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RSC Policy Brief:
"Price Gouging" in Oil and Gasoline Markets

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In light of increasing gasoline prices and mounting pressure for lawmakers to "do something" about such increases, this information on the leading Democrat solution might be helpful.

Democrat Proposal: In the House, Rep. Bart Stupak (D-MI) has introduced the Federal Price Gouging Prevention Act (H.R. 1252), which currently has 86 Democrat co-sponsors and three Republican co-sponsors. H.R. 1252 would make it a federal crime for any person to "sell crude oil, gasoline, natural gas, or petroleum distillates at a price that is unconscionably excessive or indicates the seller is taking unfair advantage [of] unusual market conditions (whether real or perceived) or the circumstances of an emergency to increase prices unreasonably."

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

- "whether the amount charged represents a gross disparity between the price of the crude oil, gasoline, natural gas, or petroleum distillate sold and the average price at which it was offered for sale by the seller during the preceding 30 days; or
- "whether the amount charged grossly exceeds the price at which the same or similar crude oil, gasoline, natural gas, or petroleum distillate was readily obtainable by other purchasers in the same geographical area.

As a mitigating factor, it would have to be considered "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."

Note: Nowhere in the legislation are the operative terms "unconscionably excessive," "unfair advantage," "unreasonably," "gross disparity," "grossly exceeds," or "reasonably reflects" defined explicitly.

H.R. 1252 would also make it a federal crime for any person to report information related to the wholesale price of crude oil, gasoline, natural gas, or petroleum distillates to the Federal Trade Commission (FTC) if:

- "that person knew, or reasonably should have known, the information to be false or misleading;
- "the information was required by law to be reported; and
- "the person intended the false or misleading data to affect data compiled by that department or agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, natural gas, or petroleum distillates."

Furthermore, H.R. 1252 would make it a federal crime for any person, "directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil, gasoline, natural gas, or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens."

The 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 crude oil, gasoline, or petroleum distillates above $500 million per year.

The penalties for violations would be as follows:

	Civil (per **day**)	Criminal
Unconscionable pricing	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.)
False price reporting	Up to $1 million	Up to $150 million (for corporations); up to $2 million and/or 10 years in prison (for non-corps.)
Market manipulation	Up to $1 million	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. 1252 (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 violation 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. 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.

H.R. 1252 would also direct the FTC to "facilitate price transparency in markets for the sale of crude oil and essential petroleum products at wholesale, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers." Specifically, the FTC would have to publicly disseminate, "on a timely basis" and using existing private-sector disseminators as much as possible, information about the availability and prices of wholesale crude oil, gasoline, and petroleum distillates. Such dissemination would have to be implemented to maximize consumer protection from "anticompetitive activity" and to minimize any detriments to markets and security.

H.R. 1252 has been referred to the House Energy & Commerce and Education & Labor Committees, neither of which have taken subsequent action on it.

In the Senate this year, 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."

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.

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.

While gas prices may be approaching record highs in nominal terms, they remain below past gas prices in relative terms. In other words, in various decades, such as the 1930s, 1940s, and 1970s, the average price of gas was more hurtful to the average American's pocketbook than is the average price of gas today.
http://www.factsonfuel.org/gasoline/index.html#us_pump_prices_in

According to the American Petroleum Institute, the nationwide average tax on gasoline is 45.8 cents per gallon as of March 2007, up 0.3 cents from October 2006. The federal tax on gasoline is 18.4 cents per gallon. The average state gasoline excise tax remained consistent at 18.2 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.
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 this webpage:
http://www.factsonfuel.org/gasoline/index.html

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.

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. 1252, conservatives may object to the lack of definitions of the operative words in determining whether price gouging, false price reporting, or market manipulation 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. 1252 would add a federal layer of anti-price-gouging law on top of the existing state anti-price-gouging laws.

Some conservatives may regard H.R. 1252 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 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 building new oil refineries.
- Make it easier for small refineries to increase capacity.
- Allow more offshore (e.g. Outer Continental Shelf) and inland (e.g. Arctic National Wildlife Refuge) oil drilling.
- Temporarily suspend the gas tax.
- Temporarily suspend the gas tax and temporarily suspend spending on all transportation earmarks in the most recent surface transportation reauthorization bill.
- Permanently reduce the gas tax.
- 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.

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