



May 17, 2022

The Honorable Nancy Pelosi
Speaker, House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader, House of Representatives
Washington, DC 20515

Dear Speaker Pelosi and Minority Leader McCarthy:

The Energy Marketers of America (EMA) is a federation of 47 state and regional trade associations representing energy marketers throughout the U.S. EMA member companies are mostly independent, family-owned, and operated businesses representing approximately 60,000 retail motor fuel stations who supply 80% of all finished motor and heating fuel products sold nationwide including renewable hydrocarbon biofuels, gasoline, diesel fuel, biofuels, heating fuel, jet fuel, kerosene, racing fuel and lubricating oils.

EMA writes in opposition to H.R. 7688, the *Consumer Fuel Price Gouging Prevention Act*. COVID-19, the Russia-Ukraine conflict and associated ban on Russian oil imports, and rising inflation continue to have a catastrophic impact on gasoline prices. H.R. 7688 attempts to distract and shift blame from self-inflicted energy and inflation crises and direct blame to the retail motor fuel industry, despite zero evidence of price gouging. Not only is price gouging extremely rare, many states already have guardrails in place to prevent this unconscionable practice.

The retail motor fuels market is the most competitive marketplace in the country. Retailers post their prices on big signs where a one-penny difference can determine where customers choose to fill up. Unfortunately, what the market is currently experiencing is the whiplash effect of prices due to a variety of factors. H.R. 7688 fails to acknowledge the various complexities involved in the U.S. motor fuels production and distribution system, which actually determine the retail price of gasoline. These factors include the price of crude oil, a lack of sufficient refining capacity, the corn ethanol mandate, credit card swipe fees, taxes and more.

According to the Federal Trade Commission (FTC) in its Spring 2006 report, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*, 99 retailers were sent investigative orders for violating the FTC's definition of price gouging. Of those who had not already settled state charges, only 24 individual retailers were further investigated by the FTC. Of those 24, only six were found to have had "price increases that could not be substantially attributed to increased costs or national market trends." In any industry with 150,000 retail locations, a 99.9 percent compliance rate for the industry as a whole shows that state laws are working and that further federal legislation is not needed.

Congress is considering legislation that will only further impact gasoline prices as it would create additional uncertainty. The bill sponsors chose not to seek input from the retail motor fuel industry but push forward with unnecessary legislation that is not supported by facts.

In any event, the bill is deeply flawed due to an apparent indifference to how retailers operate within retail gasoline markets, and how retailers would be adversely affected by its price-curbing provisions. Had inputs from retailers been solicited, these flaws could have been identified and remedied *before* the bill is introduced. For example, the benchmark prices established during the 30-day look-back period would punish retailers who maintained a high-volume low-pricing strategy during the period. Their pricing would be frozen at these levels after the emergency declaration. In a true public emergency, when supplies are hard to come by, sales are dwindling, and businesses are struggling to survive, businesses with higher pre-emergency prices would have a clear and decisive advantage over their lower-priced competitors. In addition, basing unconscionable prices on the pricing level of competitors in the same market punishes smaller retailers who do not turn over their inventories as quickly as those with higher sales volumes. In gasoline markets where wholesale prices are declining (as was the case during the COVID-19 emergency), smaller retailers may still be working off higher-priced gasoline after the retail prices of competitors drop in response to lower wholesale costs. Their prices could appear “excessive” in comparison to their larger competitors despite the fact that they did not increase their prices at all. In short, the standards for determining “unconscionably excessive” prices need to be re-worked on the basis of a better understanding of how retailers operate.

In addition, the “mitigating factor” provision of the bill focuses only on *increases* in the quantity of fuel sold when *decreases* in volume are equally important. Where demand for gasoline declines steeply as it did during the COVID-19 pandemic, retailers need higher margins to account for lost sales, which may necessitate higher prices. When gallons sold by retailers are cut in half as they were at the outset of the pandemic, retailers need twice the per gallon margin just to stay even. Failing to account for this phenomenon could threaten the existence of retailers especially small businesses at the very time consumers need the essential products they sell.

Another major flaw in the bill is its failure to preempt state price-gouging laws that would remain in effect during the emergency. These laws vary from state-to-state, with some of them regulating mark-ups over wholesale cost, others setting bright line standards for price increases, and others creating pricing benchmarks based on longer or shorter pre-emergency periods. Retail pricing is difficult enough during emergency periods and adding another layer of rules based on state laws could act to complicate pricing significantly and impose conflicting standards that could be difficult, if not impossible, to comply with.

The above-stated problems with the bill pale in comparison to the difficulties it presents for heating oil marketers. The economics of the heating oil industry have produced a retail pricing system in which a number of different prices are charged to different types of consumers, such as those that purchase under a host of different fixed-price contracts and those that purchase on a cash on delivery (COD) basis, as well as price variances resulting from discounts for the elderly and among consumers on different types of payment plans. The bill presents a potential for heating oil retailers to be charged with excessive pricing based on an apples-to-oranges comparison of different types of prices. The drafters of any price regulation regime, including price-gouging laws, need to be educated in the intricacies of heating oil markets before embarking on any attempt to regulate heating oil prices. Here, of course, input of the regulated heating oil community has not been solicited.

Overall, the bill is a misguided attempt to curb high fuel prices by focusing on the wrong level of trade and fashioning rules without the input of the only parties whose prices would be regulated.

We urge you to vote “no” when H.R. 7688 moves to the floor. We welcome the opportunity to speak with you and your staff to collectively develop solutions that will benefit all Americans.

Sincerely,

Rob Underwood
EMA President