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Legislative Bulletin…………………………………….…….………June 24, 2008

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H.R. 6346—Federal Price Gouging Prevention Act

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Order of Business: The bill is scheduled to be considered on Tuesday, June 24th, under a motion to suspend the rules and pass the bill (therefore allowing no amendments to the bill and requiring a two-thirds vote for passage).

Summary: H.R. 6346 would make it a federal crime for any person to sell, at wholesale or at retail in an area and during a period of an energy emergency, gasoline or any other petroleum distillate covered by a presidential proclamation at a price that is **"unconscionably excessive"** and indicates the seller is "**taking unfair advantage** of the circumstances related to an energy emergency to increase prices **unreasonably**." (emphasis added)

The bill would authorize the President to issue an unlimited number of 30-day energy emergency proclamations (one at a time) for any area within the jurisdiction of the United States, during which the price-crime provision above would apply. A proclamation, which could be issued up to one week in advance of a **"reasonably foreseeable"** emergency, would have to state the geographic area covered, the gasoline or other petroleum distillate covered, and the time period that such proclamation would be in effect.

In determining whether such a violation has occurred, the following factors would have to be considered:

- Whether the amount charged by a person for the applicable product at a given location in a proclamation-covered area:
  - --"**grossly exceeds** the average price at which the applicable gasoline or other petroleum distillate was offered for sale by that person during the 30 days prior to such proclamation; (emphasis added)
  - --"**grossly exceeds** the price at which the same or similar gasoline or other petroleum distillate was readily obtainable in the same area from other competing sellers during the same period; (emphasis added)
  - --"**reasonably reflected** additional costs, not within the control of that person, that were paid, incurred, or reasonably anticipated by that person, or reflected additional risks taken by that person to produce, distribute, obtain, or sell such product under the circumstances; (emphasis added) and

--"was **substantially attributable** to local, regional, national, or international market conditions; (emphasis added) and

- Whether the quantity of the applicable product the person produced, distributed, or sold in a proclamation-covered area during a 30-day period following the issuance of such proclamation increased over the quantity that that person produced, distributed, or sold during the 30 days prior to such proclamation, taking into account "**usual seasonal demand variations**." (emphasis added)

NOTE: Nowhere in the legislation are the operative terms "unconscionably excessive," "unfair advantage," "unreasonably," "reasonably foreseeable," "grossly exceeds," "reasonably reflected," "substantially attributable," or "usual seasonal demand variations" defined explicitly.

Transactions on futures markets would not be covered by this legislation, nor would crude oil or natural gas.

The Federal Trade Commission (FTC) would be tasked with promulgating and enforcing the provisions above. Specifically, the FTC would have to enforce violations of the above provisions as unfair or deceptive trade practices, with a particular emphasis on companies with total U.S. wholesale or retail sales of gasoline or other petroleum distillates above $500 million per year.

The penalties for violations would be as follows:

	Civil (per **day**) (FTC)	Criminal (DoJ)
Unconscionable pricing (retail or wholesale)	Up to $3 million or up to 3 times the "excess profits"	Up to $150 million (for corporations); up to $2 million and/or 10 years in prison (for non-corps.)

A state attorney general could bring a civil action under H.R. 6346 (in a U.S. district court) on behalf of the residents of his state, if he feels that "the interests of the residents of the State have been or are being threatened or adversely affected" by a retail-sale-level violation of the "unconscionable pricing" provisions of this legislation. The civil action could seek to either compel compliance with this legislation or to impose the civil penalties authorized by this legislation, and the FTC could intervene in any such state action.

The state action could be brought in a judicial district in which the defendant operates, was authorized to do business, **or** is physically found (note the concerns about venue-shopping in the "Conservative Concerns" section below). Furthermore, process could be served in such state action "without regard to the territorial limits of the district or of the State in which the civil action is instituted," and "a person who participated with the defendant in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person."

No state action could be brought while an already-initiated FTC action is pending. This legislation would NOT prevent a state attorney general from taking state-only actions in state courts.

Revenues collected from violations of this legislation would be diverted to the Low Income Home Energy Assistance Program (LIHEAP), via a newly established fund in the U.S. Treasury: the Consumer Relief Trust Fund. Expenditures from the Fund would be subject to appropriation.

H.R. 6346 would explicitly state that "nothing in this Act preempts any State law."

Major Change from H.R. 1252: The major change in H.R. 6346, as compared to what the House passed last year (H.R. 1252), is that H.R. 1252 contained a provision H.R. making it a federal crime for any person to report to a federal agency information related to the wholesale price of gasoline or other petroleum distillates "with actual knowledge or knowledge fairly implied on the basis of objective circumstances" that such information is false or misleading. This provision is NOT in H.R. 6346, as it was enacted into law as part of last year's energy law (Public Law 110-140).

Recent Legislative History: In the 109th Congress, a variety of bills were introduced to address gasoline "price gouging," most of them by Democrats. The House passed, but the Senate never considered, H.R. 5253, a bill to "prohibit price gouging in the sale of gasoline, diesel fuel, crude oil, and home heating oil," sponsored by Rep. Heather Wilson (R-NM). The bill, which is similar to H.R. 1252 in the 110th Congress, passed 389-34. Of the 34 "no" votes, 33 were Republicans, and the vast majority of those Republicans were RSC Members.

In the 109th Congress, there was also some price-gouging language contained in the GAS Act (H.R. 3893) that the House passed on October 7, 2005, by a vote of 212-210. To read the RSC Legislative Bulletin on the GAS Act, visit this webpage and scroll down to page 5: http://www.house.gov/hensarling/rsc/doc/LB%2010-07-05--GAS%20Act.pdf.

On May 23, 2007, the House passed a bill (H.R. 1252) substantively similar to H.R. 6346 by a vote of 284-141.

In the Senate this Congress, Senator Ted Stevens (R-AK) has introduced related anti-price-gouging legislation (S. 94), and Majority Leader Harry Reid (D-NV) has introduced a sense of Congress (S. 6) that would, among other things, encourage the passing of laws to "enhance the security of the United States by reducing the dependence of the United States on foreign and unsustainable energy sources and the risks of global warming by…preventing energy price gouging, profiteering, and market manipulation."

Additional Background: Gasoline prices naturally vary from region to region, state to state, locality to locality, and even block to block, for a variety of reasons, among those are:

- State and local taxes variations;
- Proximity of supply;
- Supply disruptions;
- Competition in local markets;

- Environmental requirements; and
- operating costs.

According to the American Petroleum Institute, the nationwide average tax on gasoline is 47.0 cents per gallon as of the first quarter of 2008, up over one cent from March 2007. The federal tax on gasoline is 18.4 cents per gallon. The average state gasoline excise tax remained consistent at 28.6 cents per gallon. Other taxes add 9.15 cents per gallon to the average tax on gasoline. These other taxes include applicable sales taxes, gross receipts taxes, oil inspection fees, underground storage tank fees, and other miscellaneous environmental fees.
http://www.factsonfuel.org/gasoline/index.html#howdotaxesaffect

The FTC, as cited by the Heritage Foundation, has itself asserted that price gouging is difficult to define and thus difficult to enforce. Furthermore, the FTC found that price gouging did NOT occur in the Hurricane Katrina aftermath, contrary to what many politicians had assumed and asserted.
http://www.heritage.org/Press/Commentary/ed062706a.cfm

To access a variety of statistics about gas prices, including the change in gas prices over time and the factors behind gasoline production, visit these webpages:
http://www.factsonfuel.org/gasoline/index.html
http://www.fueleconomy.gov/feg/gasprices/FAQ.shtml#History.

To read an analysis of the economic problems with price controls, visit this webpage:
http://www.econlib.org/library/Enc/PriceControls.html.

To read an op-ed by George Will against price controls, visit this webpage:
http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602429.html.

To read a report on gas taxes in each state, visit this webpage:
http://www.api.org/statistics/fueltaxes/index.cfm.

RSC Bonus Fact: In 1980, the average retail price of a gallon of unleaded regular gasoline was $1.25 (http://www.eia.doe.gov/emeu/aer/txt/ptb0524.html). If this price had increased steadily with inflation, the price of the same gallon of gasoline today would be $3.27 (http://www.minneapolisfed.org/research/data/us/calc/).

Committee Action: On June 23, 2008, H.R. 6346 was referred to the Energy & Commerce Committee, as well as the Education & Labor Committee, neither of which took subsequent public action on the bill.

Possible Conservative Concerns: Some conservatives might be concerned that certain entities, such as *The Wall Street Journal* and the Cato Institute, have described anti-price-gouging efforts as federal interference in free-market pricing. Some free-marketeers have asserted that there is no such thing as price-gouging, as long as the consumer has reasonably accessible choices of products, services, and prices in the open market. Anti-price-gouging legislation would effectively mandate that certain private companies sell their products within a price-range that is acceptable to the government.

And although the price controls would be limited to periods in which the President has declared an energy emergency, some conservatives may still be concerned that such authority is unconstitutional and anti-capitalist, while doing actual harm to the supply of gasoline during emergencies—when arguably the ready availability of gasoline is most important.

Furthermore, government intervention in the price of gasoline and petroleum products may stifle the natural market reactions to prices that consumers find uncomfortably high: strategic innovation, increases in supply, increased efficiencies in production, increased research into alternative fuels, etc.

In H.R. 6346, conservatives may object to the lack of definitions of the operative words in determining whether price gouging or false price reporting has occurred. There is considerable reliance on FTC regulations—which the FTC says it does not want to promulgate—and no guarantee that the FTC definitions will be any less vague or subjective.

Some conservatives may also be concerned that, for states with anti-price-gouging laws on the books, H.R. 6346 would add a federal layer of anti-price-gouging law on top of the existing state anti-price-gouging laws, adding further uncertainty to the energy marketplace.

Some conservatives may regard H.R. 6346 as allowing venue shopping for lawsuits. For example, if alleged price-gouging occurred in South Carolina, but the involved gasoline company also sells gas in California, a civil action could be brought in California. This could lead to trial lawyers strategically picking districts in which to file their actions that are more favorable to claims of price gouging.

Lastly, some conservatives may be concerned that the revenues collected from violations of this legislation would be diverted to the Low Income Home Energy Assistance Program (LIHEAP), which has been viewed by conservatives as an expensive program, of questionable constitutionality, and peppered with fraud and abuse.

Possible Conservative Solutions: In recent years, many conservative sources, in and out of Congress, have proposed pro-free-market solutions to the uncomfortably high gas prices, including:

- Streamline the environmental hurdles to expanding oil refinery capacity and building new refineries.
- Allow more offshore (e.g. Outer Continental Shelf) and inland (e.g. Arctic National Wildlife Refuge) oil drilling to help increase energy supply.
- Waive or repeal gas formulation (e.g. oxygenation) requirements under the Clean Air Act and related regulations.
- Encourage private-market projects to recover usable energy from oil shale and to otherwise increase production of renewable/alternative fuel sources.

- Strengthen the existing investment tax credit for Enhanced Oil Recovery (using modern technology improvements to extract oil from previously unavailable sources) in section 43 of the IRS Code.
- Waive the tariff on imported ethanol and waive regulations that limit refined gasoline imports.

Administration Position: Although a Statement of Administration Policy (SAP) for H.R. 6346 is unavailable, the SAP for H.R. 1252 last year stated that the Administration is "strongly opposed" to H.R. 1252. The SAP notes that, "If H.R. 1252 or any similar price control bill were presented to the President, his senior advisors would recommend that he veto the bill."

Additionally, the Secretary of Energy wrote, in a letter to Rep. Vito Fossella (R-NY) that, "The Administration strongly opposes the passage of H.R. 1252 because it is essentially a 'gasoline price control bill' that has the potential to exacerbate shortages and lead to 1970s style gasoline lines….**Neither the Department of Energy nor the Federal Trade Commission has found credible evidence that the rising prices are due to collusive behavior among private oil companies.** The Administration and many other experts believe that gasoline prices are rising because of rising crude oil prices and limited refining capacity relative to the increasing demand for motor fuels." (emphasis added)

Furthermore, the White House Council of Economic Advisers issued a white paper expressing concerns about the vagueness of the operative terms in H.R. 1252 and asserting that the bill would do more harm than good for consumers.

Cost to Taxpayers: A CBO cost estimate was not available at press time, though for H.R. 1252 last year, CBO noted that any additional revenues (from fines) and any increase in authorizations (for the FTC to promulgate regulations) would be insignificant.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill would create two new federal crimes, overlaying existing state laws, and in violation of basic capitalist principles of free-market pricing.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, the bill is filled with mandates about what the private sector can and cannot do with and regarding petroleum.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: Though the bill contains no earmarks, and there's no accompanying committee report, the earmarks rule (House Rule XXI, Clause 9(a)) does not apply, by definition, to legislation considered under suspension of the rules.

Constitutional Authority: A committee report citing constitutional authority is unavailable.

Note: Article VI, Clause 3 of the U.S. Constitution states that, "The Senators and Representatives…and all executive and judicial Officers…shall be bound by Oath or Affirmation, to support this Constitution."

<u>Outside Organizations</u>: Various conservative entities have expressed public opposition to price-gouging legislation, including the American Conservative Union, Americans for Tax Reform, the Club for Growth, FreedomWorks, the National Taxpayers Union, the National Association of Manufacturers, and the U.S. Chamber of Commerce. The Heritage Foundation has also written against the notion of federal price "gouging" legislation. The American Petroleum Institute is strongly opposed to the bill as well.

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