencies created by divorcement are necessary to protect small businesses.

Michael Vita, the former Deputy Assistant Director of the Bureau of Economics for the Federal Trade Commission (FTC), noted that “divorcement regulations raise the price of gasoline by about 2.7¢ per gallon,” and found that while in some cases preventing vertical integration can result in efficiency by preventing anticompetitive practices, empirical evidence of the effect of gasoline divorcement legislation fails to show such policies lower prices.¹⁶ A recent FTC advisory opinion stated that bans and restrictions on vertical integration and “direct-to-consumer sales” of motor fuel are likely anticompetitive and harmful to consumers.¹⁷

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

¹³ Email from Nancy Stewart, Representative for Marathon Petroleum, [EXTERNAL] Marathon Statistics and Figures (Jan. 6, 2016) (on file with the Business and Professions Subcommittee).

¹⁴ Michael G. Vita, *Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies*, 18 J. Reg. Econ. 217-33 (2000). [hereinafter Vita Study]

¹⁵ See generally Asher A. Blass & Dennis W. Carlton, *The Choice of Organizational Form in Gasoline Retailing and the Cost of Laws That Limit That Choice*, 44 J.L. & Econ. 511, 524 (2001) (indicating that “a policy of divorcement is likely to impose significant costs on society.”)

¹⁶ Vita Study, *supra* note 14, at 22.

¹⁷ Federal Trade Commission, *Staff Advisory Opinion to Rep. Michael J. Colona*, archived at 2014 WL 2109057 (May 15, 2014) (stating that a “ban on direct-to-consumer sales by motor vehicle franchisors is very likely anticompetitive and harmful to consumers ... [and] arguments that have been offered in its defense appear to be contrary to a significant body of economic study and FTC experience.”)

2. Other:

Petroleum divorcement was ruled unconstitutional under the United States Constitution by a Florida circuit court in 1975;¹⁸ however, after a similar law related to petroleum divorcement from Maryland was upheld as constitutional by the U.S. Supreme Court in 1978,¹⁹ Florida's First District Court of Appeal reversed the earlier circuit court decision and certified several questions of the constitutionality of petroleum divorcement under the Florida and U.S. Constitution to the Florida Supreme Court in 1984.²⁰ Prior to the Florida Supreme Court considering the certified questions, the Florida Legislature repealed the petroleum divorcement statute in 1985, rendering the questions moot.²¹

The Florida Supreme Court has not addressed the issue of petroleum divorcement under the U.S. or Florida Constitutions.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

¹⁸ See *Gas Kwick, Inc*, 453 So. 2d at 864 (stating that the decision declaring s. 526.151, F.S., unconstitutional in *Exxon Corporation, Shell Oil Company, Union Oil Company of California, and Phillips Petroleum Company v. Conner*, Cases No. 74-1449, 74-1577, and 74-1772, Circuit Court of the Second Judicial Circuit in and for Leon County [January 23, 1975] was unreported and never appealed).

¹⁹ *Exxon*, 437 U.S. at 120-21.

²⁰ *Gas Kwick, Inc.*, 453 So. 2d at 864.

²¹ Ch. 85-74, Laws of Fla.