"Prices depend on the will of Allah; it is he who raises and lowers them."
-- Attributed to the Prophet Mohammed

Back in seventh century Medina, the invisible hand was the response to complaints about the high price of bread under ordinary market conditions. But, when bread prices rose sharply after a small group of merchants collectively acquired the entire wheat crop to create an artificial shortage, the Prophet swiftly condemned the market manipulation as "haram" (forbidden by Islamic law). The principles illustrated by these ancient anecdotes remain the cornerstone of modern competition law.

Free market forces of supply and demand act for the benefit of all if competition is fair, but if competition is distorted, sovereigns must interfere. What constitutes distortion and the appropriate measure of intervention varies over time and across jurisdictions. In the European Union, pricing by a dominant firm is unlawful if it is excessive and unfair. In the US, charging high prices is not necessarily unlawful and, in fact, may be seen as a reward for innovation and superior business acumen.

COVID-19 and other crisis events call into question the government's role in determining prices. We anticipate that most price-gouging actions will be driven by state attorneys general pursuant to state-specific price gouging or unfair and deceptive trade practices laws. Some behaviors may be condemned as per se unlawful where margins clearly increased during the time of distress. The evaluation of retailer pricing to consumers is more likely to fall into this category. A more nuanced rule of reason type analysis will be required to address what constitutes unfairness, excessiveness or market manipulation where margins initially appear to have decreased or remained constant. These analyses will require an in-depth examination of margins, especially as costs are likely to have changed dramatically with labor constraints, complicated transportation, and input shortages.

How to account for the costs of increasing production to meet the surge in demand—in many cases caused by government stockpiling globally—will also present a challenging issue. We also anticipate increased involvement by private parties as comparative data may be required to evaluate cost and margin claims, blame will be shifted, and competitors may see an opportunity to highlight their good deeds at the expense of less altruistic actors.

A patchwork of statutes

Although Congress has considered such legislation in the past, to date the United States does not have a federal anti-price gouging statute. Recently proposed legislation is based on California's price-gouging statute, which would prohibit more than a 10 percent increase in pricing, unless justified by costs. The Federal Trade Commission (FTC) could arguably pursue price-gouging conduct under section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." The FTC has long avoided acting as
a price setter and has even cautioned that "price gouging laws that have the effect of controlling prices likely will do consumers more harm than good." The FTC has, however, investigated concerns of market manipulation, as evidenced by its repeated investigations into the oil and gas industry.

On March 17, 2020, members of the House of Representatives sent a letter to FTC Chairman Joseph J. Simons "strongly urging" the [FTC] to take immediate action to protect consumers from price gouging during this declared public health emergency." Nine days later, Chairman Simons issued a statement advising that "[o]ver the next few weeks, the FTC will remain flexible and reasonable in enforcing compliance requirements that may hinder the provision of important goods and services to consumers," and emphasizing that enforcement decisions will take into account "good faith efforts undertaken to provide needed goods and services to consumers." The FTC also discussed its work to protect consumers from the proliferation of scams and other deceptive practices related to the COVID pandemic.

Likewise, members of Congress sent a letter to the US Department of Justice on March 18, 2020, urging "immediate and decisive steps to stop extensive price gouging of consumer health products." On March 23, 2020, President Trump issued an executive order that prohibits hoarding of designated items. It is a crime to accumulate designated items either in excess of reasonable needs or for the purpose of selling it in excess of prevailing market prices. The next day, Attorney General Barr announced through a memorandum the creation of a task force to address COVID-19 market manipulation, hoarding and price gouging. The memo outlines that the DOJ "will investigate and prosecute those who acquire vital medical supplies in excess of what they would reasonably use or for the purpose of charging exorbitant prices to healthcare workers and hospitals that need them" and clarifies that the DOJ will not take action against suppliers who are working with the government and healthcare providers in an effort to combat the crisis.

More than 30 states have price-gouging statutes. While many statutes share similar elements, including cost justifications and applicability during declared states of emergency, what may constitute price gouging can vary markedly. California and New Jersey proscribe price increases of more than 10 percent over the pre-declaration price. Texas, New York and Florida prohibit prices that are vaguely "exorbitant or excessive," "unconscionably excessive," and "unconscionable." In Georgia, it is unlawful to sell any goods identified by the governor in the emergency declaration at any higher price. For jurisdictions that do not have price-gouging laws, such as Washington State, the state attorney general may choose to take action pursuant to other consumer protection laws.

Several states are now revamping their price-gouging enforcement mechanisms. For example, Maryland enacted a price-gouging law in March 2020. On March 19, 2020, Ohio's AG issued a statement saying he would "seek a new anti-price gouging law that does not rely on price controls," noting that "[e]nforcing the current laws can be challenging." On March 20, 2020. Massachusetts' AG "filed an emergency regulation to prohibit price gouging of essential products and services during the COVID-19 public health emergency." State AGs are already taking action against price gouging in the face of mounting complaints in their respective states. For example, on March 31, 2020, the Washington AG issued a release noting that his office had sent cease-and-desist letters to five independent sellers in the state and expected to send more. As of April 3, 2020, the Maryland AG's office said that it "[had] received over 100 complaints" and that "[a]approximately 60 letters [had] gone out to companies and retailers." Similarly, on April 7, 2020, the Florida AG issued a statement discussing her office's "all hands on deck approach" as it "continues to fight price gouging," noting that it had "[r]eceived approximately 2,000 consumer contacts about the price of essential commodities," "[i]ssued 59 subpoenas to further price gouging investigations," and "[w]orked with online platforms to deactivate more than 130 posts offering items for outrageous prices." Michigan's AG has sent four cease-and-desist letters to online sellers for price gouging medical
supplies such as hand sanitizer and disinfectant spray, and Missouri’s AG has similarly sent cease-and-desist letters to businesses price gouging N95 medical masks. The AGs of Alaska, Ohio and Texas have filed lawsuits against various sellers accused of price gouging N95 masks and other medical supplies.

**Enforcement in the COVID-19 era**

Price-gouging enforcement can be effective if there is a sufficient supply of the affected products. In the current environment, however, many supply chains have become strained due to shutdowns and delays in the manufacturing and transport of a wide range of goods, as well as increased demand for goods across broad geographies for longer periods of time. And for critical goods like medical equipment and supplies, the demand is particularly acute (and emotionally charged). Labor constraints lead to further supply stress but the federal antitrust authorities made clear in a joint announcement on April 13, 2020, that anticompetitive coordination that may lead to wage suppression will be closely monitored and not tolerated.

State AGs may focus in the near term on retailers, then move up the supply chain if they find that retailers’ prices are in response to price increases from their own suppliers, distributors and/or wholesalers. Although enforcement upstream would require a more in-depth economic analysis, the current environment may support and perhaps even encourage more aggressive enforcement against entities that attempt to take advantage during the global crisis, regardless of where they sit in the supply chain.

In addition, price-gouging concerns are not likely to dissipate in the near future. COVID-19’s impact on supply chains is anticipated to be felt for an extended period, and other elements beyond the market’s control may exacerbate that impact. For example, forecasters anticipate “above-normal activity” during the 2020 hurricane season, with a 69 percent probability that at least one major hurricane (Category 3 or higher) will make landfall on the continental United States. Added strain on already stressed supply chains could lead to further instances of price gouging or market manipulation and increased enforcement activity over a longer term.

**Impact on businesses in the COVID-19 era and beyond**

As companies, consumers and enforcers seek to navigate the COVID pandemic, the impact on businesses throughout the supply chain will be increased scrutiny of their margins during the crisis—which could be defined to cover a period in excess of a year. While price-gouging enforcement is typically directed at retailers, here suppliers, distributors and wholesalers may also find themselves subject to inquiries by state and federal enforcers who may probe whether increased prices to consumers were the result of upstream issues or costs, rather than potentially unlawful conduct on the part of the retailer alone.

Such enforcement actions would test the scope of unfair and deceptive business practices laws. The outcomes of these efforts could have lasting impacts on how these laws are interpreted and the scope of enforcement activities for years to come. Moreover, new laws may be sought at the state and/or federal levels to fill perceived “gaps” in protecting consumers against “unfair” pricing.

**Conclusion**

Just as US citizens face different pandemic-related restrictions depending on their state of residence, businesses will
likely face different standards with regards to their pricing and supply decisions depending on the state(s) in which they are located or sell goods.

State governments charged with protecting their residents have the flexibility to more aggressively enforce perceived unfair and deceptive trade practices. Federal antitrust agencies, on the other hand, have to carefully weigh the degree of their intervention to uphold the central tenets of a market-based economy. That said, this crisis and its economic aftermath may shift where that line is drawn—especially if dictated by legislation, executive orders or political pressures.

As Steve Pearlstein lays bare in *Can American Capitalism Survive?:*

A decade ago, 80 percent of Americans agreed with the statement that a free market economy is the best system. Today, it is 60 percent, lower than in China. One recent poll found that only 42 percent of millennials supported capitalism. In another, a majority of millennials said they would rather live in a socialist country than a capitalist one.

And in the court of public opinion, companies throughout the supply chain may face still further scrutiny over actions taken—or not taken—to prevent or address price gouging during a time of widespread strain and crisis, regardless of whether such actions fall within the scope of anti-price gouging laws.

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Dentons’ team will continue to follow developments in this area. If you have any questions or would like more information regarding the legal issues discussed above, please reach out to any of our key contacts.

1 Consolidated Version of the Treaty on the Functioning of the European Union, art. 102, 2010 O.J. (C326) (“TFEU”).


12 See generally CAL. PENAL CODE § 396 (West 2019); N.J. STAT. ANN. §§ 56:8-108, 56:8-109 (West 2019). Other states with a pricing...
percentage limit include Arkansas, Kansas, Maryland, Maine, Oklahoma, Oregon and West Virginia.

13 See TEX. BUS. & COM. CODE ANN. § 17.46(b)(27) (West 2019); N.Y. GEN. BUS. LAW § 396-r (McKinney 2019); FLA. STAT. § 501.160 (2020). Other states that prohibit amorphous “unconscionable” pricing include Alabama, Idaho, Iowa, Massachusetts, Michigan, Missouri, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin.

14 GA CODE ANN. § 10-1-393.4 (West 2020). Other states with an outright ban on price increases during emergencies include Connecticut, Hawaii, Kentucky, Louisiana, Mississippi, and Utah.


16 Until very recently, Maryland did not have an anti-price gouging statute. The state’s law was passed by the legislature and approved by the governor in March 2020 in response to the current crisis. See 2020 Md. Laws Chs. 13 & 14.


27 See, e.g., Brendan Murray, How Supply Chains Jumped From Business School and Into Our Lives, BLOOMBERG NEWS (Mar. 29, 2020), https://www.bloomberg.com/news/articles/2020-03-29/how-supply-chains-jumped-from-business-school-and-into-our-lives ("[W]hile there have been shocks before, like the Sept. 11 terrorist attacks and the tsunami that devastated Japan a decade later, the system hasn’t encountered an economic steamroller that first flattens supplies and then hits demand like coronavirus.").


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