

Professional Perspective

# Price Gouging Compliance

Contributed by John Ingrassia, Proskauer

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# Price Gouging Compliance

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For reputable companies up and down the national supply chain, it is difficult to assess which price gouging laws apply to them, or even which restrictions remain in effect. Even with the best intentions, many businesses inadvertently run afoul of price gouging laws.

Because price gouging restrictions can cover more than obvious bad conduct and point-of-sale pricing to consumers, manufactures and suppliers should consider implementing procedures to assess their compliance obligations, whether they are complying, and how to manage compliance. Now is the opportune time to review price gouging basics to ensure compliance come future emergencies.

## Who is Subject to Restrictions

Price-gouging restrictions generally include high-level descriptions of covered entities. However, many statutes are silent as to whether non retailers are within scope and, if so, how. States differ as to whether price-gouging laws apply to suppliers. Maine's law, for example, applies to all necessities regardless of to whom they are sold, and regardless of where the seller sits in the supply chain. This may include, for example, national wholesaler or consumer goods producers selling to supermarkets in Maine. Similarly, New York's law applies to "all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of consumer goods or services or both." By contrast, Idaho's law only applies for sales to the ultimate consumer.

Additionally, the products subject to pricing restrictions vary by state. Many states provide a blanket prohibition on price increases, while others provide a specifically enumerated list. Several states have recently become more nuanced in defining the products subject to pricing restrictions in emergency orders.

## Nature of Price Restrictions

Laws governing prices usually take two forms. Some states have restrictions against unfair or unconscionable prices in their general consumer protection laws. For example, a putative class action lawsuit brought against Amazon looked to challenge price increases during the Covid-19 pandemic as "unfair" under the Consumer Protection Act, among other claims.

Alternatively, many states have dedicated laws banning price gouging under certain circumstances. These laws come in many flavors. Some create bright line restriction limiting price increases. Most state price gouging laws do not specify a precise price increase that qualifies as price gouging. Alabama, Florida, and Maine, for instance, bar selling at "unconscionable" prices, but maintain a rebuttable presumption of price gouging for price increases over a certain percentage.

In most instances, the dedicated price gouging statutes must be "turned on" to be in effect. The switch is typically a declared state of emergency. Usually, these emergency declarations last for a couple of days or maybe a week or two. The Covid-19 pandemic created a more complicated situation since many states, some to this day, repeatedly extended states of emergency related to the pandemic. Connecticut, Idaho, Kansas, Massachusetts, Missouri, New Jersey, Oklahoma, Rhode Island, South Carolina, and Texas continue to implement price gouging laws based on President Joe Biden's indefinite extension of the federal Covid-19 state of emergency.

## Practical Implications

The precise amount of a permitted price increases will often depend on a baseline price. Establishing the baseline price for each covered product at issue is essential—and not always straightforward. The formulas for baseline prices also vary by state. For instance, in Oklahoma, the baseline price is the price charged "immediately prior to the state of emergency." Any price increase above 10% of that baseline is presumptively illegal.

These baseline prices lay the foundation for showing that the price increase was permitted. Additionally, businesses should consider that Covid-19 states of emergency may still be in effect, or lapsed only to be reinstated, adding an additional layer to consider when calculating a product's baseline price.

To the extent price increases are put in place to reflect cost increases and maintain profit margin –potentially even increasing gross margins—they likely fall within the majority of the allowable exceptions. It becomes riskier, though, where profit margins are increased, as that component of the price increase may not get the full benefit of the exception. Defending any such pricing movements on the basis of the exception will necessarily require solid data on pricing and cost movements, and the relationship between them, along with evidence of a strong price gouging compliance program.

## Defense Production Act

The Defense Production Act (DPA) gives the president, among other things, power to control the domestic economy during times of crisis. The DPA is routinely invoked in a variety of circumstances, including in response to natural disasters like Hurricane Katrina and now Covid-19. Along with the power to control production and spending, the DPA penalizes hoarding or price gouging of any materials deemed scarce. On March 25, 2020, the Secretary of Health and Human Services announced 15 categories of goods covered by the Act including personal protective equipment (PPE), portable ventilators, and disinfecting devices.

The DPA provides in part: “to prevent hoarding, no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices.” 50 U.S.C. § 4512. While such prohibitions may ring similar to state price gouging laws, there are several noteworthy distinctions.

The DPA specifically prohibits “accumulation” as a triggering condition for price gouging liability, while states price gouging statutes focus on the price charged. Accumulation is not defined in the Act, highlighting perhaps the key challenge in DPA compliance: many of the DPA’s key terms are undefined, and there is little case law applying this part of the statute.

Enforcement to date offers some guidance. In the first case brought by the federal government for Covid-19 related price-gouging, criminal charges were brought against a defendant for allegedly using his retail sneaker and sports apparel store to amass and sell large quantities of PPE at a more than 1,000% markup. The defendant entered into a deferred prosecution agreement with the government.

In other instances, federal prosecutors brought criminal charges against companies and individuals, alleging either attempts to overcharge the government for PPE or simply defrauding the government with offers to sell equipment that never existed in the first place. While the number of cases brought by the Department of Justice (DOJ) during the course of the pandemic remains low, the broad language of the DPA, along with accounts of active DOJ inquiries, makes it important to continue to monitor federal actions in this space and to consider federal restrictions when putting a price gouging compliance program in place.

Accordingly, best practices for DPA compliance, like compliance with state price gouging prohibitions more generally, include determining whether your goods or services are covered, making sure to track and document pricing and cost information as well reasons for any price movements, and making efforts to ensure that prices do not exceed any conservative benchmarks.

## Compliance Tips

Two years after the start of the Covid-19 pandemic, with some notable exceptions, large businesses were able to successfully navigate the complex realm of price gouging compliance. Many companies under investigation have successfully avoided government enforcement by providing documentation of cost increases to justify price increases. Others have put in place price holds in the face of emergency declarations.

As more and more states lift their emergencies declarations, companies should use this opportunity to ensure they are taking the following steps to prepare of future coronavirus waves or new disasters. Following are some recommendations to incorporate into your compliance strategy.

*Identify the places in which you may be deemed to do business for the purpose of state price gouging laws.*

The locations where you produce or sell goods or provide services may impact which laws apply to your company. Understanding the scope of applicable laws is a first step in any compliance analysis.

*Identify goods and/or services which may be subject to regulations.*

Once the relevant states have been identified, review relevant state and local laws to ascertain whether your goods and/or services are covered by those price gouging laws.

*Determine how your relevant states evaluate compliance.*

If your goods and services are covered, review the relevant laws to determine when they were activated, the applicable baseline reference price to evaluate whether a price increase was impermissible, and the level of price increase that the state permits. Some laws designate a particular reference date for evaluating price increases, while others compare to prices in the days, weeks or months before a state of emergency was declared.

*Maintain a record of price increases and fluctuations and the basis for any pricing movements.*

With the relevant baselines, review actual pricing during the relevant periods to determine whether your prices have changed and, if so, whether they have exceeded any applicable thresholds or caps.

*Evaluate current price setting and documentation processes to evaluate whether changes should be made in light of price gouging laws.*

State laws provide a range of potential defenses for price increases, including pricing movements that are responsive to market conditions, such as higher input costs. Carefully review available defenses against whether actual or planned price increases fall within those exceptions.

*Develop a strategy to respond to any inquiries about possible price gouging.*

Any inquiry from a state attorney general office is a serious matter that can pose real risk, including expense to respond, reputational risk, and penalties, as well as possible subsequent civil suits by parties at all levels in the supply chain that may potentially allege overcharges now or even after the crisis subsides and the restrictions are lifted.

*Timothy Burroughs, Proskauer, contributed to this article.*