

COVID-19: PRICE GOUGING ENFORCEMENT IN THE UNITED STATES - KEY CONSIDERATIONS

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By: Lauren Norris Donahue, Christopher S. Finnerty, Jack S. Brodsky

The legal landscape surrounding price gouging has changed dramatically over the past several weeks and continues to do so. When COVID-19 first reached the United States, several states had yet to enact price gouging prohibitions. Since then, state governors and attorneys general have been actively issuing executive orders and/or other regulations and statutes addressing concerns over price gouging. Not only this, but the federal government has taken action as well—on March 23, President Trump signed an Executive Order implementing the Defense Production Act prohibiting the accumulation of “scarce” products, and just last week, several members of Congress proposed two bills aimed at extending protections against price gouging of essential goods and services.

While many manufacturers and resellers have sought to keep abreast of the ever-changing price gouging restrictions at both the state and federal level, this may ultimately be a futile practice. Whether under the state's price-gouging specific laws or more general consumer protection statutes, nearly all states have made it clear that they will move quickly and forcefully against any company they suspect to be price gouging. Manufacturers and resellers—particularly of ventilators, personal protective equipment (“PPE”), and other items that are currently in high demand—should be prepared for state and possibly federal enforcers to aggressively scrutinize their prices charged during the COVID-19 pandemic (especially prices charged to the states) and should position themselves to prove that their conduct does not constitute price gouging.

Accordingly, in addition to concentrating time and resources to ensure compliance with price gouging rules and regulations, manufacturers and resellers are advised to focus on bolstering their defenses to a potential price gouging challenge and mitigating future liability through proper documentation. Below are key considerations for manufacturers and resellers to consider in the current environment:

- Price gouging refers to a seller's increase in price of an item or service during a declared state of emergency or other similar disaster, such as the COVID-19 national crisis. Generally, price gouging laws prohibit an increase in price above a certain threshold or ceiling, generally above a given percentage of the average price preceding the state of emergency. Many, however, allow for a price increase if there is a legitimate cost increase due to the state of emergency.
- Penalties for violating the anti-price gouging statutes and consumer protection laws vary by state, but many provide for serious penalties in the form of potential jail time, substantial fines, or prohibition of future sales. Additionally, conduct that conflicts with the Defense Production Act could result in federal criminal charges, which could lead to jail time and substantial fines.

- Sellers should be cautious not to take too much comfort in the fact that a particular state does not have a price gouging statute or that a particular product or service is not covered under that statute. Given the unprecedented nature of the COVID-19 pandemic, we expect price gouging enforcement to be broad, aggressive, and widespread in the aftermath of COVID-19, whether under a specific state price gouging statute, the Defense Production Act, or general consumer protection laws.
- The risk of investigation is extremely high, especially for companies selling high-profile products that are in high demand, such as PPE and ventilators. The risk is likely increased further if the state is the purchaser of those products and if that state has a history of aggressive consumer protection enforcement. A number of state attorneys general have already announced investigations of alleged price gouging. We have also received reports of state attorneys general serving broad subpoenas and document holds on resellers. In the months following the COVID-19 crisis, state attorneys general are likely to closely review the purchases their states made during the COVID-19 crisis and investigate any prices they view as excessive to determine whether they may be able to recoup costs through legal action.
- We expect—at least at the investigation phase—that some state attorneys general will shift the burden to companies to show that the prices they charged the states and consumers for products and services during COVID-19 were not excessive and did not constitute price gouging or otherwise run afoul of state consumer protection laws.
- There are several strategies that manufacturers and resellers can utilize to position themselves to limit the time and expense of defending permissible price increases, such as documentation of costs, prices, and revenues before and after the COVID-19 pandemic. Additionally, there are legal avenues, such as trademark infringement claims, by which manufacturers can police downstream resellers who may be price gouging the manufacturer's products, leaving the manufacturer open to a potential price gouging enforcement action.

The K&L Gates antitrust, competition and trade regulation team is closely monitoring price gouging enforcement in the United States, and can provide legal guidance to companies selling products or services during the COVID-19 pandemic that may be susceptible to price gouging accusations. If you would like additional information or have any questions, please contact the authors.

KEY CONTACTS



LAUREN NORRIS DONAHUE
PARTNER

CHICAGO
+1.312.807.4218
LAUREN.DONAHUE@KLGATES.COM



CHRISTOPHER S. FINNERTY
PARTNER

BOSTON
+1.617.261.3123
CHRIS.FINNERTY@KLGATES.COM

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