

LEGAL UPDATES

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State and Federal Enforcers Ramp Up Price Gouging and Deceptive Practices Enforcement

State Attorneys General in more than 40 states and their federal counterparts are using consumer protection authority triggered by state and federal COVID-19 emergency declarations to ferret out and stop scams and price gouging of essential products such as face masks, hand sanitizer, ventilators and personal protective equipment. Price gouging refers to sellers trying to take unfair advantage of consumers during an emergency or disaster by greatly increasing prices for essential consumer goods and services. Thousands of complaints from consumers have already been lodged with State AGs and the Federal Trade Commission (FTC). In addition, Amazon, Facebook, Craigslist and eBay are using their robust online price comparison tools to identify, pull down, and refer potential excessive pricing violations by third-party sellers to State AGs.

On the federal side, in the absence of an express federal price-gouging statute, the U.S. Department of Justice (DOJ) and FTC are invoking enforcement authority under various fraud and federal consumer protection statutes to go after national and international violators, as well as working collaboratively with State AGs as appropriate. Along with prosecutors around the country, DOJ has formed a Hoarding and Price Gouging Task Force to coordinate the federal response pursuant to the President's Executive Order invoking the Defense Production Act, but the action is mainly on the state side.

Although not all states have statutes specifically addressing price gouging—e.g., Nebraska, Arizona, and Colorado are three that do not—enforcement of price-gouging laws has been the traditional province of the states. Most often, localized natural disasters such as flooding, wildfires, or hurricanes trigger state emergency declarations. Consequently, many state price gouging statutes speak in terms of policing price increases for products like gasoline, bottled

water, generators and construction materials. In the current health emergency, state statutes target essential products such as face masks, personal protective equipment, ventilators, hand sanitizer, cleaning supplies, and the like. Some states rely on general language linking the types of covered products to the type of market disruption involved. The North Carolina price gouging statute is of this type. Other state statutes may list specific products by supplemental emergency rule or other proclamation, as with New York. As a result, state price-gouging prohibitions may vary somewhat as to what is covered.

State statutes also differ in how they determine the size of post-event price increase that invokes the statute. Prohibitions under the various state statutes may be triggered by post-event price increases as small as 10 percent under the statutes in California, New York, and New Jersey. Other states use larger percentage increase formulas such as 15 percent in Wisconsin and 20 percent in Pennsylvania. Florida, North Carolina, Michigan, Minnesota (by executive order), Missouri, Ohio, Illinois (authority expanded by executive order), Tennessee, and Texas use descriptors such as excessive or grossly disparate or apply a general unconscionability standard to post-event price increases.

Most states impose civil fines and penalties for violations; however, some state statutes, including California and Missouri, also provide for criminal penalties including jail time. And in other states, including Pennsylvania, North Carolina and California, price gouging statutes apply to manufacturers and wholesale distributors, as well as direct-to-consumer retailers. Most, if not all, such statutes allow retailers to defend against price-gouging actions by substantiating price increases further up the supply chain. Because state price gouging statutes are not uniform, it is important to understand the specific laws and regulations where the client's operations are located.

State AGs and their federal counterparts are acting quickly to investigate and mitigate potential violations. State AGs are filing lawsuits and issuing civil investigative demands, as well as serving cease-and-desist or warning letters to suspected violators. For example, the Texas AG filed suit against an auction company seeking to sell medical items to the highest bidder despite warnings to desist. The Missouri AG recently issued eight civil investigative demands to third-party sellers based on referrals from Amazon. A compendium of State AG COVID-19 enforcement actions can be found on the National Association of Attorneys General website.

On the federal level the FTC and the Food and Drug Administration have sent at least seven warning letters to companies making deceptive or scientifically unsupported claims about their ability to treat COVID-19. Additionally, DOJ filed a civil wire fraud suit in a Texas federal district court against a website, coronavirusmedialkit.com, that was purportedly offering access to World Health Organization vaccines that do not exist.

In light of ongoing COVID-19 enforcement initiatives at all levels of government and the variety of statutory prohibitions involved, all manufacturers, distributors, and suppliers of targeted products,

whether brick-and-mortar or online, should consult with knowledgeable counsel to avoid unwanted scrutiny. Manufacturers, distributors, and retailers in the distribution chain for essential health-related products should review state price-gouging statutes in states where they have a significant presence. All companies in the supply chain for such products should preserve relevant documentation relating to supply costs since most state price-gouging statutes allow those in the chain to pass along cost-based upstream price increases in order to maintain reasonable profit margins.

Contact us

Husch Blackwell's Antitrust and State AG practice teams continue to monitor state and federal guidance and enforcement actions in this area. Should you have any questions, please do not hesitate to contact Wendy Arends, Mark Tobey, Matthew Diehr or your Husch Blackwell attorney. For additional information on COVID-19's legal implications, please visit Husch Blackwell's comprehensive COVID-19 toolkit.