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## *PH COVID-19 Client Alert Series: Consumer Protection Rules and Regulations Still Apply During COVID-19*

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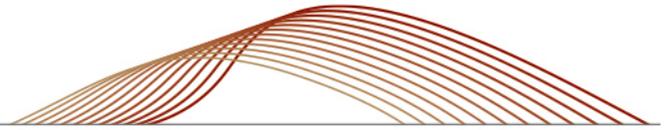
Natural disasters and pandemics produce a host of reactions, some altruistic, some heroic, and some improper. True in all times, but particularly true in times of crisis, businesses search for ways to respond to the moment to ensure the on-going health of the business, current and future profit, and long-term success. But the crisis, be it momentary or sustained, can impair business judgment. When the crisis abates, as this one will eventually, businesses will be evaluated by regulators and scrutinized closely by plaintiff's attorneys with regard to how they treated their customers during this time. It is therefore essential that businesses recognize and understand that consumer protection rules and regulations still apply during a crisis.

Looking to the federal level for interstate business, the Dodd-Frank Wall Street Reform and Consumer Protection Act gives the CFPB the authority to prohibit "unfair, deceptive, or abusive<sup>1</sup> practices" (UDAAP) in the consumer financial services industry.<sup>2</sup> The CFPB shares responsibility with the FTC to enforce federal consumer protection standards. Some of these standards, like price gouging, are clear. Others are less so: including the "unfairness," "deception," and "abusiveness" standards. While the exact reach of these rules is not defined, they remain the rules against which businesses will be measured through normal times as well as these time of crisis. The CFPB, FTC, and others, have made clear that businesses will be evaluated against these standards in reviewing their interactions with consumers during the COVID-19 Pandemic.

This alert is intended to give parties a short reminder of the current meaning of these important federal consumer protection standards.

### **Unfairness**

Under CFPB and FTC guidance, an act is "unfair" if 1) it causes or is likely to cause substantial injury to consumers, 2) it is not reasonably avoidable by consumers and 3) such substantial injury is "not outweighed by countervailing benefits to consumers or to competition."<sup>3</sup> Substantial injury usually involves monetary harm, for example, costs or fees that consumers paid as a result of an unfair practice.<sup>4</sup> Additionally, an act that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.<sup>5</sup>



Consumers cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury.<sup>6</sup> The inquiry does not consider whether the consumer could have made a better choice, but instead, asks whether the act or practice hinders the consumer's decision making ability.<sup>7</sup>

Overall, the act must be injurious, meaning that the injury is not outweighed by any offsetting consumer or competitive benefits produced by that same act.<sup>8</sup>

## Deception

Under CFPB guidance, an act or practice is deceptive if there is a representation, omission, act, or practice that misleads or is likely to mislead the consumer.<sup>9</sup> Consumers need not actually be misled, but rather the key question is whether the act or practice is likely to mislead consumers.<sup>10</sup> Statements will be analyzed in the context of the entire transaction or course of dealing, rather than in isolation.<sup>11</sup>

## Price Gouging

Price gouging often follows a crisis. Natural disasters create both supply and demand shocks. Products that are generally available can suddenly become scarce, creating a temptation for merchants to raise prices. Most states prohibit price gouging. Although the specific language of the legal prohibition varies from state to state, these laws bar forms from exploiting a crisis by charging exorbitant<sup>12</sup> prices for essential goods such as clothing, fuel, water, and hotel accommodations.

Past experience reveals the regulatory response. In the wake of Hurricane Harvey, the Texas Attorney General filed lawsuit against businesses for alleged price gouging.<sup>13</sup> These businesses included hotels and gas stations.<sup>14</sup> Similarly, after Hurricane Sandy hit New Jersey in 2012, that state accused four hotels, three gas stations and a hardware store of price-gouging.<sup>15</sup> The businesses settled with the state and paid \$282,844 in fines.<sup>16</sup>

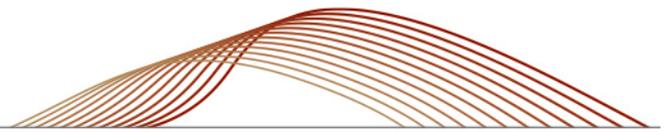
The COVID crisis has already led to promises of enforcement. As an example, Michigan Gov. Gretchen Whitmer signed an executive order targeting big markups on supplies and consumer food items through mid-April, and the state's attorney general, Dana Nessel, is pushing recently introduced bipartisan legislation to strengthen the state's anti-price-gouging laws.<sup>17</sup> A New York state senator stated that he will introduce legislation to expand New York's price-gouging law to cover public health emergencies and prohibit excessive markups on medical supplies.<sup>18</sup> This proposed legislation would amend New York's price gouging statute to establish an "unconscionable excessive price" as greater than 10% higher than before a public health emergency began, thus prohibiting stores and sellers from marking up first aid kits, facemasks, over the counter medications, etc. during this public health crisis.<sup>19</sup> As of March 13, 2020, the New York Attorney General had already sent six cease and desist letters for price gouging of hand sanitizer and disinfectant spray.<sup>20</sup>

## Conclusion

Consumer facing businesses, like all of us, face significant pressures during times of crisis. Businesses should try as best they can not to let those pressures cloud their judgment. Their actions remain subject to consumer protection laws and are subject to heightened review as federal and state regulators look to protect their citizenry during these difficult times.

If you have any further questions, please feel free to give us a call or email us.





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<sup>1</sup> The authority with respect to “abusive” practices is one newly created in conjunction with the CFPB and is not shared by the FTC. The definition of an “abusive” act or practice in Dodd-Frank (12 U.S.C. § 5531(d)) reveals that the purpose of this authority is to prevent practices that may interfere with a consumer’s ability to understand the terms and conditions of a financial product or service or that otherwise take advantage of a consumer’s lack of understanding of the risks, costs, or conditions of a financial product or service. 12 U.S.C. § 5531(d). The definition, however, has been recognized as vague. Richard Cordray, the former Director of the CFPB, acknowledged the vagueness and described determining whether an act or practice is “abusive” as a “facts or circumstances” test. Furthermore, the CFPB has stated that “although abusive acts or practices may also be unfair or deceptive, [the prohibitions on unfair, deceptive, or abusive] are separate and distinct, and are governed by separate legal standards.” CFPB, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts*, CFPB BULLETIN 2013-07 (July 10, 2013), [files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_unfair-deceptive-abusive-practices.pdf](https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf). For now, it appears that looking to the CFPB’s enforcement activities will provide the best guidance for determining whether an act or practice is considered “abusive” and how that differs from being unfair or deceptive.

<sup>2</sup> 12 U.S.C. § 5531(a).

<sup>3</sup> 15 U.S.C. § 45(n) (applying to FTC authority); 12 U.S.C. § 5531(c) (applying to CFPB authority).

<sup>4</sup> CFPB Consumer Laws and Regulations UDAAP Manual (available at [https://files.consumerfinance.gov/f/documents/102012\\_cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures.pdf](https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* Examples include the consumer lacking access to material information or being coerced into purchases without consent. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> The actual price increase that is actionable varies from state to state.

<sup>13</sup> Office of the Texas Attorney General, AG Paxton Files Suit Against Three Businesses for Price Gouging During Hurricane Harvey, September 12, 2017 (available at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-suit-against-three-businesses-price-gouging-during-hurricane-harvey>).

<sup>14</sup> *Id.*

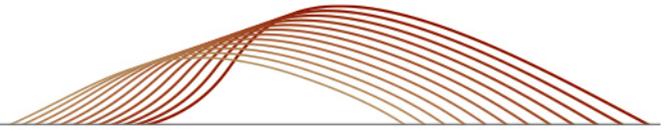
<sup>15</sup> 8 businesses, including 4 hotels, Settle Hurricane Sandy Price Gouging Complaints, March 30, 2019 (available at [https://www.nj.com/news/2013/07/sandy\\_price\\_gouging.html](https://www.nj.com/news/2013/07/sandy_price_gouging.html)).

<sup>16</sup> *Id.*

<sup>17</sup> NBC News, States Push Price-Gouging Measures as Coronavirus Fuels Consumer Fears, March 20, 2020 (available at <https://www.nbcnews.com/politics/politics-news/states-push-price-gouging-measures-coronavirus-fuels-consumer-fears-n1163846>); See also Exec. Order No. 2020-8 (Mar. 15 2020).

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- <sup>18</sup> Joan Verdon, Amid The Coronavirus Outbreak, Retailers Try To Combat Price-Gouging Online, March 4, 2020 (available at <https://www.forbes.com/sites/joanverdon/2020/03/04/coronavirus-related-price-gouging-is-a-risky-business-for-retailers/#14fa974417a0>).
- <sup>19</sup> New York lawmaker wants to bar price-gouging for masks and medical products amid coronavirus fears, March 3, 2020 (available at <https://www.nydailynews.com/news/politics/ny-price-gouging-masks-coronavirus-new-york-law-attorney-general-20200303-dza7i4pdline2xmavkbnkn2pfffy-story.html>). This proposal mirrors the existing price gouging legislation in California, New Jersey, and the District of Columbia.
- <sup>20</sup> Price Gouging Incidents Follow Coronavirus Outbreak, March 13, 2020 (available at <https://www.npr.org/2020/03/13/815307791/price-gouging-incidents-follow-coronavirus-outbreak>).