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## *PH COVID-19 Client Alert Series: Regulator and Prosecutor Focus on Price Gouging with COVID-19 Product Demand*

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As the COVID-19 pandemic continues to progress, demand has increased exponentially for personal protective equipment, hand sanitizer, certain health care products and test supplies, and—as the media reports of empty grocery shelves make clear—other essentials for daily living.

On March 23, 2020, the President issued Executive Order 13910, which provided the Department of Health and Human Services (“HHS”) with the authority to designate certain specific goods as scarce in the context of the COVID-19 pandemic.<sup>1</sup> For purposes of potential price gouging evaluations, the HHS lists as “scarce” categories of goods, including face masks and respirators, ventilators, personal protective equipment, and sterilization and disinfecting devices.<sup>2</sup>

The HHS list is not the only list protecting items against potential price gouging practices. These lists vary from jurisdiction, with many state and local governments identifying their own categories of goods and services that are protected against excessive pricing. Many of these lists are even broader than what HHS put out, and include not only medical items, but also certain food items, fuel , and even services such as construction.

Not unexpectedly, since the start of the COVID-19 pandemic, there has been a surge of price gouging allegations and reports of federal and state investigations into that conduct. On Friday, April 24, 2020, Craig Carpenito, the head of the U.S. Department of Justice’s (“DOJ”) COVID-19 Hoarding and Price Gouging Task Force and New Jersey U.S. Attorney, released a statement that “The Department of Justice and its partners will intervene whenever profiteers and scammers break the law by capitalizing on the public’s fear to enrich themselves.”<sup>3</sup> Price gouging during this emergency is and will continue to be an enforcement priority.

### **Federal Enforcement of COVID-19 Price Gouging**

Although the HHS list identifies particular products, federal law does not preclude a seller's decision to raise its price. In fact, there is no federal prohibition against even an exorbitant price increase. Rather, Section 102 of the Defense Production Act (“DPA”) makes it a crime to accumulate scarce goods under two circumstances: “(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 . . . .”<sup>4</sup>



The activity prohibited by the DPA is not the sale of goods; instead, the DPA prohibits accumulation—that is, gathering or storing scarce goods. That accumulation is illegal only if it is unreasonable or if the person or business engaged in the accumulation has the intent or the “purpose” to sell above the market price.

Even for those who do not ordinarily deal in the trade of goods, the DPA imposes the burden of proving a defendant’s state of mind when it accumulated the pertinent goods, which will be a challenge as prosecutions are brought.

Individuals convicted of violating DPA provisions are guilty of a misdemeanor and face a maximum of one year in prison and \$10,000 fine.<sup>5</sup> However, it is likely that other charges with more significant available penalties will be added to cases involving DPA violations as prosecutors seek harsh penalties in this environment.

## **First COVID-19 Federal Price Gouging Investigation Invoking the DPA**

On April 24, 2020, the U.S. Attorney’s Office for the Eastern District of New York announced the first criminal case invoking the DPA in a COVID-19-related investigation. A criminal case was brought against Amardeep Singh,<sup>6</sup> alleging that since March 18, when the President signed an executive order authorizing the use of the DPA for certain products, he stockpiled scarce medical supplies and personal protective equipment and sold them at excessive markups.

The items that Singh is accused of stockpiling were not part of his normal business; he owned a sneaker and apparel store. In this case, Singh is alleged to have received numerous shipments of essential products deemed to be scarce by the HHS list, including thousands of N95 face masks, surgical gloves, and full-body isolation suits. Singh allegedly marked up these items, which he purchased wholesale, in amounts ranging from 59 percent to 1,328 percent. Singh has thus far been charged with only a single criminal count.

## **State Enforcement of COVID-19 Price Gouging**

As Deputy Attorney Jeffrey Rosen acknowledged on March 24, 2020, the DOJ must coordinate with state and local authorities to prevent wrongdoers from “capitalizing on this crisis to reap illicit profits or otherwise preying on Americans.”<sup>7</sup> In fact, most states are already investigating many other potential cases of price gouging.

The majority of states have some form of price gouging law and others have enacted temporary regulations to address the issue. However, adding to the complexity for national businesses, state statutes have divergent metrics for identifying excessive pricing and varying penalties for the practice, ranging from fines per violation to prison time.

While some states take an objective approach, with an allowable “mark-up” percentage on certain goods, others require the application of multiple factors to identify prohibited price gouging, such as: (1) a comparison of the price paid for the good immediately prior to the emergency, (2) additional costs of doing business during the emergency, and (3) the duration of the emergency. Below are examples of state price gouging provisions, which can be criminally enforced.

### **California**

Under its penal code, California considers it unlawfully excessive for retailers to increase the price of goods by more than ten percent of their ordinary cost during a state of emergency. A “justifiable price



increase” cannot be “more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business . . . .”<sup>8</sup>

If, after factoring in a seller’s additional costs due to the emergency, the price is marked up above the allowable percentage, the seller may be at risk of prosecution in California.

Additionally, Governor Newsom recently issued an Executive Order supplementing California’s price-gouging statute.<sup>9</sup> The Executive Order adds restrictions on sellers who enter the market after a state of emergency has been declared, which California issued on March 4, 2020.<sup>10</sup> Specifically, it prohibits new merchants from selling protected goods at a price that is greater than 50 percent more than what the seller originally paid for the good or greater than 50 percent more than the cost of producing and selling the good.<sup>11</sup>

## **New Jersey**

New Jersey similarly considers it unlawful for retailers to increase the price of goods by more than ten percent during an emergency. However, in New Jersey, price increases beyond ten percent are considered lawful if attributable to higher costs from suppliers or simply from operating during an emergency.<sup>12</sup> Last month, New Jersey Attorney General Gurbir Grewal noted that despite its investigations of hundreds of businesses following price gouging complaints, the majority of the reported price increases were permissible because the investigated businesses were able to establish that their suppliers had raised prices.<sup>13</sup>

## **New York**

Rather than using objective criteria like a mark-up threshold, New York’s excessive pricing statute prohibits, among other things, selling goods for a more general “unconscionably excessive price.”<sup>14</sup>

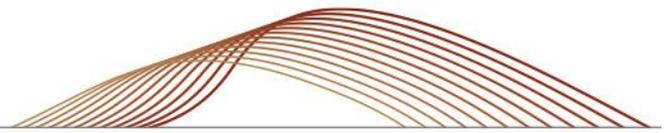
In New York, presumption of a seller’s excessive pricing may be established by showing (1) a gross disparity between the pre- and post-emergency prices, or (2) that the amount charged grossly exceeded the prices charged by competitors.<sup>15</sup> In turn, a seller can rebut this presumption with evidence that the price increase was based on additional costs outside of the seller’s control.<sup>16</sup>

Statutes like New York’s set up a defense for businesses to avoid allegations of price gouging if they can point to “additional costs” that have been imposed on them by suppliers or otherwise.

## **Conclusion and Recommendations**

The implementation of the DPA creates new challenges for businesses and the lack of uniformity among the various federal and state statutes make it all the more complicated for businesses operating in multiple states. Inevitably, each situation will require very specific analysis of the underlying costs and market forces under applicable state laws. It is likely that major corporate investigations are currently pending at federal and state levels, though they have not yet been made public.

For businesses that sell across multiple states but which ordinarily maintain nationwide or regional pricing, these different state approaches pose challenges. But even for more local businesses, such as supermarkets, pharmacies, and gas stations, the breadth of covered items and the likelihood that “scarce goods” lists will change pose investigative risks.



Price gouging investigations during the COVID-19 pandemic are likely to be politically-charged, with increased media coverage on companies (and their senior executives) that are being investigated with regulators seeking exceptionally harsh outcomes.

As companies are well aware, many price increases during times of emergency are legitimate. Disrupted supply chains, manufacturing difficulties, scarcity, capacity constraints, employee overtime pay, and other factors may explain what otherwise appears to be an excessive price increase, and any of which may be defenses in a price gouging investigation. It is essential that those companies selling goods or charging for services that are in scarce supply, or are deemed or even perceived to be essential, be particularly cautious. Price gouging rules are complex in their application and vary by state, so businesses should consult with counsel before making significant pricing changes.

More generally, in this climate, it is important for companies to preemptively work with counsel to consider the applicable laws, review their pricing practices, and develop internal protocols to mitigate the risks of a price gouging investigation.



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- <sup>1</sup> U.S. Exec. Order No. 13910 (Mar. 23, 2020).
  - <sup>2</sup> U.S. Dep't of Health & Human Servs., Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950 (Mar. 25, 2020).
  - <sup>3</sup> Emilie Ruscoe, "N.Y. Sneaker Salesman Charged With COVID-19 Price Gouging," Law360 (Apr. 24, 2020).
  - <sup>4</sup> 50 U.S.C. §§ 4512, 4513.
  - <sup>5</sup> 50 U.S.C. § 4513.
  - <sup>6</sup> *United States v. Singh*, case number 2:20-mj-00326, (E.D.N.Y. Apr. 24, 2020).
  - <sup>7</sup> *Memorandum from Jeffrey Rosen*, Deputy Att'y Gen., U.S. Dep't of Justice, Department of Justice Enforcement Actions Related to COVID-19 (Mar. 24, 2020).
  - <sup>8</sup> Cal. Penal Code §396(b).
  - <sup>9</sup> C.A. Exec. Order N-44-20 (Apr. 3, 2020).
  - <sup>10</sup> C.A. Exec. Order N-33-20 (Mar. 4, 2020).
  - <sup>11</sup> *Id.* ¶ 3.
  - <sup>12</sup> N.J. Stat. § 56:8-107 *et seq.*
  - <sup>13</sup> State of N.J., TRANSCRIPT: March 23rd, 2020 Coronavirus Briefing Media (Mar. 23, 2020).
  - <sup>14</sup> N.Y. Gen. Bus. Law § 396-r(3).
  - <sup>15</sup> *Id.* § 396-r(3)(b).
  - <sup>16</sup> *Id.*

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