

## Anti-Price Gouging Laws to be Aware of During COVID-19 Emergency

Complaints of price gouging have surged in New York and throughout the country. Consumer protection statutes that prohibit price gouging exist in most states, and—like in New York—often go into effect automatically during a state of emergency or public health emergency, which have now been declared in every state and U.S. territory. Companies that buy and/or sell goods or services should be aware of these anti-price gouging consumer protections now in effect.

According to the New York Attorney General, New York's anti-price gouging statute went into effect as of January 31, 2020, when the U.S. Secretary for Health and Human Services declared a national public health emergency for COVID-19. The NY statute prohibits any party within the chain of distribution of essential consumer goods or services (including any manufacturer, supplier, wholesaler, distributor or retail seller, so long as the product was located in the state prior to the sale) from selling or offering to sell such goods or services for an "unconscionably excessive price." Essential consumer goods or services include those that are vital and necessary for the health, safety and welfare of consumers, and which are used, bought or rendered primarily for personal, family or household purposes.

Whether essential consumer goods or services are being offered and/or sold for an "unconscionably excessive price" is a question of law to be determined by a court. The price will likely be found "unconscionably excessive" if: (1) the price is grossly higher than the price charged by the same seller prior to the onset of the emergency; or (2) the price grossly exceeds the price for the same or similar goods or services readily obtainable in the affected area by other consumers. The New York Attorney General may seek an order restraining illegal price gouging and seek civil penalties up to \$25,000 and restitution for aggrieved consumers.

Anti-price gouging statutes vary widely between states. Some are like New York in the sense that price increases may not be "unconscionable," while other states set a percentage above which prices for covered goods or services may not be increased. For example, the New Jersey anti-price gouging law makes it unlawful, in most circumstances, to increase prices by 10 percent or more during an emergency. In contrast, Pennsylvania law assumes that price increases of 20 percent or more are unlawful, though lesser price increases may be unlawful depending on the circumstances.

There is also variation among states as to whether anti-price gouging laws apply to all parties across the distribution chain, or whether parties that simply pass along cost increases are exempt. Potential penalties also vary in type (civil or criminal) and magnitude, but businesses should understand that any investigation can result in reputational damage to the business and its owners or senior employees. Complaints made to state attorneys general by consumers that feel aggrieved due to price increases beyond what they are used to can trigger costly investigations, even if no price gouging is ultimately found.

States and government agencies are taking swift action in response to the outcry against price gouging during the COVID-19 pandemic, in the form of expanded laws and regulations, and enforcement actions. For example, legislation recently introduced in the New York State legislature would create a presumption that price increases for consumer medical supplies of more than 10 percent during a declared public health emergency are unconscionably excessive and therefore illegal price gouging. The NYC Department of Consumer and Worker Protection similarly promulgated an emergency rule making it illegal to increase the price of any personal or household good or service needed to prevent or limit the spread of or to treat COVID-19 by 10 percent or more.

Massachusetts has issued an emergency regulation that expands the scope of price gouging in that state to include sales (or offers to sell) to a consumer or business any goods or services necessary for the health, safety or welfare of the public for an unconscionably high price during a declared statewide or national emergency. The governor of Maryland recently issued an executive order prohibiting retailers from increasing the price of various goods and services (including, among others, food, medical supplies and equipment, building supplies and equipment, delivery services, and internet, telephone and video streaming services) to a price that increases the retailer's profit by more than 10 percent.

There is no federal law expressly prohibiting price gouging. However, President Trump has issued an executive order instructing the Department of Health and Human Resources and the Department of Justice (DOJ) to enforce the anti-hoarding provisions of the Defense Production Act with respect to those who hoard supplies of necessary health and medical resources. The DOJ just recently seized one million pieces of medical supplies in furtherance of this order. It is also possible that federal agencies like the DOJ or the Federal Trade Commission will use existing fraud, deceptive advertising and anti-trust laws to pursue price gouging related to the pandemic.

Not every price increase during the COVID-19 pandemic is price gouging. Sellers may be able to defend against allegations of price gouging on the basis that the increased price was due to factors not within the seller's control. Examples are that the seller's costs were increased due to product shortages or because the seller had to reallocate equipment and/or labor due to the emergency.

In light of this disparate and evolving regulatory environment, it is imperative that businesses be aware of the applicable price gouging laws as they manage pricing of goods and services throughout this emergency. This can be a challenge where businesses are selling goods or services in multiple states. Even businesses that have no intent to price gouge should review the applicable anti-price gouging laws and their own pricing practices, document the reasons for price increases with respect to goods or services that are subject to applicable laws, and seek legal counsel as needed throughout this process and particularly before responding to any inquiry from a government or law enforcement agency on these issues.

The attorneys at Bond, Schoeneck and King are available to assist you in navigating any applicable pricing laws during this emergency. If you have any questions regarding this Information Memo, please contact [Gail Norris](#), [Mary Moore](#), any of the [attorneys](#) in our [Business and Transactions Practice](#) or the attorney at the firm with whom you are regularly in contact.



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