

Price Gouging and Government Investigations

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What is Price Gouging?

- Charging an excessively high price for a products or service during an emergency situation or other unusual market conditions. Law varies between federal and state systems, and then from state to state.



Who can be subject to a price gouging claim?

- Potentially, any business or individual providing a product or service
- Brick and mortar stores, as well as online retailers and online marketplaces
- Businesses in the supply chain (suppliers, manufacturers, distributors, wholesalers)
- Individuals: owners and employees of company

Who can bring a price gouging claim in court?

- Federal enforcement agencies, such as the United States Department of Justice or the Federal Trade Commission
- State Attorneys General, and potentially state criminal prosecutors
- In a few states, private citizens (consumers) or businesses (competitors)

What are the potential penalties for price gouging?

- Criminal conviction and incarceration
- Civil fines (\$1000s/day or instance)
- Injunctions restricting business operations
- Revocation of licenses to do business
- Loss of federal or state funding
- Reputational harm and loss of goodwill

Federal Law on Price Gouging

- Attempts at passing a federal law on price gouging have repeatedly failed in Congress.
- On March 23rd, President Trump issued an Executive Order pursuant to the Defense Production Act, which order criminalizes the hoarding (holding in excess of reasonable needs) any of a number of designated items for the purpose of **selling any such items in excess of prevailing market prices.** [50 U.S.C. § § 4512, 4513]

Federal Law on Price Gouging

- U.S. Secretary of Health and Human Services already has designated several items as protected, including ventilators, face masks, and other PPE.
- U.S. Department of Justice has established a COVID-19 Task Force made up of federal prosecutors from each state, whose job is to, among other things, prosecute price gouging related to designated items.
- The phrase “selling [] in excess of prevailing market prices” is not defined in the Executive Order. The phrase is used in a number of other legal contexts, and the interpretation of that phrase will be a major ground of contention in any prosecution.

Federal Law on Price Gouging

- In addition, federal prosecutors have at their disposal a variety of other criminal laws which they might seek to apply to price gouging conduct, such as mail fraud and antitrust laws.
- In light of the COVID-19 pandemic, price gouging has become a highly-politicized issue which in turn imposes pressure on law enforcement agencies to demonstrate decisive action against suspected wrongdoers. This may result in more aggressive prosecutions with harsher consequences pursued.

State Regulation of Price Increases

- Varies from state to state, and it is important to understand the legal standard in your jurisdiction.
- State anti-price gouging laws are generally either:
 - (A) a specific anti-price gouging law or regulation, or
 - (B) a general consumer protection law that includes price gouging as an unfair or deceptive trade practice.
- Specific price gouging laws can be divided into three categories used to determine when a price increase is illegal.

Three Variations of State Price Gouging Laws

- **Percentage increase cap**
 - Example: California
 - Can range from 10% to 25%
 - Boundaries defined, but rigid
- **Prohibition against “unconscionable” price increases**
 - Example: New York, Massachusetts, Rhode Island
 - Definitions of unconscionability vary
- **“No unusual increase” laws**
 - Example: Connecticut
 - Vague prohibitions
 - Usually limited, by statute or order, only to certain products

Connecticut's Price Gouging Laws

- There are two price gouging statutes in Connecticut. One applies to all retail products once the Governor declares an emergency, and the other applies only to specific products when the Governor declares a supply emergency for those products.
- The first statute, § 42-230, is triggered by a declaration of emergency by the Governor or the President of the United States. It prohibits increasing the price of any item offered for retail sale in Connecticut during that emergency, provided the increase was not due to normal business fluctuation. This has occurred.

Connecticut's Price Gouging Laws

- The second statute, § 42-232, is triggered only if the Governor declares a supply emergency for certain products.
- A supply emergency exists when there is a “a state-wide or regional shortage or threatened shortage of a product or service due to an abnormal market disruption resulting from a natural disaster, weather conditions, acts of nature, strike, civil disorder, war, national or local emergency or other extraordinary adverse circumstance.” This has not occurred yet.

Connecticut's Price Gouging Laws

- In the case of a supply emergency, Connecticut law prohibits the selling or offering for sale “any product or service which the Governor has designated to be in short supply or in danger of becoming in short supply . . . at a price which exceeds the price at which such product or service was sold or offered for sale by such person in the usual course of business immediately prior to the declaration of the emergency.”
- Even then, however, Connecticut generally allows price increases which are genuinely and provably “attributable additional costs incurred by such person in connection with the acquisition, production, distribution or sale of such product or service.”

State Variations Have Common Themes

- **Limits on Timing**
 - Triggered by executive order and may extend past end of the declaration of emergency.
- **Limits on Geographical Scope**
 - Can be entire state or only certain area.
- **Limits of Types of Items Covered**
 - Food
 - Medical supplies
 - Essential consumer goods
 - Gas, utilities, and generators
 - Services: housing, reconstruction in wake of disaster

Justifications for Price Increases

- Federal and state laws recognize that businesses are allowed to make a profit, and that conditions may exist justifying price increases. So not every price increase during a crisis is price gouging.
- Some states permit price increases in response to increased costs that are actually incurred, but a few other states further permit price increases that are in reasonable **anticipation** of future increases in costs
- Examples of cost increases that might justify price increases, depending on the jurisdiction: Transportation, Payroll, Materials, Customary Seasonal Fluctuations, Taxes, Processing Fees

Considerations Notwithstanding the Justifications

While there may be some justifications to increase a price, it is important to first consider...

- Is the proposed price increase proportional to the increased cost?
- Is the cost increase imposed by a third party or controllable from within your own company?
- Did other costs decrease?
- Had the item been discounted recently?
- Regardless of cost increases, is it a very substantial increase in price?
- Is this a new item for your business that you are selling at a price above the historical prevailing market price, because it cost you significantly more to buy?
- Is your price increase a result of increased market demand due to the emergency?
- What are your competitors doing?

Pricing Increase Practices to Consider

- The cost of compliance is almost always less than the cost of a crisis.
- There is no “one size fits all” set of best practices when it comes to price increases in a time of public emergency.
- Some general measures are worth considering in order to best position the company to remain within the requirements of the law for price-setting, and to prepare the company for a government investigation.

Pricing Increase Practices to Consider

1. Identify all states into which your products are sold directly or indirectly.
2. Obtain guidance from legal counsel on each relevant state's specific gouging laws (Do your products fall within the scope of the law? If so, what exceptions or justifications are available?).
3. Develop internal written policies that specifically guide setting prices.
4. Limit which employees can set prices.
5. Formally train those employees on pricing policies.
6. Direct responsible employees to maintain complete set of all records related to price increase decisions.
7. Operate "Complaint Portal" on your website for customers to report price concerns directly.
8. Designate, in advance, one person to be responsible for those complaints.
9. Designate, in advance, one person to monitor federal and state emergency declarations.
10. Avoid email discussion regarding complaints/concerns related to price increases/price gouging.