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Gasoline Price Increases: Federal and State Authority to Limit “Price Gouging”

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Gasoline Price Increases: Federal and State Authority to Limit “Price Gouging”

Fluctuations in gasoline prices, including supply chain concerns related to international events, have renewed focus on the role of the government in discouraging gasoline “price gouging,” a term commonly used to refer to sellers increasing prices to take advantage of certain circumstances that trigger decreases in supply, including emergencies. Others have sought to enhance protections against “price fixing,” whereby sellers collude to raise prices beyond levels dictated by market conditions. Past federal legislative efforts to address gasoline price gouging and price fixing would bar certain commercial practices and mandate studies of gasoline pricing.

The federal government has not enacted legislation aimed specifically at price spikes for retail gasoline. However, a majority of states have enacted statutes to curtail price gouging for certain critical goods and services, including gasoline, during emergencies. Some of these statutes bar pricing during emergencies that is considered to be “unconscionable” or “excessive” or otherwise violates a subjective standard. Other statutes place a hard cap on prices during periods of emergency based on percentage increases from prices charged for the good or service in question prior to the emergency. These state statutes generally allow sellers to show that the price increases are the result of increased costs rather than simply changes in the marketplace.

Multiple bills introduced in the 117th Congress would explicitly address price gouging for retail gasoline or other practices that might impact retail pricing during emergencies at the federal level. This has been the case in previous Congresses as well. Some of the legislation proposes limitations on pricing during emergencies similar to the state statutes, while others choose a different approach.

Although there is no federal law aimed specifically at price gouging or at retail gasoline pricing, federal antitrust laws do forbid various types of anticompetitive business practices. For example, Section 1 of the Sherman Act prohibits unreasonable restraints of trade. It is possible that a group of gasoline retailers or other retailers collaborating to set prices unreasonably high during an emergency could violate Section 1 of the Sherman Act. In addition, federal statutes addressing monopolies and vertical integration may play a role in evaluating retail gasoline price changes.

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Introduction

Fluctuations in retail gasoline pricing have a substantial impact on Americans and, as a result, often receive substantial media, public, and government attention—particularly when the price spikes. This attention sometimes takes the form of accusations that sellers of crude oil or retail gasoline are engaged in “price gouging” or “price fixing.”

Price gouging is a term commonly used to refer to sellers inflating prices to “unfair” levels in order to take advantage of circumstances that decrease supply, including emergencies. Currently, no federal law specifically addresses price gouging.¹ However, bills have been introduced in the 117th Congress that would prohibit price gouging of gasoline and other fuels.² In addition, price-gouging laws already exist in many states and are generally applicable in situations arising from a declared emergency.³ An increase in prices alone does not constitute price gouging under most of these state statutes. Generally, protections and prohibitions in these statutes are triggered only when prices increase following a statutorily designated event. Federal antitrust and consumer protection laws also afford consumers some protection from unfair pricing schemes.⁴ This report begins with a discussion of state price-gouging laws, including their triggers and applications, and then moves to a discussion of proposed federal legislation aimed at prohibiting price gouging. The report also analyzes existing federal law regarding anticompetitive behavior and how it might apply to the market for gasoline or other petroleum products.

State Price-Gouging Laws

Many states have enacted some type of prohibition or limitation on price increases during declared emergencies. Generally, these state laws take one of two basic forms. Some states prohibit the sale of goods and services at what are deemed to be “unconscionable” or “excessive” prices in the area and during the period of a designated emergency. Other states have established a maximum permissible increase in the prices for retail goods during a designated emergency period. Many statutes of both kinds include an exemption if price increases are the result of increased costs incurred for procuring the goods or services in question.

¹ Although they are often conflated, “price gouging” is not the same as “price fixing,” which refers to coordination among rival businesses to charge higher prices. This report focuses on “price gouging” and sudden price spikes triggered by external events. Section 1 of the Sherman Antitrust Act categorically prohibits “naked” price fixing—that is, price fixing among rivals that is not connected to any legitimate joint productive activity. 15 U.S.C. § 1; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). For more discussion of federal regulation of such practices, see CRS In Focus IF11234, *Antitrust Law: An Introduction*, by Jay B. Sykes.

² See H.R. 7099, S. 3920. The substance of these bills is discussed later in this report.

³ At least 30 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, Utah, Virginia, West Virginia, and Wisconsin—as well as the District of Columbia, Guam, and the Northern Mariana Islands—have laws or regulations 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.

⁴ For example, the Federal Trade Commission has adopted rules to prohibit energy market manipulation, as directed by Congress in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, P.L. 110-140. See 16 C.F.R. Part 317.

Examples of State Statutes

Prohibitions on “Excessive” or “Unconscionable” Pricing

One common way that states address price gouging is to ban prices that are considered to be (for example) “excessive” or “unconscionable,” as defined in the statute or left to the discretion of the courts. These statutes generally bar such increases during designated emergency periods. The process for emergency designation is also usually defined in the statute. Frequently, the state’s governor is granted authority to designate an emergency during which the price limitations are in place.

For example, the New York statute provides that:

During any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.⁵

The statute defines *abnormal disruption of the market* as a real or threatened change to the market “resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency ... which results in the declaration of a state of emergency by the governor.”⁶ The statute provides only for criminal liability and leaves the ultimate decision as to whether a price is “unconscionably excessive” to prosecutors (for charging purposes) and to the courts, with no separate cause of action created for private parties. As guidance in such cases, the statute notes that if there is a “gross disparity” between the price during the disruption and the price prior to the disruption, or if the price “grossly exceeds” the price at which the same or similar goods are available in the area, such disparity will be considered *prima facie* evidence that a price is unconscionable.⁷

Similarly, Florida’s statute bars “unconscionable pricing” during declared states of emergency.⁸ 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, it is considered *prima facie* evidence of “unconscionable pricing,” which constitutes an “unlawful act or practice.”⁹ However, pricing is not considered unconscionable if the increase is attributable to additional costs incurred by the seller or is the result of national or international market trends.¹⁰ As with the New York statute, the Florida statute offers guidance, but the question of whether certain prices during an emergency are deemed “unconscionable” is ultimately left to the courts.

Many state price-gouging laws are triggered only by a declaration of emergency in response to localized conditions. Thus, they will generally not apply after a declared emergency ends or in areas not directly affected by a particular emergency or natural disaster. However, at least two

⁵ N.Y. Business Law § 396-r(2).

⁶ *Id.*

⁷ *Id.* at § 396-r(3).

⁸ Fla. Stat. § 501.160(1)(b)(3).

⁹ Fla. Stat. §§ 501.160(1)(b)(1)-(2), 501.204. The section does not create a private cause of action for people harmed by such pricing. Fla. Stat. § 501.160(6).

¹⁰ *Id.*

states have laws prohibiting excessive pricing that impose liability even without a declaration of any type of emergency. Maine law prohibits “unjust or unreasonable” profits in the sale, exchange, or handling of necessities, defined to include fuel.¹¹ 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.”¹²

Prohibitions of Price Increases Beyond a Certain Percentage

In contrast to a general ban on “excessive” or “unconscionable” pricing, some state statutes leave less to the courts’ discretion and instead place limits on price increases of certain goods during emergencies.

For example, California’s anti-price-gouging statute states that for a period of 30 days following the proclamation of a state of emergency by the President of the United States or the governor of California or the declaration of a local emergency by the relevant executive officer, it is unlawful to sell or offer certain goods and services (including emergency and medical supplies, building and transportation materials, fuel, etc.) at a price more than 10% higher than the price of the good prior to the proclamation of emergency.¹³ As a defense, a seller can show that the price increase was directly attributable to additional costs imposed on it by the supplier of the goods or additional costs for the labor and material used to provide the services.¹⁴ The prohibition lasts for 30 days from the date of issuance of the emergency proclamation.¹⁵

West Virginia has also adopted an anti-price-gouging measure based on caps to percentage increases in price during times of emergency. The West Virginia statute provides that upon a declaration of a state of emergency by the President of the United States, the governor, or the state legislature, it is unlawful to sell or offer to sell certain critical goods and services “for a price greater than ten percent above the price charged by that person for those goods and services on the tenth day immediately preceding the declaration of emergency.”¹⁶ West Virginia also provides an exception for price increases attributable to increased costs on the seller imposed by the supplier or to added costs of providing the goods or services during the emergency.¹⁷

Some states use language barring “unconscionable” or “excessive” pricing in a manner similar to the state statutes described in the previous section but define these terms with hard caps instead of leaving their exact definition to the discretion of the courts. For example, the Alabama statute makes it unlawful for anyone to “impose unconscionable prices for the sale or rental of any commodity or rental facility during the period of a declared state of emergency.”¹⁸ However, it provides that 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

¹¹ Me. Rev. Stat. tit. 10, § 1105.

¹² MCL 445.903(1)(z).

¹³ Cal. Penal Code § 396.

¹⁴ *Id.*

¹⁵ *Id.* The statute also forbids contractors from price increases for services related to emergency cleanups for a period of 180 days following the emergency declaration.

¹⁶ W. Va. Code R. § 46A-6J-3.

¹⁷ *Id.*

¹⁸ Ala. Code § 8-31-3.

immediately prior to the declared state of emergency.”¹⁹ As with most other state price-gouging statutes, the statute does not apply if the price increase is attributable to reasonable costs incurred by the seller in connection with the rental or sale of the commodity.²⁰

A few other states have imposed caps on price increases during emergencies even tighter than the one imposed by the aforementioned statutes. Some state statutes ban *any* price increase during periods of emergency. For example, in Georgia, it is considered an “unlawful, unfair and deceptive trade practice” for anyone doing business in an areas where a state of emergency has been declared to

sell or offer for sale at retail any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency.²¹

As with other state gouging statutes, the Georgia statute provides an exception for price increases that reflect “an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area.”²²

State Price-Gouging Regulations

In some states, anti-price-gouging measures have been implemented by the state’s executive branch pursuant to its delegated authority to protect consumers. For example, in Massachusetts there is no statute that specifically addresses “price gouging.” However, the state’s regulatory code includes a price-gouging provision similar to those found in state statutes as described above. The Massachusetts regulation provides that it shall be “an unfair or deceptive act or practice, during any market emergency, for any petroleum-related business to sell or offer to sell any petroleum product for an amount that represents an unconscionably high price.”²³ The regulation defines *unconscionable high price* as a price that

represents a gross disparity between the price of the petroleum product and 1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or 2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and

the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.²⁴

The Massachusetts attorney general promulgated these regulations pursuant to statute that authorizes regulations to administer the state’s Fair Business Practices Act.²⁵ This state statute is somewhat similar to the Federal Trade Commission Act, which makes unlawful “unfair or deceptive acts or practices in or affecting commerce”²⁶ and authorizes the Federal Trade

¹⁹ Ala. Code § 8-31-4.

²⁰ *Id.*

²¹ Ga. Code Ann. § 10-1-393.4

²² *Id.*

²³ 940 Mass. Code Regs § 3.18(1).

²⁴ *Id.* at § 3.18(2).

²⁵ Ga. Code Ann. § 10-1-395.

²⁶ 15 U.S.C. § 45(a)(1).

Commission (FTC) to take action to prevent “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”²⁷

Iowa has also chosen to address price gouging through regulations implementing its Consumer Fraud Act. That statute prohibits unfair and deceptive trade practices in the sale of a product or service and authorizes the state attorney general to adopt rules and to file lawsuits for injunctive relief or civil penalties for parties in violation of the act.²⁸ Pursuant to this authority, the Iowa attorney general adopted a regulation declaring that “the charge of excessive prices for merchandise needed by victims of disasters” constitutes an unfair practice under the Iowa Consumer Fraud Act.²⁹ The regulation defines *excessive price* as “one that is not justified by the seller’s actual costs of acquiring, producing, selling, transporting, and delivering the actual product sold, plus a reasonable profit.”³⁰

Federal Price-Gouging Legislation Introduced in the 117th Congress

There is no federal law that deals specifically with price gouging. However, federal antitrust laws may apply to behavior generally regarded as price gouging.³¹ The FTC monitors gas prices and investigates possible antitrust violations in the petroleum industry.³² 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.”³³ In May 2006, the FTC released its report, finding generally that sellers behaved competitively following Hurricane Katrina and that the price increases were the result of increased costs, although there were limited instances of price gouging.³⁴ Interest in gasoline prices also goes beyond the potential antitrust problem of market manipulation and extends to the non-coordinated behavior of individual sellers.

At least two bills introduced in the 117th Congress specifically address crude oil and gasoline price gouging in response to emergencies. H.R. 7099 would impose a 50% tax on large crude oil producers³⁵ that meet minimum production and gross receipts thresholds on “the excess of the adjusted taxable income of the applicable taxpayer for taxable year 2022 over the reasonably inflated average profit for such taxable year.”³⁶ *Reasonably inflated average profit* is defined as “an amount equal to the average of the adjusted taxable income of such taxpayer for taxable years beginning during the 2015–2019 taxable year period (determined without regard to the taxable year with the highest adjusted taxable income in such period) plus 10 percent of such average.”

²⁷ *Id.* at § 45(a)(2).

²⁸ Iowa Code § 714.16.

²⁹ Iowa Admin. Code § 61-31.1.

³⁰ *Id.*

³¹ The applicability of the federal antitrust laws to the petroleum industry generally and retail gasoline prices specifically are discussed later in this report.

³² For more information on the FTC’s activities with respect to gas pricing, see <http://www.ftc.gov/ftc/oilgas/index.html>.

³³ P.L. 109-58 at § 1809 (August 8, 2005).

³⁴ The FTC’s report can be viewed at <http://www.ftc.gov/opa/2006/05/katrinagasprices.htm>.

³⁵ Note that H.R. 7099 would regulate crude oil prices, not gasoline prices. While crude oil prices and gasoline prices are related, crude oil producers are usually multiple steps removed from retail gasoline sales.

³⁶ H.R. 7099, at § 2(a).

The bill does not address future tax years, suggesting an intent to capture profits associated with the 2022 gasoline and crude oil price spikes. The revenue would be used to fund an “energy price rebate” for eligible individual taxpayers.³⁷

S. 3920 would address the sale of wholesale or retail gasoline (or any other petroleum distillate) at a price that is “unconscionably excessive” and that “indicates that the seller is taking unfair advantage of the circumstances related to an international crisis to increase prices unreasonably.”³⁸ The bill would make it unlawful to engage in this behavior during an “international crisis affecting the oil markets” as declared by the President within the affected area as designated by the President.³⁹ The bill would create both civil and criminal penalties for violations.⁴⁰ The FTC would be tasked with enforcement,⁴¹ although the bill would also authorize state attorneys general to bring civil actions on behalf of state residents to enforce the provisions of the bill and to recover civil penalties.⁴²

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³⁷ *Id.*

³⁸ H.R. 964/S. 3920, at § 2(a)(1). The bill includes factors to be considered in evaluating whether such a sale has occurred, including whether the price charged grossly exceeded the average price at which the applicable petroleum distillate was offered for sale by that person during the 30 days prior to the presidential proclamation declaring the emergency, whether the price charged grossly exceeded the price at which the same or similar petroleum distillates were readily obtainable from competing sellers during the same time period, whether the price charged reasonably reflected additional costs not within the control of the seller or reflected additional risks taken by the seller, and whether the price charged was substantially attributable to local, regional, national, or international market conditions. *Id.* at § 2(a)(3).

³⁹ S. 3920.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*