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CRS Report for Congress

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

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Summary

During the 2005 hurricane season, gasoline prices rose sharply, both in directly affected areas and elsewhere in the country, and attention turned to the causes underlying these sharp increases. Although gasoline prices have fluctuated since then, Congress continues to consider legislation on fuel pricing, including provisions addressing price gouging. In the 110th Congress, bills have been introduced in both the Senate (S. 94) and the House of Representatives (H.R. 1252) that would adopt federal provisions on price gouging of gasoline and other fuels. Meanwhile, a majority of states have already enacted statutes to curtail price gouging, particularly during emergencies. This report discusses state laws regarding price gouging, the role of the federal government in addressing rising gas prices, and the new federal legislative proposals related to price gouging.

Introduction

"Price gouging," a term commonly used to refer to sellers inflating prices to "unfair" levels in order to take advantage of certain circumstances causing a decrease in supply, including emergencies, reached the public consciousness in 2005, when gasoline prices rose sharply in the wake of several hurricanes in the Gulf Coast area, including Hurricane Katrina. Currently, no federal law specifically addresses price gouging. However, bills were recently introduced in both the Senate and the House of Representatives that would prohibit price gouging of gasoline and other fuels.[1] Price gouging laws already exist at the state level and are generally applicable in situations arising from a declared emergency.[2] An increase in prices alone does not constitute price gouging. Generally,

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[1] S. 94, 110th Cong., and H.R. 1252, 110th Cong. Other than Committee referral, no reported action has been taken on either bill as of the date of this Report.

[2] At least 30 states — Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, (continued...)

provisions in price gouging statutes are triggered only when prices increase following a statutorily designated event.

Even absent a specific "price gouging" law, federal antitrust laws might apply to price-gouging behavior.[3] The Federal Trade Commission (FTC) monitors gas prices and investigates possible antitrust violations in the petroleum industry.[4] In addition, the Energy Policy Act of 2005 required 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."[5]

This report begins with a discussion of state price gouging laws, including their triggers and applications, and then moves to a discussion of federal legislation aimed at prohibiting price gouging.

State Price Gouging Laws

Many states have enacted some type of prohibition or limitation on price increases during declared emergencies. Generally, these 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. However, many statutes include an exemption if the increased prices are the result of increased costs incurred for procuring the goods or services in question.

Hurricane-Affected States. Price gouging became a highly publicized concern in the aftermath of the 2005 hurricane season, which saw sharp price increases in gasoline and natural gas prices. The potential for price gouging was of particular concern in the states directly impacted by the hurricanes. Of the five affected states on the Gulf of Mexico, four have specific price gouging laws premised on the declaration of a state emergency.[6]

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[2] (...continued)
Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia and Wisconsin — 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 in which price increases occur.

[3] 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.

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

[5] P.L. 109-58 § 1809, 119 Stat. 594, 1125 (Aug. 8, 2005). The FTC's report was published in May of 2006 and can be viewed at [http://www.ftc.gov/opa/2006/05/katrinagasprices.htm].

[6] Texas's deceptive trade practices law prohibits the exorbitant or excessive pricing of necessities
(continued...)

The Florida statute establishes a prima facie case of unconscionable pricing if the amount being charged represents a "gross disparity" from the average price at which the product or service was sold in the usual course of business, or available 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 is the result of national or international market trends.[7]

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;" however, as in the Florida statute, there is no unconscionable pricing if the price increase is attributable to reasonable costs incurred by the seller in connection with the rental or sale of the commodity.[8]

The Mississippi and Louisiana statutes do not specify elements of a "prima facie" case of price gouging, but they are otherwise similar to the Florida and Alabama statutes. Mississippi and Louisiana prohibit 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."[9] Under each statute, price gouging does not include price increases due to additional costs or expenses incurred as a result of the emergency.[10]

Other States. Many 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 are not likely to apply to any price increases subsequent to an emergency or disaster occurring elsewhere.

Some price gouging laws are less tethered to the occurrence of a local natural disaster. 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 threatened shortage of usable energy resources," with no geographical restrictions.[11]

At least two states have laws that do not require the declaration of any type of emergency as a trigger. Maine law prohibits "unjust or unreasonable" profits in the sale,

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[6] (...continued)
during a declared disaster, but it does not specifically define those activities as price gouging. Tex. Bus. & Com. Code Ann. § 17.46(b)(27).

[7] Fla. Stat. § 501.160(1)(b).

[8] Code of Ala. § 8-31-4.

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

[10] Id.

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

exchange or handling of necessities, defined to include fuel.[12] Michigan's consumer protection act simply prohibits "charging the consumer a price that is grossly in excess of the price at which similar property or services are sold."[13]

Federal Price Gouging Legislation

As mentioned above, currently there is no federal law that deals specifically with price gouging. However, federal antitrust laws may apply to behavior generally seen in price gouging.[14] The Federal Trade Commission (FTC) monitors gas prices and investigates possible antitrust violations in the petroleum industry.[15] In addition, the Energy Policy Act of 2005 required 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."[16] In May 2006, the FTC released its report, finding generally that sellers behaved competitively and that the price increases were the result of increased costs, although there were limited instances of price gouging.[17]

In the aftermath of Hurricane Katrina and the subsequent rise in gasoline prices, a number of bills were introduced in the 109th Congress to create a federal price gouging law. The House passed H.R. 3893, the Gasoline for America's Security Act of 2005, on October 7, 2005. Subsequently, H.R. 5253, the Federal Energy Price Protection Act of 2006, was passed by the House on May 3, 2006. Both bills were aimed at prohibiting price gouging and charged the FTC with enforcement. Neither bill reached a vote in the Senate.

New price-gouging bills have since been introduced in both the Senate and the House of Representatives in the 110th Congress. The House bill, the Federal Price Gouging Prevention Act (H.R. 1252), would forbid the sale of crude oil, gasoline, natural gas or petroleum distillates at a price that (a) is unconscionably excessive or (b) indicates that the seller is taking unfair advantage of unusual market conditions (whether real or perceived) or the circumstances of an emergency to increase prices unreasonably.[18] H.R. 1252 also lists factors to be considered in determining if such a sale has taken place and

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[12] 10 M.R.S.A. § 1105.

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

[14] 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.

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

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

[17] The FTC's report can be viewed at [http://www.ftc.gov/opa/2006/05/katrinagasprices.htm].

[18] H.R. 1252 at § 2(a)(1).

provides that certain "mitigating factors" should also be taken into account.[19] These "mitigating factors" include "among other things, whether the price at which the crude oil, gasoline, natural gas or petroleum distillate was sold reasonably reflects additional costs not within the control of the seller, that were paid or incurred by the seller."[20] In addition, H.R. 1252 would make it unlawful to report false fuel pricing information to the FTC or to engage in market manipulation.[21] The FTC would be charged with enforcement of the Act through its authority to penalize unfair or deceptive acts and practices under the Federal Trade Commission Act.[22] State attorneys general would also be given limited enforcement authority.[23] The FTC would also be required to promulgate rules to facilitate market transparency for the crude oil, gasoline, natural gas and petroleum distillates markets.[24]

The Senate bill, titled the Gasoline Consumer Anti-Price-Gouging Protection Act (S. 94), would authorize the President to issue a proclamation if an "abnormal market disruption has occurred or is reasonably expected to occur" and also would authorize the FTC to issue emergency orders in the absence of a presidential proclamation if it is determined that "an abnormal market disruption affecting more than 1 State has occurred or is reasonably expected to occur."[25] The presidential proclamation or FTC emergency order must specify the triggering event and the duration of its application, and may also specify the area or region to which it applies.[26] S. 94 would make it unlawful for any supplier to increase the price at which it sells gasoline or petroleum distillates in an area covered by one of these presidential proclamations or emergency orders.[27] It would define certain lawful "justifiable" price increases, including those substantially attributable to an increase in the wholesale cost of gasoline or petroleum distillate; an increase in the replacement costs for gasoline or petroleum distillate sold; an increase in operational costs; and local, regional, national or international market conditions.[28] S. 94 also lists "other mitigating factors" to be considered in determining if a violation has occurred. The language mirrors the "mitigating factors" language in H.R. 1252.[29] As with H.R. 1252, S. 94 would charge the FTC with enforcement through its authority to penalize unfair or deceptive acts and practices under the Federal Trade Commission

[19] *Id.* at § 2(a)(2), (3).

[20] *Id.* at § 2(a)(3).

[21] *Id.* at § 2(b), (c).

[22] *Id.* at § 3 and 4; 15 U.S.C. § 57a(a)(1)(B).

[23] H.R. 1252 at § 5.

[24] *Id.* at § 8.

[25] *Id.* at § 4(a)(2).

[26] *Id.* at § 4(b). A proclamation or order under the bill is limited to 30 days but can be renewed for up to 30 additional days. As to proclamations and orders issued in anticipation of an expected abnormal market disruption, they may apply to a period of up to 7 days prior to the anticipated triggering event.

[27] *Id.* at § 2. The scope of S. 94 is more narrow than the scope of the H.R. 1252, because it does not address the sale of crude oil or natural gas.

[28] *Id.* at § 3(a).

[29] *Id.* at § 3(b).

Act.[30] However, S. 94 does not include the provisions for market transparency or limited state enforcement authority found in H.R. 1252.

[30] *Id.* at § 5(a); 15 U.S.C. § 57a(a)(1)(B).