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FISCAL IMPACT REPORT

SPONSOR HJC DATE TYPED 10/11/05 HB 9/aHAFC/CS/aHFI#1

SHORT TITLE Emergency Anti-Price-Gouging Act SB _____

ANALYST Medina/Fernández/
Francis/Quezada

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

Relates to the Unfair Practices Act (Chapter 57, Article 12 NMSA 1978)
Conflicts with House Bill 9 and Senate Bill 3

SOURCES OF INFORMATION

LFC Files
Federal Trade Commission
National Consumer Law Center
Office of the Governor
FindLaw
Library of Congress

Responses Received From

First Judicial District Attorney
Attorney General

SUMMARY

Synopsis of HFI # 1 Amendment

House Floor Amendment 1 to House Judiciary Committee Substitute for House Bill 9 as amended by HAFC relates to the determination of an unconscionable price and to the application of the Unfair Practices Act.

The amendment removes “whether an increase in local prices is attributable to regional, national or international trends, indices and postings” as a criterion to consider in determining whether a price is unconscionable. The amendment *converts* this criterion into a determinant of a price of a good or service that is to be deemed *not* unconscionable. The new language says that an increase

in the price sought for essential goods or services shall not be deemed unconscionable to the extent that: “the increase in local prices is attributable to national or international trends or regional, national or international indices or postings”.

Finally, the amendment changes the title of Section 8 of the bill from “Application of Unfair Practices Act” to “Application of Unfair Practices Act—Attorney Fees” and adds a provision prohibiting private action from being brought pursuant to the Emergency Anti-Price-Gouging Act.

Synopsis of HAFC Amendment

The House Appropriations and Finance Committee amendment to House Judiciary Committee Substitute for House Bill 9 strikes the appropriation and the sections of the bill creating the anti-price-gouging fund and providing for the emergency release of funds to the anti-price-gouging fund.

Synopsis of Original Bill

House Judiciary Committee Substitute for House Bill 9 authorizes the governor, with State Board of Finance approval, to transfer \$1,000.0 from the general fund operating reserve to a proposed anti-price-gouging fund for the attorney general to investigate and prosecute alleged violations of the Emergency Anti-Price-Gouging Act.

Prohibited practices. The bill prohibits the sale, rent or lease of goods or services vital and necessary for the health, safety and welfare of consumers for an unconscionable price during a federally or state-declared period of abnormal market disruption. The charging for such a good or service at an unconscionable price is the practice commonly known as price gouging. A period of abnormal market disruption is defined as a change in the market proximately caused by an emergency or disaster where market forces are or appear to be likely to be insufficient to ensure reasonably stable prices of good or services.

Abnormal market disruption. A period of abnormal market disruption is declared by executive order after any federal or state declaration of emergency or disaster has been made, subject to the governor’s determination that the emergency or disaster has caused an abnormal market disruption within the state. In the governor’s declaration of a period of abnormal market disruption, the governor is to specify the cause of the disruption, the geographic regions with which the price gouging restrictions imposed apply, and the categories of essential goods and services to which the restrictions apply. An executive-ordered period of restrictions due to abnormal market disruption can end when the governor determines that the abnormal market disruption has ceased but is not to exceed thirty days. The governor may issue a single thirty day extension of the period of abnormal market disruption for each federally or state-declared emergency or disaster. The legislature may also extend or terminate a period of abnormal market disruption by joint resolution.

Exemptions. Persons subject to the price gouging restrictions may file a petition for exemption from those restrictions in any district court in a county included in an area affected by the abnormal price disruption. Notice of a petition for an exemption shall be served upon the attorney general. The court is to act upon a petition for exemption pursuant to Rule of Civil Procedure 1-066 NMRA (Injunctions and Receivers). The court’s issuance of an exemption can come if the

court determines that the enforcement of the price restrictions of the Emergency Anti-Price-Gouging Act could result in a catastrophic loss of life or property, or if the petitioner demonstrates that due to certain circumstances the petitioner is unable to comply with the restrictions without suffering undue hardship beyond the hardship suffered by the persons generally subject to those restrictions.

Unconscionable price. The bill requires that proof of the occurrence of price gouging lies in proving that the price that a violator charged for an eligible good or service was more than fifteen percent above the average price charged by the alleged violator at the same location during the twenty days prior to the issuance of an executive order declaring a period of abnormal market disruption. This constitutes *prima facie* evidence that the price charged for that good or service was unconscionable. (See Significant Issues)

Penalties, remedies and enforcement. Each instance of violating the prohibited practices of this Act constitutes a separate violation of the Act. Those found by a court to be engaged in continuous and willful violations of this Act (those found guilty of price gouging) would be subject to a court's suspension or revocation of their business licenses and may be banned from conducting business in the state. Any profits deemed to have resulted from the charge of an unconscionable price may also be required to be disgorged. Violators of this Act would also be subject to the civil penalties outlined in the Section 57-12-11 NMSA 1978, which allows the attorney general, upon petition to the court, to recover, on behalf of the state of New Mexico, a civil penalty of not exceeding five thousand dollars (\$5,000) per violation.

Emergency civil investigative demands. The attorney general may, in addition to exercising its normal authority to investigate alleged violations of the Emergency Anti-Price-Gouging Act, serve a civil investigative demand pursuant to Section 57-12-12 NMSA 1978 (Civil investigative demand of the Unfair Practices Act) and may require the person to whom the demand is directed to respond within three business days.

Notice. The Office of the Governor is to immediately notify the public of a declaration of a period of abnormal market disruption by any means available.

Significant Issues

The main difficulty in determining whether the price of a good or service is unconscionable lies in the determination of price prior to the event and the changes in the components of the price. Anti-price-gouging laws have been challenged on the basis of the inherent subjectivity of this determination. A violation of this Act would occur when a vendor charges a price deemed insufficiently supported by market forces. The bill includes a non-exclusive list of seven factors that are to be considered by the court in determining whether a price is unconscionable:

- *Notice of the declaration of period of abnormal market disruption.* The court is to consider whether and when an alleged violator had actual or constructive notice of the issuance of executive order declaring restrictions under the Emergency Anti-Price-Gouging Act.
- *The timing, frequency and extent of increases in price by the alleged violator.*
- *Exercise of unfair economic or other advantage by the alleged violator.*

- *Price difference between alleged violator and market area twenty days prior to declaration of period of abnormal market disruption.* This requires a comparison between the price sought for the essential goods or services by the alleged violator and the average price of those same goods or services in the market area during the twenty days prior to the declared period of restrictions.

Determining an appropriate “market area” will be the challenge of this method. If the alleged violator is near an access point (i.e. an interstate ramp), is the market price of the good/service all others at that access point or the community at large. Another consideration is whether the vendor has always been higher than the market area even in non-emergencies. There are cases where retailers, due to visibility or particular locations or even brand identification, can command a higher price than surrounding retailers.

- *Profit margin difference.* A determination needs to be made that the price sought by the alleged violator would have resulted in a profit margin greater than the alleged violator’s usual and customary profit margin.

This factor would capture all of the input prices and thus isolate the cause of the higher price of the alleged violator. A significant difference in profit margin before and after a significant event would provide substantiate that the price sought for a good or service was unconscionable. However, determining profit margin difference would likely be controversial to vendors since profit margins are generally thought of as confidential information crucial to competition. It would not be improbable to envision a competitor making allegations for the sole purpose of discovering profit margin information.

- *Historical seasonal price changes*—whether the price sought by the alleged violator was a result of historical seasonal price changes.
- *Other market forces affecting local prices*—whether an increase in local prices is attributable to regional, national or international trends, indices and postings.

This provision allows for some protection for local retailers who are heavily dependent on suppliers outside of the state.

The bill provides that an increase in price sought for a good or service be construed as unconscionable to the extent that the increase is directly attributable to actual costs imposed by a supplier of essential goods or services or other costs of providing goods or services, including additional costs for labor, transportation or material used to provide the good or service. Increases in price that are deemed necessary to prevent catastrophic loss of life or property are also exempt from being considered unconscionable.

FISCAL IMPLICATIONS

This bill creates the Anti-Price-Gouging Fund to be administered by the Attorney general. Money shall be transferred from the general fund operating reserve pursuant to Section 1-2 of the Emergency Anti-Price-Gouging Act and any other appropriations, gifts, grants or donations. Funds shall be used by the Attorney general for the investigation and prosecution of alleged violations of the Emergency Anti-Price-Gouging Act, including expenses of other state agencies involved in the investigation.

Money in the fund shall not revert at the end of a fiscal year but shall remain in the fund.

In the event there is a transfer of funds to the Anti-Price-Gouging fund on or before the first day of a regular legislative session that convenes at least one hundred twenty days after the issuance of an executive order, the Attorney general shall report to the following to the legislature:

- The amount of funds that have been expended from the Anti-Price-Gouging through December 31 of the calendar year prior to the legislative session and the purposes for which the funds have been expended;
- The amount of funds the Attorney general projects spending from the fund during the calendar year in which the legislative session has convened and the purpose for which the funds are to be expended;
- Whether the Attorney general anticipates that the remaining funds will be sufficient to complete investigations and prosecutions regarding alleged violations of the act during an abnormal market disruption set forth in an executive order.

Continuing Appropriations - This bill creates a new fund and provides for continuing appropriations. The LFC objects to including continuing appropriation language in the statutory provisions for newly created funds. Earmarking reduces the ability of the legislature to establish spending priorities.

The authorization for the transfer in case of an emergency of up to \$1,000.0 for a single abnormal market disruption resulting from a single cause, contained in this bill is a nonrecurring expense to the general fund operating reserve. If the period of abnormal disruption is limited to 60 days, then potentially there could be up to 6 periods in one year at a cost of \$6,000.0.

Any unexpended or unencumbered balance remaining in a newly-created anti-price-gouging fund at the end of a fiscal year shall not revert to the general fund. Rather, any funds remaining are to remain to the credit of the anti-price-gouging fund until the attorney general completes the investigation and prosecution of a violation. The costs to the attorney general of obtaining *prima facie* evidence that a price charged for a good or service is unconscionable would require issuing subpoenas for business records, obtaining search warrants, and economic analyses, among other activities.

ADMINISTRATIVE IMPLICATIONS

As the primary enforcer of the Unfair Practices Act, the Office of the Attorney General's Consumer Protection Division has the resources to investigate, mediate, and prosecute cases related to consumer protection and would also have original jurisdiction of the Emergency Anti-Price-Gouging Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The Unfair Practices Act (Chapter 57, Article 12 NMSA 1978) prohibits unfair or deceptive and unconscionable trade practices but does not provide for price control mechanisms related to circumstances of emergency or disaster-related market abnormalities.

Similar legislation at the federal level is currently under consideration by the U.S. House of Representatives. House Resolution 3681 proposes to amend the Clayton Act to make unlawful price

gouging for necessary goods and services during Presidentially-declared times of national disaster. H.R. 3681 includes provisions similar to those in this bill for the determination of an unconscionable price.

OTHER SUBSTANTIVE ISSUES

According to the Office of the Governor and the National Consumer Law Center, at least nineteen states have laws or regulations that prohibit price-gouging on petroleum products or other goods in the aftermath of disasters. New Mexico is one of four states not directly affected by Hurricane Katrina that are currently taking action on alleged price gouging. These efforts are a targeted response to spikes in gas prices since Hurricane Katrina.

According to the *Seattle Post-Intelligencer* (September 19, 2005), the Federal Trade Commission (FTC), which investigates suspected violations of price gouging using broad laws regulating antitrust practices and collusion between businesses, has never brought a gas-price-gouging case.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

If this bill is not enacted, current statutes would not include provisions for investigating allegations of price gouging during a state of emergency or abnormal market disruption, nor for imposing penalties for persons engaged in price gouging. By not enacting this bill, the state's economy would be allowed to react to states of emergency or abnormal market disruption as a free market economy.

POSSIBLE QUESTIONS

Has it been determined that price gouging has had a significant negative impact on the state's economy?

How successful have efforts in other states been at combating price gouging, in particular at the gas pump?

If a state of emergency is declared for which what are the implications of that declaration? In other words, what resources are automatically mobilized following an emergency declaration that are unnecessary to the public safety of New Mexicans?

Is it conceivable, following the liberal interpretation called for in Section 15 of this bill, that an executive emergency declaration in which no disaster, natural or otherwise, has befallen in the state, could be used to justify enacting the price controls contained in this bill?

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