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Gasoline Price Increases: Federal and State Authority to Limit "Price Gouging"

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Summary

In the aftermath of last year's hurricane season, questions arose regarding increased prices in the areas affected by Hurricanes Katrina, Rita, and Wilma and the effect that the damage caused by the hurricanes would have on prices, specifically gasoline prices, in other parts of the country. As gasoline prices have continued to rise in the months since, Congress is expected to consider comprehensive legislation addressing gasoline and oil prices that could include provisions related to price gouging. This report discusses state laws regarding price gouging in the event of an emergency, as well as the role the federal government could play in addressing rising gas prices. It will be updated as events warrant.

Introduction

Currently, there are no federal laws that specifically address price gouging. Price gouging laws exist at the state level and are generally applicable in situations arising from a declared emergency.[1] An increase in prices alone does not necessarily constitute price gouging, and technically, price gouging arises as an issue only when a statutorily designated triggering event occurs.

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[1] At least 28 states — Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia — the District of Columbia, Guam, and the Northern Mariana Islands have laws that prohibit price gouging, excessive price increases, or unconscionable pricing. Most states have laws that are triggered in the event of a declared emergency, with a few having laws that may be applicable at other times as well. Other states may also exercise authority under general deceptive trade practice laws depending on the nature of the state law and the specific circumstances under which price increases occur.

On the other hand, if there exists evidence of collusive activity among retailers, suppliers, or manufacturers, federal antitrust laws might apply.[2] The Federal Trade Commission (FTC) monitors gas prices and investigates possible antitrust violations in the petroleum industry.[3] Additionally, the Energy Policy Act of 2005 requires the FTC to investigate whether the price of gasoline is being "artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices."[4] Also, supply-side measures taken by the federal government could affect the retail price of gasoline.

This report begins with a discussion of state price gouging laws, including their triggers and applications, and then moves to a discussion of what steps the federal government may take to control prices.

State Price Gouging Laws

Although there is no federal price gouging law, many states have enacted some type of prohibition or limitation on price increases during declared emergencies.[5] Generally, the laws prohibit the sale of goods and services in the designated emergency area at prices that exceed the prices ordinarily charged for comparable goods or services in the same market area at or immediately before the declaration of an emergency.[6] However, there exists a general exemption for increased prices that are the result of additional costs incurred for procuring the goods or services in question, or "national or international market trends."[7]

Hurricane-Affected States. Price gouging came to the fore as an issue during the unprecedentedly active hurricane season of 2005. All five affected states on the Gulf of Mexico have laws addressing sudden price increases, laws all premised on the declaration of a state emergency.

The Florida statute is among the most detailed. It establishes a prima facie case of unconscionable pricing if the amount being charged represents a "gross disparity" between the average price at which the product or service was offered in the usual course of business during the 30 days immediately prior to a declaration of a state of emergency,

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[2] For more information on the applicability of the federal antitrust laws, see CRS Report RS22262, "*Price Gouging," the Antitrust Laws, and Vertical Integration: How They Are Related*, by Janice E. Rubin.

[3] For more information on the Federal Trade Commission's activities with respect to gas pricing, see [http://www.ftc.gov/ftc/oilgas/index.html].

[4] P.L. 109-58 § 1809, 119 Stat. 594, 1125 (Aug. 8, 2005).

[5] The Federal Emergency Management Administration has declared emergencies in all four states affected by Hurricane Katrina. *See* [http://www.fema.gov/news/disasters.fema]. States of emergency have also been declared by the Governors of Alabama, Florida, Louisiana, and Mississippi.

[6] *See* Miss. Code Ann. § 75-24-25(2). The Alabama statute prohibits "unconscionable prices" during the period of a declared state of emergency, but does not define "unconscionable." Code of Ala. § 8-31-3.

[7] *See* Fla. Stat. § 501.160.

or if the amount charged "grossly exceeds" the average price at which the same or similar product or service was readily obtainable in the trade area during the 30 days immediately prior to a declaration of a state of emergency. However, unconscionable pricing does not exist if the increase is attributable to additional costs incurred by the seller or the result of national or international market trends.[8]

In Alabama, prima facie evidence of unconscionable pricing exists "if any person, during a state of emergency declared pursuant to the powers granted to the Governor, charges a price that exceeds, by an amount equal to or in excess of 25% the average price at which the same or similar commodity or rental facility was obtainable in the affected area during the last 30 days immediately prior to the declared state of emergency," but, like Florida, price gouging does not exist if the price increase is attributable to reasonable costs incurred by the seller in connection with the rental or sale of the commodity.[9]

The Mississippi and Louisiana statutes define price gouging more generally and do not provide any specific activities which could give rise to prima facie evidence of price gouging. Each of these statutes prohibits the selling of goods and services at prices which exceed "the prices ordinarily charged for comparable goods and services in the same market area at, or immediately before, the time of the [declaration of the] state of emergency."[10] Under each statute, price gouging does not include price increases due to additional costs or expenses incurred as a result of the emergency.[11] In its deceptive trade practices law, Texas bars the exorbitant or excessive pricing of necessities during a declared disaster.[12]

Laws of Other States. Typically, state price gouging laws are triggered only by a declaration of emergency in response to localized conditions. Thus, in areas not directly affected by a particular emergency or natural disaster, state price gouging laws, where they exist, are not likely to apply to any price increases subsequent to the emergencies or disasters occurring elsewhere. Still, while price increases may not fall within the price gouging statutes, if the raising of prices by retailers, suppliers, or manufacturers is the result of collusive activity, the federal antitrust laws could be applicable.[13]

Some states have adopted gouging laws that can be more readily triggered by the declaration of an emergency not specifically related to a natural disaster occurring in the state. For example, Georgia's price gouging statute can be triggered by the declaration of an "energy emergency," which is defined as "a condition of danger to the health, safety, welfare, or economic well-being of the citizens of this state arising out of a present or

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[8] Fla. Stat. § 501.160(1)(b).

[9] Code of Ala. § 8-31-4.

[10] La. R.S. 29:732; Miss. Code Ann. § 75-24-25(2).

[11] Id.

[12] Tex. Bus. & Com. Code Ann. § 17.46(b)(27).

[13] For an overview of federal antitrust law, see CRS Report RL31026, *General Overview of United States Antitrust Law*, by Janice E. Rubin.

threatened shortage of usable energy resources."[14] The Governor of Georgia declared such an emergency on August 31, 2005, triggering the state's price gouging statute.[15]

At least two states have laws that do not require the declaration of any type of emergency as a "trigger." A Maine law prohibits "unjust or unreasonable" profits in the sale, exchange or handling of necessities, defined to include fuel.[16] Michigan's consumer protection act generally prohibits "charging the consumer a price that is grossly in excess of the price at which similar property or services are sold."[17]

Increases in Gas Prices not Attributable to Price Gouging

Both the House and the Senate are reportedly preparing energy legislation to address rising gasoline prices. According to news accounts, there are Republican proposals to provide gas tax rebates to consumers, repeal tax breaks for oil companies, change the fuel economy standards for passenger vehicles, and suspend acquisition of oil for the Strategic Petroleum Reserve (SPR). Some of these proposals, namely changes to fuel economy standards and a $100 gas tax rebate to consumers, are contained in the Gas Price Relief and Rebate Act that has been filed as an amendment to H.R. 4939, the Supplemental Appropriations bill. The effect that such proposals would have on gasoline prices is debatable and beyond the scope of this report.

During previous periods of significant energy price increases, laws were used in attempts to reduce prices, some of which remain in force today, while others have been repealed. Under the Economic Stabilization Act of 1970,[18] for instance, the President was authorized to control the price of commodities, including crude oil and refined petroleum.[19] President Nixon exercised this authority in 1971; it expired in 1974.[20] Similarly, the Emergency Petroleum Allocation Act of 1973 (EPAA)[21] directed the President to establish temporary measures "to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system" and to "minimiz[e] the adverse impacts of such shortages or dislocations on the American people and the domestic economy."[22] To meet these objectives, the Act granted the President broad authority to allocate oil and to specify its price.[23] A comprehensive program was established in 1974, including standby regulations for use during

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[14] O.C.G.A. § 10-1-393.4; O.C.G.A. § 38-3-3.

[15] See [http://www.gov.state.ga.us/ExOrders/08_31_05_01.pdf].

[16] 10 M.R.S.A. § 1105.

[17] MCL 445.903(1)(z).

[18] P.L. 91-379, §§201-06, 84 Stat. 796, 799-800 (1970).

[19] 12 U.S.C. § 1904, note (1976).

[20] Exec. Order No. 11615, 36 Fed. Reg. 15727 (Aug. 17, 1971).

[21] P.L. 93-159, 87 Stat. 627, 693-702 (codified at 15 U.S.C. §§ 751-760).

[22] 15 U.S.C. § 751(b).

[23] Id. § 753(a).

emergencies, which included price controls and allocation measures.[24] The President was also empowered to take other actions to affect petroleum product prices, such as ordering refineries to modify their output and controlling the accumulation of petroleum by importers, producers, refiners, marketers or distributers.[25] These regulations were phased out over successive Administrations and eventually terminated by President Reagan in 1981;[26] the law itself expired on September 30, 1981.[27] With the expiration of these statutes, no law provides authority to impose price controls on petroleum products.

The federal government may be able to add crude oil supply to markets through use of the Strategic Petroleum Reserve (SPR). The SPR was created by the Energy Policy and Conservation Act (EPCA),[28] enacted in 1975, which authorizes the stockpiling of petroleum products and the distribution of SPR oil by the Secretary of Energy. Distribution can be accomplished in several different manners, each of which is subject to different requirements, as described below.[29]

The first distribution method under current law is the "drawdown and sale," which can occur only after the President has found that distribution of SPR oil is "required by a severe energy supply interruption" or by international obligations.[30] The law requires the Secretary of Energy to sell SPR products released pursuant to this authority at "public sale to the highest qualified bidder ... without regard to Federal, State, or local regulations controlling sales of petroleum products."[31] DOE regulations indicate that contracts for sale of SPR petroleum are to be awarded to "responsive, responsible persons offering the highest prices ...[through] sales conducted pursuant to [DOE] rules...."[32]

The second authority for distributions from the SPR may be used to respond to disruptions in crude supply that are internal to the United States. Under this provision, a drawdown may be initiated in a situation that "constitutes, or is likely to become, a domestic or international energy supply shortage of significant scope or duration" and

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[24] 39 Fed. Reg. 1924 (Jan. 15, 1974); 44 Fed. Reg. 3928 (Jan. 18, 1979); 45 Fed. Reg. 55374 (Aug. 19, 1980).

[25] See 15 U.S.C. §§ 760b-760e.

[26] See, e.g., 15 Weekly Comp. of Pres. Doc. 609 (Apr. 1979); Exec. Ord. No. 12287, "Decontrol of Crude Oil and Refined Petroleum Products," 46 Fed. Reg. 9909 (Jan. 30, 1981). The price controls in the petroleum markets were generally considered by economists to be inefficient and the cause of additional problems.

[27] 15 U.S.C. § 760g.

[28] P.L. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. §§ 6231-6247).

[29] 42 U.S.C. §§ 6234, 6241.

[30] Id. § 6241(d)(1), (h). The President made this finding on September 2, 2005. *See* Memorandum for the Secretary of Energy and Secretary of Homeland Security (Sept. 2, 2005), available at [http://www.whitehouse.gov/news/releases/2005/09/20050902-10.html].

[31] Id. § 6241(e).

[32] 10 C.F.R.§ 625.2; 10 C.F.R. Pt. 625, App. A, § B.3. These provisions indicate that sales of SPR petroleum should generally result in a return to the government equivalent to the value of market-priced petroleum. Thus, any effect on gasoline prices resulting from SPR petroleum sales would seem more likely to be caused by increased supply or the perception of increased supply.

where "action taken ... would assist directly and significantly in preventing or reducing the adverse impact of such shortage."[33] This authority allows for a limited use of the SPR. No more than 30 million barrels may be sold over a maximum period of 60 days, and this limited authority may not be exercised at all if the level of the SPR is below 500 million barrels.[34] This authority was invoked on September 2, 2005 in response to gasoline price spikes following the Gulf Coast hurricanes.[35] In coordination with the International Energy Agency (IEA), the President authorized a drawdown of 30 million barrels of SPR oil to be offered for bid. Neither Congress nor the Administration has proposed using this authority to respond to current price increases.

An SPR loan program has also been used to alleviate tight supply in the past. This process does not appear to be expressly provided for in the applicable statutes and regulations; however, authority may be inferred from the Secretary's SPR development and operations powers, which include authority to "acquire ... by purchase, exchange, or otherwise, petroleum products for storage in the Strategic Petroleum Reserve ... [and to] execute any contract necessary to develop, operate, or maintain ... [the SPR]."[36] The SPR was used in this manner on August 31, 2005, to loan crude oil to operating U.S. refineries. Generally, recipients of these loans are required to repay them by providing a somewhat larger amount of oil to the SPR when oil prices have fallen.[37] Return barrels resulting from the hurricane-related loans are due in May.[38] It is possible, however, that this could be delayed in response to current prices.

As stated, instead of releasing SPR petroleum to expand supply and lower prices, some are proposing the suspension of future SPR acquisitions to ease demand. Apart from acquisition of return barrels for earlier loans, however, other acquisition at significant levels may not occur in the near term.[39] The 2005 Energy Policy Act does require expansion of SPR capacity to 1 billion barrels and directs acquisition to fill this new capacity.[40] This expansion has not yet begun, and, further, the necessary acquisitions can only be made in a manner that does not incur "excessive" cost to the government or appreciably affect the price of petroleum products to consumers.[41] Thus, a current acquisition suspension that would significantly affect gasoline prices may be unlikely.

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[33] 42 U.S.C. § 4261(h)(1).

[34] Id. § 4261(h)(2).

[35] DOE Press Release, President Bush Directs Energy Secretary to Draw Down Strategic Petroleum Reserve (Sept. 3, 2005), *available at* [http://www.fe.doe.gov/news/techlines/2005/tl_spr_drawdown.html].

[36] 42 U.S.C. §§ 6239; 6240.

[37] For a description of this process, see CRS Issue Brief IB87050, *Strategic Petroleum Reserve*, by Robert Bamberger.

[38] *See* Dep't of Energy, Strategic Petroleum Reserve Inventory (Apr. 27, 2006), [http://www2.spr.doe.gov/DIR/SilverStream/Pages/pgDailyInventoryReportViewDOE_new.html].

[39] The current inventory of the SPR is 687.3 million barrels; its current capacity is 727 million barrels. Id.

[40] 42 U.S.C. § 6240 note.

[41] Id; 71 Fed. Reg. 20909 (April 24, 2006).