

COVID-19 Pandemic Spurs Renewed State and Federal Focus on Price Gouging Enforcement

May 21, 2020

As the COVID-19 crisis places extraordinary pressure on the supply chain for various essential goods, federal and state authorities have turned their focus to suspected instances of price gouging, particularly for medical and healthcare goods experiencing extraordinary demand. This memorandum provides an overview of those efforts thus far.

Background

Under most states' laws, it is illegal for a seller to set an excessively high price on necessary goods or services such as food, transportation, or medical supplies during a time of emergency or abnormal market disruption.

The federal government, by contrast, has no express law prohibiting price gouging, and historically has been circumspect about curtailing alleged price gouging in times of crisis. A notable example came during Hurricane Katrina in 2005, when gasoline prices spiked, and some Members of Congress called for **amendments to the antitrust laws** to prohibit price gouging in times of national disaster. The Federal Trade Commission ("FTC") **opposed this action**, arguing that such laws "likely will do consumers more harm than good" because "price increases lower demand and help make the shortage shorter-lived than it otherwise would have been."

The COVID-19 pandemic may be testing this position, however. Since the crisis began, there have been **reports** of sellers hoarding stockpiles of personal protective equipment, hand sanitizer, and other medical supplies in order to resell those goods at high prices. This has led both the federal government and states to take action.

The Federal Response

On March 23, 2020 President Donald Trump **issued an Executive Order** intended to counteract hoarding of important medical equipment and materials during the crisis. The Executive Order delegates to the Department of Health and Human Services ("HHS") the power to enforce the anti-hoarding provisions of the Defense Production Act ("DPA") and "to prescribe conditions with respect to the accumulation of such resources." These provisions of the DPA have been seldom invoked, and have generally applied to ensure that defense-related goods such as titanium ore are used for national defense purposes.¹

One day after the Executive Order, HHS published a **Notice** designating N-95 facepiece respirators, ventilators, disinfecting devices, personal protective equipment, and several other items as "scarce," under the Defense Production Act, which means that the listed materials may not be acquired in excess

¹ See *Carey v. United States*, 326 F.2d 975, 980-81 (U.S. Ct. Cl. 1964).

of reasonable business or personal use or for “resale at prices in excess of prevailing market prices.”² Violations are punishable by a maximum fine of \$10,000 or one-year of imprisonment.³ The Notice is in force for 120 days after its publication, or until July 22, 2020, but may be renewed.

On March 24, the Department of Justice (“DOJ”) issued its own **Memorandum** stating that it “will work closely” with HHS on the designation of scarce items and, where appropriate, investigate and prosecute those who hoard excessive amounts of vital medical items for personal use or resale at exorbitant prices. DOJ also made clear, however, that it would not pursue “regular Americans who are stocking up on the necessities of daily life” or businesses reasonably acquiring these materials. In order to meet its goal of prosecuting “bad actors,” the DOJ set up a “COVID-19 Hoarding and Price Gouging Task Force.” The Task Force is led by Craig Carpenito, the United States Attorney for the District of New Jersey, and includes members of DOJ’s Antitrust Division Criminal Program, and designated experienced attorneys from every United States Attorney’s Office and all relevant DOJ components.

The FTC, for its part, has **publicly committed** to investigating and initiating actions against COVID-19 scams, but has as of yet not indicated a specific focus on price gouging.

There have been calls for Congress to pass federal anti-price gouging legislation. Some Members of Congress are seeking to include anti-price gouging provisions in **stimulus bills** that would give the FTC as well as state attorneys general authority for the duration of the COVID-19 crisis to bring civil enforcement actions against sellers who charge “unconscionably excessive” prices for goods or services.⁴ To determine whether price gouging has occurred, the proposed legislation would have regulators look to whether the price “grossly exceeds” the average price charged by the seller before the onset of the COVID-19 crisis, whether it grossly exceeds the average price charged by other sellers before the crisis, or whether a price increase alternatively “reasonably reflects” market conditions such as additional costs or risks. It remains to be seen whether these legislative efforts will materialize into law.

State Responses

Over 30 states have some form of price gouging statute, which are generally triggered when a state of emergency is declared. Some states provide for specific benchmarks for what constitutes price gouging. In California, for example, once the President, the Governor, or a proper local official declares a state of emergency, it becomes illegal to sell any basic consumer goods and services, including emergency and medical supplies, for a price greater than ten percent above what the seller charged for the goods or services immediately prior to the declaration of the emergency, unless the seller can show that the increase was reasonable based on non-gouging factors such as increased costs.⁵ Other states provide a

² 50 U.S.C. § 4512.

³ 50 U.S.C. § 4513.

⁴ The **proposed legislation** provides for FTC enforcement and penalties under the powers of the Federal Trade Commission Act. It also provides that state attorneys general who have reason to believe that a person has violated the anti-gouging provision may bring a civil action for an injunction, civil penalties, damages, or restitution. If a state attorney general files an action under these provisions, then she would be required to provide notice to the FTC, at which point the FTC would have the right to intervene. By contrast, if the FTC commences an action against a defendant, no state attorney general would be permitted to bring an action against that defendant. A state attorney general would be permitted to bring an action under the proposed federal law and any state consumer or anti-price gouging law at the same time.

⁵ Cal. Penal Code § 396 (West 2019). California Governor Gavin Newsom **declared a state of emergency** in early March 2020, triggering the statute.

less precise definition of price gouging. For example, in New York sellers are prohibited from selling consumer goods and services for an “unconscionably excessive price” during a state of emergency or other abnormal market disruption,⁶ although [pending legislation](#) would move New York closer to California, making it a rebuttable presumption that a price is unconscionably excessive if it is more than ten percent above the price charged immediately prior to the emergency. Finally, for those states without price gouging statutes, attorneys general may bring enforcement actions under more general consumer protection laws.⁷ Violations of consumer protections laws or price gouging provisions may be met with civil or criminal penalties.⁸

State attorneys general have brought a variety of recent enforcement actions against alleged price gouging schemes. A few examples include:

- In Washington State, the Attorney General sent [cease-and-desist letters](#) to five internet sellers who raised prices on products such as hand sanitizer and N-95 masks.
- In [Ohio](#) and [Texas](#), the Attorneys General have brought civil lawsuits against sellers alleging price gouging for N-95 masks and other goods.
- In Massachusetts, the Attorney General issued an [emergency regulation](#) extending price gouging restrictions to goods or services necessary for health, safety, and welfare, whereas before the regulation they applied only to price gouging of gas and petroleum.

Of note, 33 state attorneys general also recently sent [a letter](#) to the CEOs of four major online retailers alleging that price gouging has occurred on their platforms, and urging the CEOs to create anti-price gouging policies, protections that will be triggered before any official state of emergency, and “Fair Pricing” portals for reporting price gouging.

More Davis Polk insights on the coronavirus pandemic can be found [here](#).

⁶ N.Y. Gen. Bus. Law § 396-r (McKinney 2008). New York Governor Andrew Cuomo [declared a state of emergency](#) in early March 2020, triggering the statute.

⁷ See, e.g., Wash. Rev. Code § 19.86.020 (2020).

⁸ See *id.* § 19.86.140; Cal. Penal Code § 396(h); N.Y. Gen. Bus. Law § 396-r.3.4.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

New York

Greg D. Andres	+1 212 450 4724	greg.andres@davispolk.com
Martine M. Beamon	+1 212 450 4262	martine.beamon@davispolk.com
Angela T. Burgess	+1 212 450 4885	angela.burgess@davispolk.com
Tatiana R. Martins	+1 212 450 4085	tatiana.martins@davispolk.com

Washington, DC

Robert A. Cohen*	+1 202 962 7047	robert.cohen@davispolk.com
Neil H. MacBride	+1 202 962 7030	neil.macbride@davispolk.com
Fiona R. Moran	+1 202 962 7137	fiona.moran@davispolk.com
Paul J. Nathanson	+1 202 962 7055	paul.nathanson@davispolk.com
Linda Chatman Thomsen	+1 202 962 7125	linda.thomsen@davispolk.com
Kenneth L. Wainstein	+1 202 962 7141	ken.wainstein@davispolk.com

*Mr. Cohen is admitted to practice in New York and Maryland, and is practicing in DC under the supervision of partners of the firm.

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