

Goodwin Alerts

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Price Gouging: U.S. Enforcement Agencies Actively Monitoring for Violations

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As consumers continue to seek essential goods to address the COVID-19 pandemic, U.S. law enforcement agencies have made clear that they will be focused on identifying and challenging instances of price gouging. Indeed, last week federal prosecutors filed the first criminal complaint for alleged price gouging in violation of the Defense Production Act that President Trump invoked in March.^[1] While there is good reason to believe that enforcers will continue to focus on the most egregious offenders, the reality is that price-gouging prohibitions reflect a patchwork of state – and now federal – laws that can make compliance for any business selling essential goods tricky. It's important that companies keep in mind what products and services may be covered, and what pricing policies are prohibited.

THE REGULATORY LANDSCAPE

Price gouging laws have traditionally been a state matter. Some states have specific price-gouging statutes on the books, effective once a state of emergency has been declared by executives.^[2] Others that lack such statutes can look to general laws prohibiting unfair and deceptive trade practices.^[3] Generally, all of these laws provide for civil penalties, and often grant law enforcement civil subpoena powers to investigate. Some also provide for criminal prosecution, and for civil actions by private parties.

At the federal level, there is no specific price-gouging law. However, the Defense Production Act of 1950^[4] gives the President authority to issue regulations governing the supply and sale of essential goods, and President Trump has exercised that authority to issue an Executive Order prohibiting hoarding and price gouging of essential materials.^[5] Attorney General William Barr has since set up a federal task force to address COVID-19-related market manipulation and price gouging, making it clear that federal law enforcers are serious about the issue.^[6]

Additionally, other federal laws may prove to be useful (and creative) enforcement tools. Some private manufacturers have turned to federal trademark law to prevent resellers from price gouging with their products. Last week, manufacturer 3M was successfully granted a temporary restraining order in such a suit alleging that a supplier was price gouging its N95 masks.^[7]

WHAT TYPES OF PRICING CONDUCT ARE PROHIBITED?

Generally, price gouging statutes cover conduct that meets the following elements:

- Pricing during a state of emergency
- Of an essential good
- That is “excessive” or “unconscionable,” often defined by a percentage increase over a pre-emergency period average price (e.g., 30 days prior to the declared emergency).

The state laws vary tremendously, though, so it is important to look at specific laws and regulations to ensure proper compliance. For example, some state laws are only applicable to a small category of goods, such as gasoline.^[8] Others, including the federal Executive Orders, cover a broader list of enumerated “essential” products and services. The U.S. Department of Health and Human Services has provided a list of all such essential services on its website.^[9] And yet still others leave things open ended, proscribing excessive pricing for any “goods and services vital and necessary for the health, safety, and welfare of consumers,” for

example.^[10] Similarly, the various laws also differ in what percentage of prices is deemed “excessive” (10%, 20%, 25%, etc.) and what lookback period to apply (30 days, 60 days, a blended average, etc.). Others do not rely on specific percentages at all to define excessive pricing.^[11]

COMPLIANCE RECOMMENDATIONS

Despite the wide variations in scope, there are several steps you can take to help ensure compliance:

- Document any shifts that can justify a change in price, such as increased input or labor costs;
- Look to your past pricing norms rather than current market trends when pricing products or services;
- Ensure that your sales team understands the risks of stepping afoul of price gouging laws. This may be an opportune time to refresh your compliance program or implement one in the first place;
- Ensure that any distributors you use are in similar compliance;
- Make sure that your efforts to avoid any price gouging liability don’t run afoul of other antitrust laws. It is illegal to coordinate on pricing or output with other competitors.

Goodwin’s [Antitrust + Competition](#) team regularly counsels companies on how to maintain compliance with U.S. competition laws, and we stand ready to advise you as your company responds to COVID-19 and its impacts.

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Please visit Goodwin’s [Coronavirus Knowledge Center](#), where lawyers from across the firm are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

^[1] <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0>

^[2] For example, California, Cal. Penal Code § 396, and New York, N.Y. Gen. Bus. Law §396-r.

^[3] Washington state, for example, lacks a specific law but has sought to root out COVID-19 related price gouging under the state’s Consumer Protection Act. <https://www.atg.wa.gov/news/news-releases/ag-ferguson-sends-cease-and-desist-letters-price-gouging-washington-based-online>

^[4] 50 U.S.C. §§ 4501 *et seq.*

^[5] Executive Order 13910, 85 Fed. Reg. 17,001.

^[6] <https://www.justice.gov/file/1262776/download>

^[7] See *April 24, 2020 Order, 3M Company v. Performance Supply LLC*, No. 1:20-cv-02949 (S.D.N.Y.)

^[8] Indiana Code Title 4, § 4-6-9.1-1, *et seq.*

^[9] <https://www.hhs.gov/sites/default/files/hhs-dfa-notice-of-scarce-materials-for-hoarding-prevention.pdf>

^[10] New York Consolidated Laws, General Business Law § 396-r.

^[11] *Id.*

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