

Responding to Government Inquires Related to Price Gouging During the COVID-19 Pandemic

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Along with increased news about the spread of COVID-19 across the country, there has been a surge of price gouging allegations and reports of government investigations into that conduct, particularly in the northeast, likely due to New York's role as the apparent epicenter of the outbreak in the United States. These law enforcement efforts appear to be aimed at established businesses - retail chains, manufacturers (including those in supply chains), and online marketplaces (e.g., eBay) - rather than the individual trying to re-sell hand sanitizer on Facebook at a 300 percent markup.

As they arise in a time of national crisis, each investigation has the potential to be politically-charged, with government officials seeking harsher-than-normal outcomes in order to show decisive action to the public. There may be extended, reputation-damaging media coverage for the target company and its owners and senior employees. Even businesses with no intention to gouge would be wise to take the time now to consider the applicable laws, review their pricing practices, and develop internal protocols for dealing with enforcement agencies - all before the government comes knocking on the door.

No federal law expressly prohibits price gouging. Multiple attempts at passing a federal price gouging statute have failed in Congress, with the most recent attempt unable to overcome opposition in the U.S. House of Representatives in 2013. That said, two anti-price gouging bills are pending in the U.S. Senate, and on March 23rd President Trump issued an Executive Order instructing the Department of Health and Human Resources and the Department of Justice (USDOJ) to enforce the anti-hoarding provisions of the Defense Production Act against those who hoard supplies of necessary health and medical resources. Amid increased political pressure to combat price gouging, federal enforcement agencies - primarily the USDOJ and the Federal Trade Commission - may try to stretch existing laws addressing fraud, anti-trust, and deceptive advertising to additionally target businesses that advertise and sell products by taking advantage of consumer fears.

Most states, on the other hand, have laws intended to address price gouging, which are enforced by the respective state Attorneys General. Regardless of whether the gouging investigation is launched

at the state or federal level, the measures used to collect evidence and build the case are generally similar. The investigation may begin with a brief inquiry letter seeking information and possibly documents, and the relative informality of this approach sometimes causes businesses to make the crucial error of not taking the inquiry seriously. Enforcement agencies can also employ more formal measures, such as criminal or civil subpoenas or their analog, the Civil Investigative Demand. In circumstances in which the government considers time to be of the essence, search warrants may be executed at company offices or the homes of company personnel, or agents may simply appear at those locations seeking to conduct impromptu interviews.

Despite the increase of government enforcement activity, not every price increase constitutes price gouging. Defenses to gouging allegations can arise from good faith steps taken in response to abnormal market disruptions or fluctuations occurring in a particular industry as a result of the COVID-19 pandemic, such as an increase in supplier's costs due to product shortages or emergency reallocation of production equipment and labor. However, determining whether any valid defenses exist requires a nuanced consideration of not only the specific laws involved but also the relevant industry conditions. As a result, businesses receiving of any kind of pricing inquiry from a law enforcement or regulatory agency should consider involving legal counsel before any information or documents are provided to the government in response.

With this in mind, what follows is a high-level review of the relevant laws for Connecticut, New York, Massachusetts and Rhode Island.

Connecticut

Connecticut law expressly prohibits increasing the price of any item offered for sale in Connecticut during any state or federal disaster or emergency declaration, provided the increase was not due to normal business fluctuation. See Conn. Gen. Stat. § 42-230. Violators face fines and, more significantly, any violation is deemed a per se unfair or deceptive trade practice under the Connecticut Unfair Trade Practices Act (CUTPA). CUTPA, in turn, potentially allows harsher penalties per violation, including punitive damages, actual damages, recovery of enforcement costs, and injunctive relief. See Conn. Gen. Stat § 42-110b et seq.

Furthermore, if the item has been designated to be in “short supply” or “in danger of becoming in short supply,” a violator faces a fine of up to \$1,000 per violation and criminal penalties, including up to one year imprisonment or, if the violation is found to have been intentional or part of a pattern of repeated violations, up to five years imprisonment and a fine of up to \$5,000. See Conn. Gen. Stat. § 42-232.

New York

New York law prohibits manufacturers, suppliers, distributors, retailers and others within the chain of distribution for consumer goods or services from charging an “unconscionably excessive price” during any abnormal disruption in the market. See NY GBL § 396-r. The statute may be enforced only by the Attorney General, and applies to goods and services used for personal, family or household purposes, including the rendering of repair services on an emergency basis.

Although “unconscionably excessive” is an undefined standard, a newly proposed state law concerning consumer medical supplies seeks to impose a presumption that a price exceeding 10

percent of its price immediately prior to a declared public health emergency is unconscionably excessive. Similarly, New York City has issued an emergency consumer protection rule prohibiting price increases above 10 percent on certain supplies relevant to the prevention of the spread of the coronavirus, such as cleaning products, hand sanitizer and paper towels.

Massachusetts

The emergency regulation issued in Massachusetts, expands what the Commonwealth views as price gouging, making it an unfair or deceptive trade practice to sell, or offer to sell, to a consumer or business any goods or services necessary for the health, safety or welfare of the public for an amount that represents an unconscionably high price during a declared statewide or national emergency. See Amendment to 940 Mass. Code Regs. § 3.18. Per the emergency regulation, a price is “unconscionably high” if there is gross disparity between the price charged or offered and (1) the price at which the same good or service was sold or offered for sale by the business in the usual course of business immediately prior to the onset of the declared statewide or national emergency, or (2) the price at which the same or similar product is readily obtainable from other businesses.

There are strict financial penalties for violations of Massachusetts’ emergency regulation. In some cases, courts can double or treble damages, award fines and attorneys’ fees, and issue injunctions restricting business operations.

Rhode Island

In Rhode Island, it is an unfair sales practice to price gouge by selling, or offering to sell, “essential commodities” to consumers for an amount that represents an “unconscionably high price” within the local area for which the emergency is declared. 6 R.I. Gen. Laws § 6-13-21.

What constitutes an “essential commodity” is very broadly defined, encompassing most goods or services necessary for use as a direct result of the market emergency. An “unconscionably high price” exists when the amount charged represents a gross disparity between the average price the good was readily available and sold (or offered for sale) within the local area and usual course of business during the 30 days immediately before the declaration of the market emergency. Penalties for violation of the price gouging statute can include fines, costs of litigation related to the offense, and disgorgement of profits earned in violation of the statute.

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