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# *COVID-19: State and Local Law Enforcement Targets Price-Gouging Practices*

March 31, 2020

The COVID-19 outbreak has spurred shortages of and price increases for necessities such as medical equipment, cleaning supplies and paper products. Complaints by both individual consumers and state governors of “price gouging” have proliferated. State attorneys general and local law enforcement agencies, often armed with special legal powers to penalize price gouging, are acting—issuing cease-and-desist letters, commencing investigations or even effecting arrests—in response to these complaints.

This article provides an overview and analysis of state price-gouging laws, explores early trends in enforcement related to COVID-19, and provides guidance to companies making pricing decisions during this time of emergency. During this time of stressed supply lines and increased demand for certain products and services, companies should consider these issues prior to increasing their prices.

## **I. Enforcement of Price Gouging and Essential Supply Laws Related to COVID-19**

COVID-19 has dramatically impacted the market for a range of essential products, from hand sanitizer to ventilators. In response to shortages and price increases, state attorneys general and local law enforcement have sent cease-and-desist letters, issued violations and made arrests pursuant to these laws. For example, on March 18, 2020, the San Diego County Sheriff’s Department in California arrested eight people after a sting operation in which deputies met with suspects to purchase the marked-up items.<sup>1</sup> The Minnesota Attorney General’s Office has made

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<sup>1</sup> City News Service, *San Diego prosecutors crack down on COVID-19 hate crimes, price gouging*, ABC10 NEWS SAN DIEGO (March 24, 2020), available at <https://www.10news.com/news/local-news/san-diego-prosecutors-crack-down-on-covid-19-hate-crimes-price-gouging>; Steve Sbraccia, *Attorney General Josh Stein’s office goes after N.C. based Amazon price gougers*, WNCT9 (March 29, 2020), available at <https://www.wnct.com/local-news/attorney-general-josh-steins-office-goes-after-n-c-based-amazon-price-gougers/>.

more than 70 visits to various retailers to check prices and investigate complaints of price gouging, sending warning letters to offenders.<sup>2</sup> The Oregon Attorney General's Office issued eight cease-and-desist letters ordering grocery and convenience stores to stop price gouging.<sup>3</sup> New York City regulators have issued over 1,000 violations, including 75 violations to a pharmacy that charged up to \$200 for 20 face masks.<sup>4</sup>

Multiple state attorneys general have directed their attention to potential price gouging on online sales platforms. For example, the Kentucky and North Carolina attorneys general are separately investigating third-party sellers offering emergency and medical supplies on an online sales platform.<sup>5</sup> And more than 30 state attorneys general wrote a letter to several online platforms claiming they have an "ethical obligation and duty" to take steps "to ensure unscrupulous sellers do not take advantage of consumers who are buying essentials to keep them healthy during emergency situations."<sup>6</sup>

The federal government has also signaled an intent to address price gouging pursuant to the Defense Production Act, Section 4512 of which states that "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, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation."<sup>7</sup> On March 23, 2020, President Trump issued an executive order invoking his presidential authority under this provision, prohibiting the hoarding of "health and medical resources needed to respond to the spread of COVID-19, such as personal protective equipment and sanitizing and disinfecting products . . ."<sup>8</sup> Although the Department of Health and Human Services has yet to designate items as "scarce," US Attorney General Barr has promised to enforce the law, stating, "[I]f you have a big supply of toilet paper in your house, this is not something you have to worry about. But if you are sitting on a warehouse with masks, surgical masks, you will be hearing a knock on your door."<sup>9</sup>

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<sup>2</sup> Jake Judd, *MN Attorney General Cracking Down on Price Gouging*, KNSI (March 24, 2020), available at <https://knsiradio.com/news/local-news/mn-attorney-general-cracking-down-price-gouging>.

<sup>3</sup> Tess Riski, *Oregon Attorney General Orders Convenience Stores to Stop Hiking Prices on Face Masks and Toilet Paper*, WILLAMETTE WEEK (March 26, 2020), available at <https://www.wweek.com/news/2020/03/26/oregon-attorney-general-orders-convenience-stores-to-stop-hiking-prices-on-face-masks-and-toilet-paper/>.

<sup>4</sup> Anna Sanders, *NYC issues more than 1,000 violations for price gouging amid coronavirus pandemic*, NEW YORK DAILY NEWS (March 25, 2020), available at <http://www.nydailynews.com/coronavirus/ny-coronavirus-price-gouging-pandemic-fines-violations-20200325-cxtvg6nmibgrxhwse2biv5zg7e-story.html>.

<sup>5</sup> Elizabeth Kuhn, *Attorney General Cameron Issues Subpoenas to Amazon Third-Party Sellers For Price Gouging During COVID-19 Pandemic*, KENTUCKY.GOV (March 26, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=888>.

<sup>6</sup> Letter from States' Attorneys General to Amazon (March 25, 2020), available at <https://www.attorneygeneral.gov/wp-content/uploads/2020/03/Amazon.pdf>.

<sup>7</sup> Defense Production Act, 50 U.S.C. Ch. 55, § 4512.

<sup>8</sup> U.S. Exec. Order. No. 13910 (2020).

<sup>9</sup> Matt Zapotosky, *Justice Dept. warns hoarders of masks and drugs that Trump has touted as coronavirus treatment*, THE WASHINGTON POST (March 25, 2020), available at [https://www.washingtonpost.com/national/coronavirus-masks-medication-hoarding/2020/03/24/782349a8-6df0-11ea-aa80-c2470c6b2034\\_story.html](https://www.washingtonpost.com/national/coronavirus-masks-medication-hoarding/2020/03/24/782349a8-6df0-11ea-aa80-c2470c6b2034_story.html).

## II. Overview of State Price-Gouging Laws

Approximately 34 states, and the District of Columbia, have price-gouging statutes;<sup>10</sup> several more are considering such legislation or have promulgated emergency regulations in response to COVID-19.<sup>11</sup> Though these specialized laws serve a broadly similar purpose, they vary in numerous important ways. In addition, some states' general consumer protection statutes—such as those prohibiting “unfair” or “abusive” selling practices—can be employed to respond to price gouging. The discussion below reviews the significant legal issues concerning these various state laws.

### a. What is “price gouging”?

Price gouging refers to the practice of sellers increasing prices substantially during a period of high demand, such as an emergency. In a market economy, the very concept of prohibiting such behavior attracts controversy, as opponents of price-gouging laws argue they encourage buyer hoarding and disincentivize sellers from increasing supply to boost profits.<sup>12</sup>

The first important issue, then, is defining when increasing prices becomes gouging. Different state laws address this issue differently. New York's price-gouging law prohibits selling goods or services that are “vital to health, safety or welfare of consumers” for an “unconscionably excessive price.”<sup>13</sup> The law does not specify what constitutes an “unconscionably excessive price,” but provides that a price may meet this criterion if the amount charged represents a “gross disparity” from the price prior to the market disruption.<sup>14</sup> The New York Attorney

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<sup>10</sup> ALA. CODE § 8-31-1 - 8-31-6 (1975); ARK. CODE ANN. § 4-88-301 - § 4-88-305 (2018); CAL. PEN. CODE § 396 (West 2017); CONN. GEN. STAT. ANN. § 42-230 (West 2002); D.C. CODE ANN. § 28-4101 – 28-4103 (West 2001); FLA. STAT. ANN. § 501.160 (West 2011); GA. CODE ANN. § 10-1-393.4, 10-1-438 (West 2015); HAW. REV. STAT. ANN. § 127A-30 (West 2014); IDAHO CODE ANN. § 48-603 (West 2013); ILL. ADMIN. CODE tit. 14 § § 465.10 - 465.30 (2006); IND. CODE § 4-6-9.1-1 - § 4-6-9.1-7 (2002); IOWA ADMIN. CODE r. 61-31.1(714) (1994); KAN. STAT. ANN. § 50-6, 106 (2017); KY. REV. STAT. ANN. § 367.374 (2018); LA. STAT. ANN. § 29:732 (2010); ME. REV. STAT. ANN. tit. 10 § 1105 (2019); 940 MASS. CODE REGS. 3.18 (2014); MICH. COMP. LAWS ANN. § 455.903 (West 2018); MISS. CODE ANN. § 75-24-25 (West 2006); MO. CODE REGS. ANN. tit. 15 § 60-8.030 (1994); N.J. STAT. ANN. § 56:8-109 (West 2017); N.Y. GEN. BUS. LAW § 396-r (McKinney, 2003); N.C. GEN. STAT. § 75-38 (2012); OHIO REV. CODE ANN. § 13.1345.03 (2017); OKLA. STAT. ANN. tit. 15 § 777.1 – 777.5 (1999); OR. REV. STAT. ANN. § 401.965 (West 2017); 73 PA. STAT. § 232.4 (2007); 1956 R.I. GEN. LAWS ANN. § 6-13-21 (West 2014); S.C. CODE ANN. § 39-5-145 (2006); TENN. CODE ANN. § 47-18-5101 (2010); TEX. BUS. & COM. CODE ANN. § 17.46(b)(27), 17.4625 (2019); UTAH CODE ANN. § 13-41-202 (West 2006); VT. STAT. ANN. tit. 9 § 2461d (West 2005); VA. CODE ANN. § 59.1-525 – 59.1-529.1 (West 2006); W. VA. CODE § 46A-6J-1, 46A-6J-2 (2014); WIS. STAT. ANN. 100.305 (West 2005).

<sup>11</sup> See, e.g., S.712, Sen. Sess. 191 (Mass. 2019) (Massachusetts' proposed law to promote transparency and prevent price gouging of pharmaceutical drug prices), available at <https://malegislature.gov/Bills/191/S712>; H.B. 2882, 101 Gen. Assem. (Ill. 2020) (Illinois' proposed law that prohibits “a manufacturer or wholesale drug distributor” from price gouging “in the sale of an essential off-patent or generic drug”), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2882&GAID=15&DocTypeID=HB&LegID=119189&SessionID=108&GA=101>.

<sup>12</sup> Rafi Mohammed, *The Problem with Price Gouging Laws*, HARVARD BUSINESS REVIEW (July 23, 2013), <https://hbr.org/2013/07/the-problem-with-price-gouging-laws>.

<sup>13</sup> N.Y. GEN. BUS. LAW § 396-r (McKinney, 2003).

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

General thus has broad enforcement discretion regarding what increases constitute price gouging,<sup>15</sup> though a defendant “may rebut a prima facie case with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services.”<sup>16</sup> California’s law defines the type of price increase that constitutes price gouging differently. Its law prohibits selling or offering to sell various items “for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency.”<sup>17</sup> Pennsylvania sets a similar threshold at 20%.<sup>18</sup>

A second important issue concerns the calculation of the baseline price to which any price increase would be compared. For example, Virginia’s price-gouging statute states that the price increase should be compared to the price of “the same or similar goods or services during the 10 days immediately prior to the time of disaster,”<sup>19</sup> whereas South Carolina’s statute states that the price should be compared to “the seller’s average price in the preceding 60 days before the state of disaster.”<sup>20</sup> Such distinctions can be critically important in evaluating whether an increase constitutes gouging.

#### **b. What kinds of sales are subject to price-gouging laws?**

While price-gouging laws are typically utilized when prices surge for the goods and services most needed during a period of emergency—food, fuel or home repair—most state laws do not delineate specific categories of goods and services subject to the prohibition. For example, New Jersey bans the sale of “any merchandise which is consumed or used as a direct result of an emergency or which is consumed or used to preserve, protect, or sustain the life, health, safety or comfort of persons or their property for a price that constitutes an excessive price increase.”<sup>21</sup> That state’s law defines “merchandise” as “any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.”<sup>22</sup>

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<sup>15</sup> See *People by Abrams v. Two Wheel Corp.*, 71 N.Y.2d 693, 698–699 (1988) (“Respondents’ argument places undue emphasis on the ‘gross disparity’ language . . . treating it as a definition of price gouging. But the provision is procedural rather than definitional; it simply establishes a means of providing presumptive evidence that the merchant has engaged in price gouging. A showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price . . . . Furthermore, the term ‘unconscionably excessive’ does not limit the statute’s prohibition to ‘extremely large price increases,’ as respondents would have it.”).

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

<sup>17</sup> CAL. PEN. CODE § 396 (West 2017).

<sup>18</sup> 73 PA. STAT. ANN. § 232.4 (West)

<sup>19</sup> VA. CODE ANN. § 59.1-525 – 59.1-529.1 (West 2006)

<sup>20</sup> N.C. GEN. STAT. § 75-38 (2012).

<sup>21</sup> N.J. STAT. ANN. § 56:8-109 (West 2017). See also CAL. PEN. CODE § 396 (West 2017) (pertaining to the sale of “food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies” to consumers); N.Y. GEN. BUS. LAW § 396-R (McKinney, 2003) (pertaining to the sale of “consumer goods and services vital and necessary for the health, safety and welfare of consumers”).

<sup>22</sup> N.J. STAT. ANN. § 56:8-1 (West 2017).

Conversely, a few states have specialized price-gouging laws for certain goods and services. New York has both a general price-gouging statute and a specific law concerning price increases for milk.<sup>23</sup> Both Massachusetts' and Illinois' laws (among others) address only pricing for gasoline and other petroleum products,<sup>24</sup> though their respective legislatures are considering bills to promote transparency and prevent price gouging of pharmaceutical drugs.<sup>25</sup>

Other states have no price-gouging laws at all, though some have sought to bar price gouging by emergency declaration, as discussed further below. In several of these states, attorneys general utilize their general consumer protection authority to respond to the practice. For example, the Colorado Attorney General's website warns that "taking advantage of a state of emergency by unreasonably increasing the prices of essential goods and services may constitute unfair and unconscionable business acts and practices under the Colorado Consumer Protection Act."<sup>26</sup> The Nevada Attorney General has made similar statements.<sup>27</sup>

Several states are rapidly reconsidering their price-gouging laws as a result of COVID-19. Maryland passed legislation on March 23, 2020, that allows the state's attorney general to crack down on retail price gouging.<sup>28</sup> A few days earlier, Massachusetts Attorney General Maura Healey issued an emergency regulation pursuant to her authority to interpret the state's general consumer protection law banning price gouging of essential products and services, such as personal protective equipment for medical professionals, during the COVID-19 pandemic.<sup>29</sup> The legal landscape is more unsettled in Arizona. There, the governor issued an emergency declaration and directed the state attorney general to prosecute anyone who engages in price gouging under the state's Consumer Fraud Act.<sup>30</sup> The Arizona Attorney General's Office, however, claims it lacks the authority to do so and has asked the legislature to enact a new price-gouging law providing such powers.<sup>31</sup>

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<sup>23</sup> N.Y. GEN. BUS. LAW § 396-rr (McKinney, 2003).

<sup>24</sup> 940 MASS. CODE REGS. 3.18(1) (2014); ILL. ADMIN. CODE tit. 14 § § 465.10 - 465.30 (2006).

<sup>25</sup> S.712, Sen. Sess. 191 (Mass. 2019), available at <https://malegislature.gov/Bills/191/S712>; H.B. 2882, 101 Gen. Assem. (Ill. 2020), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2882&GAID=15&DocTypeID=HB&LegId=119189&SessionID=108&GA=101>.

<sup>26</sup> *Coronavirus Consumer Alert*, PHIL WEISER COLORADO ATTORNEY GENERAL, available at <https://coag.gov/coronavirus/> (last accessed on March 27, 2020). See generally COLO. REV. STAT. § 6-1-105 (2015) (Deceptive Trade Practices Act section of Colorado Consumer Protection Act); NEV. REV. STAT. § 598 (2014) (Nevada Deceptive Trade Practices Act).

<sup>27</sup> Miranda Wilson, *Nevada AG reports nearly 100 complaints of coronavirus scams, inflated prices*, LAS VEGAS SUN (March 20, 2020), available at <https://lasvegassun.com/news/2020/mar/20/nevada-ag-reports-nearly-100-complaints-of-coronav/>.

<sup>28</sup> Md. Exec. Order No. 20-03-23-03 (March 23, 2020), available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Price-Gouging-3.23.20.pdf>.

<sup>29</sup> 940 MASS. CODE REGS. 3.18 (amendment by emergency regulation on March 20, 2020), available at <https://www.mass.gov/doc/amendment-to-940-cmr-318/download>.

<sup>30</sup> Ariz. Exec. Order No. 2020-07 (March 11, 2020), available at <https://azgovernor.gov/executive-orders>.

<sup>31</sup> TUCSON.COM, *AG wants state lawmakers to consider enacting price gouging legislation* (March 12, 2020), available at [https://tucson.com/news/local/ag-wants-state-lawmakers-to-consider-enacting-price-gouging-legislation/article\\_ba124312-e56d-5e9f-8d2c-ac081dcfcf02.html](https://tucson.com/news/local/ag-wants-state-lawmakers-to-consider-enacting-price-gouging-legislation/article_ba124312-e56d-5e9f-8d2c-ac081dcfcf02.html).

### **c. What triggers the applicability of a price-gouging statute?**

Unlike most laws, many state price-gouging laws apply only during an emergency.<sup>32</sup> Some states use the issuance of a presidential or gubernatorial emergency declaration as the trigger for price-gouging law applicability. For example, Florida's and Pennsylvania's respective price-gouging laws require such an official declaration as a predicate for enforcement.<sup>33</sup> Florida's statute remains in effect for 60 days unless the declaration is renewed; Pennsylvania's law applies for the period of emergency and 30 days thereafter.<sup>34</sup> West Virginia's law goes into effect upon the governor's declaration of a state of emergency or a "state of preparedness," a term defined as "the situation existing before a disaster or large-scale threat in which a state of preparedness has been declared by the Governor or the Legislature."<sup>35</sup>

In other states, however, a declaration from the governor is not necessary to enforce the state's price-gouging statute. New York's price-gouging statute applies "during any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers."<sup>36</sup> Although the statute states that "the phrase 'abnormal disruption of the market' shall mean any change in the market . . . which results in the declaration of a state of emergency by the governor," courts have held that the governor's declaration is a sufficient, but not necessary, condition for a price-gouging enforcement action.<sup>37</sup> Similarly, Tennessee does not require an emergency declaration, merely requiring "an abnormal economic disruption for goods and services result[ing] in abnormal disruptions of the market."<sup>38</sup>

### **d. Who can be a victim of these statutes?**

Price-gouging laws are typically—though not always—part of the state's consumer protection laws, and are therefore directed toward protecting consumers from sharp sales practices. For example, the definition of consumer sales practices under Ohio law provides that a "consumer transaction" is a "sale, lease, assignment, award by chance, or other transfer of an item of

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<sup>32</sup> See FLA. STAT. ANN. § 501.160 (West 2011); 73 PA. STAT. § 232.4 (2007).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> W. VA. CODE § 46A-6J-1, 46A-6J-2 (2014).

<sup>36</sup> N.Y. GEN. BUS. LAW § 396-R (McKinney, 2003).

<sup>37</sup> See *People ex rel. Spitzer v. Wever Petroleum, Inc.*, 14 Misc.3d 491, 494 (N.Y. Sup. Ct. 2006) ("This Court further finds that a declaration from the Governor of the State of New York is unnecessary to invoke the price gouging statute, in this case, and in fact is only one of a variety of instances where price gouging is invoked, as dictated by the statute.").

<sup>38</sup> TENN. CODE ANN. § 47-18-5101 (2010).

goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household.”<sup>39</sup>

Some state statutes are not necessarily limited to consumer sales. New Jersey’s law, for example, prohibits price gouging with respect to “any merchandise which is consumed or used as a direct result of an emergency or which is consumed or used to preserve, protect, or sustain the life, health, safety or comfort of persons or their property . . . .”<sup>40</sup> The California Attorney General has also asserted that state price-gouging law applies throughout the supply chain and outside the context of consumer sales.<sup>41</sup>

Other state legislatures are considering bills addressing price gouging in the context of sales to businesses or government procurement. The Illinois pharmaceutical bill, for example, is targeted at price gouging by manufacturers and wholesale distributors, defining the practice as “an unconscionable increase in a prescription drug’s price that . . . would result in the wholesale acquisition cost of a 30-day supply of the essential off-patent or generic drug exceeding \$20 and would result in an increase in the wholesale acquisition cost of the essential off-patent or generic drug” by certain percentages over a period of time.<sup>42</sup> Its emphasis on upstream supply chain participants and wholesale acquisition cost suggests it would govern price increases to medical providers like hospitals. The Illinois bill comes in the wake of the Fourth Circuit striking down a Maryland law regulating prescription drug prices for violating the US Constitution’s Dormant Commerce Clause.<sup>43</sup>

#### **e. Who enforces price-gouging laws, and what sanctions can result from violation?**

State attorneys general enforce price-gouging laws in every state in which they exist. As discussed above, these laws are usually civil in nature, found in the state’s general consumer protection code. For example, violations of Pennsylvania’s price-gouging statute can incur civil penalties of up to \$10,000 for each violation, as well as injunctive relief, restitution and costs.<sup>44</sup> Violations of North Carolina’s and Idaho’s price-gouging statutes can result in civil penalties of up to \$5,000 per violation.<sup>45</sup>

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<sup>39</sup> OHIO REV. CODE ANN. § 13.1345.01 (2017). *See also* OHIO REV. CODE ANN. § 13.1345.03 (2017) (Ohio’s price gouging law).

<sup>40</sup> N.J. STAT. ANN. § 56:8-109.

<sup>41</sup> *See FAQs on Price Gouging*, ATTORNEY GENERAL XAVIER BECERRA, *available at* <https://oag.ca.gov/consumers/pricegougingduringdisasters#2C> (last accessed on March 29, 2020) (“Individuals, businesses, and other entities must comply with the statute. The statute applies to all sellers, including manufacturers, wholesalers, distributors, and retailers. It also covers all sales, including sales to individuals and families, businesses and other organizations, and government agencies.”).

<sup>42</sup> H.B. 2882, 101 Gen. Assem. (Ill. 2020), *available at* <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2882&GAID=15&DocTypeID=HB&LegId=119189&SessionID=108&GA=101>.

<sup>43</sup> *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), *cert. denied* 139 S.Ct.1168 (2019).

<sup>44</sup> 73 PA. STAT. § 232.4, 232.5 (2007).

<sup>45</sup> N.C. GEN. STAT. §75-15.2 (1998); N.C. GEN. STAT. § 75-38 (2012); IDAHO CODE ANN. § 48-603 (2013); IDAHO CODE ANN. § 48-606 (2001).

In some states, however, price gouging is a crime. Partly as a result, these state laws can be enforced by local criminal prosecutors as well as the attorney general. For example, both the California Attorney General and local criminal prosecutors can enforce the state's civil and criminal price-gouging law. A violation is a misdemeanor punishable by up to one year of imprisonment and a maximum fine of \$10,000.<sup>46</sup> Civil violations, which can be enforced by local civil prosecutors such as city and county attorneys, are also subject to penalties of up to \$5,000 per violation, injunctive relief and mandatory restitution; civil actions can also be brought by private parties, rather than solely by government law enforcement agencies.<sup>47</sup> Arkansas law similarly makes price gouging a misdemeanor,<sup>48</sup> while price gouging can be a felony in Mississippi depending on the value of the goods and services.<sup>49</sup>

### III. How Companies Should Make Pricing Decisions During COVID-19

Against this backdrop of state, local and, potentially, federal price-gouging enforcement in the context of COVID-19, companies anywhere within the emergency goods and services supply chain—particularly those making sales directly to consumers—should carefully consider pricing strategies and price increases. The current intense media and public scrutiny being given to pricing for such goods adds another dimension, as common perceptions of “gouging” are often divorced from supply chain economics or legal considerations, yet enforcement agencies often react to media reports, commencing public investigations that can cause substantial reputational damage to a business even if ultimately they find no wrongdoing took place.<sup>50</sup>

Of course, at a time when supply chains are stressed due to demand for emergency goods and government-mandated restrictions on the global workforce, price increases can be justified and necessary. Many state laws also provide a defense for increases due to higher costs, so long as companies can prove the existence and scale of such increases.<sup>51</sup> Companies that raise prices should therefore retain documentation of supply chain impacts, increased internal costs, added downstream costs, and other information or data that justify the increase. Companies should also create additional protocols, such as approval by internal legal counsel and senior management, prior to instituting price increases. In-house counsel evaluating a potential price increase should

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<sup>46</sup> See CAL. PEN. CODE § 396 (West 2017); *FAQS on Price Gouging*, ATTORNEY GENERAL XAVIER BECERRA, available at <https://oag.ca.gov/consumers/pricegougingduringdisasters#2C> (last accessed on March 26, 2020).

<sup>47</sup> *Id.* See also VT. STAT. ANN. tit. 9 § 2461 (permitting civil actions by private plaintiffs concerning price gouging related to petroleum and heating products).

<sup>48</sup> ARK. CODE ANN. § 4-88-301, 4-88-103 (2018); *Understanding Arkansas' Price Gouging Law*, ATTORNEY GENERAL LESLIE RUTLEDGE, available at [https://arkansasag.gov/site/assets/files/90175/arkansas\\_price\\_gouging.pdf](https://arkansasag.gov/site/assets/files/90175/arkansas_price_gouging.pdf) (last accessed on March 30, 2020).

<sup>49</sup> MISS. CODE. ANN. § 75-24-25.

<sup>50</sup> As many attorneys general step up enforcement of price gouging, investigations of fraud and other pernicious activities linked to incidents of price gouging could potentially increase as well.

<sup>51</sup> N.Y. GEN. BUS. LAW § 396-r (McKinney, 2003).

review the laws of the states within which they do business, a particularly important yet complex analysis for companies selling goods or services nationwide.

As some state laws can be enforced against entities throughout the supply chain, and concerning products utilized by a variety of end users, this advice applies to entities anywhere in the supply chain. Yet retail sellers, in particular online outlets that are in many states the only ones operational, should be as transparent with customers as possible concerning pricing. Online sales platforms should vigorously monitor the activities of third-party sellers, even though they may not be liable for pricing and sales practices by these sellers. Further, companies that incur seemingly unjustified price increases from within their own supply chain may be able to appeal to law enforcement or avail themselves of the remedies set forth in these statutes.

COVID-19 has transformed all aspects of American commercial life over the past few weeks. Yet there is every indication that the pandemic will be with us for much longer, stressing supply chains and leading to more organized and concerted responses to price gouging by law enforcement agencies at all levels of government. Businesses that trade in essential goods would be wise to exercise additional caution and ensure a thorough understanding of pricing decisions to avoid potential enforcement actions and the attendant reputational damage.

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