

March 10, 2020

State AGs Respond to COVID-19-Related “Price Gouging” and DOJ Antitrust Enforcement to Focus on Public Health Products

The outbreak and continued spread of a new strain of coronavirus, COVID-19, has led to surging demand for, and in some cases shortages in the supply of, a wide variety of consumer products, including hand sanitizer, face masks and toilet paper. This in turn has led to instances of prices for certain such products being increased sharply. Responding to this dynamic, attorneys general of states including California, New York and Washington have announced their intent to take action against unfair “price gouging” under their respective state laws.

While such practices are generally outside the scope of federal antitrust laws, the U.S. Department of Justice has also cautioned businesses involved in manufacturing, distribution or sale of public health products that it will be stepping up antitrust enforcement efforts in this sector (including criminal prosecutions for price fixing, bid rigging and market allocation). These efforts will include the department’s recently announced Procurement Collusion Strike Force, which targets collusive practices in connection with federal, state and local government procurement. Attorney General William P. Barr stated: “The Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time.”

Businesses should anticipate increased enforcement of state consumer protection and unfair competition laws, as well as federal and state antitrust laws, with respect to the sale of public health-related products and other consumer goods. This is an opportune time for manufacturers, distributors and sellers of such products—and especially those involved in government contracting—to consider evaluating their antitrust and other internal compliance programs to ensure that such programs are effective, up-to-date and being communicated appropriately within their organizations.

Responses of State Attorneys General to Alleged Price Gouging

At least three state attorneys general have announced their intent to use their enforcement powers to combat alleged price gouging in connection with coronavirus/COVID-19.

On March 4, 2020, California Governor Gavin Newsom issued a “Proclamation of a State of Emergency” regarding COVID-19.¹ The same day, California Attorney General Xavier Becerra issued a “price gouging

¹ Executive Dep’t State of California, *Proclamation of a State of Emergency* (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

alert” to “remind[] all Californians that, under Penal Code Section 396, price gouging is illegal in all California communities during the declared state of emergency.”²

The state attorneys general of New York and Washington have issued similar alerts. Washington Attorney General Bob Ferguson, also on March 4, announced that his “office is investigating price gouging in the wake of the COVID-19 public health emergency,” and encouraged consumers who “see price gouging” to “file a complaint with [his] office.”³ The following day, New York Attorney General Letitia James issued a press release describing several “potential consumer scams” related to COVID-19. Among other things, the press release encouraged consumers to “[r]eport retailers that appear to take unfair advantage of consumers by selling goods or services that are vital to the health, safety, or welfare of consumers for an unconscionably excessive price.”⁴

California and New York each have laws that apply specifically to such situations. California Penal Code § 396(b) prohibits increasing prices for various goods—including food, “emergency supplies” and medical supplies—by more than 10 percent for 30 days following the Governor’s proclamation of a state of emergency.⁵ New York General Business Law § 396-r(2) provides that during any “abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution” of such goods or services may sell or offer them for an “unconscionably excessive price.” The New York statute has been applied in the past by the attorney general to combat alleged price gouging following severe storms. For example, following Hurricane Katrina, the New York Attorney General brought a successful action against a gas station that had increased its normal mark-up of \$0.83 per gallon, to mark-ups ranging from \$0.97 to \$1.43 per gallon.

² Press Release, *Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities*, Cal. Att’y Gen. (Mar. 4, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide>.

³ Press Release, *AG Ferguson Statement on Price Gouging in Public-Health Emergency*, Wash. Att’y Gen. (Mar. 4, 2020), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-price-gouging-public-health-emergency>.

⁴ Press Release, *Attorney General James Takes Action Against Coronavirus Health Scams, Issues Guidance to New Yorkers*, N.Y. Att’y Gen. (Mar. 5, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-takes-action-against-coronavirus-health-scams-issues>.

⁵ A seller may defend against a claim of price gouging under § 396(b) if it “can prove that the increase in price was directly attributable to additional costs imposed on it by” its supplier or increased labor or materials costs, and “the price is no 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 immediately prior to the onset of the state of emergency.”

Businesses should anticipate that the three states identified will increase enforcement of such laws with respect to the sale of health-related products and other consumer goods in the coming weeks and months. Other states are likely to follow suit.

DOJ Antitrust Division to Focus on Enforcement in Public Health Products Sector

Concerns over the prospect of price gouging typically fall outside the realm of federal antitrust enforcement. On March 9, 2020, however, the Antitrust Division of DOJ announced that it would use its enforcement powers under federal antitrust laws to “hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics.”⁶ In particular, DOJ noted that “[i]ndividuals or companies that fix prices or rig bids for personal health protection equipment such as sterile gloves and face masks could face criminal prosecution,” and warned that “[c]ompetitors who agree to allocate among themselves consumers of public health products could also be prosecuted.”

In addition, DOJ stated that its “recently announced Procurement Collusion Strike Force will also be on high alert for collusive practices in the sale of such products to federal, state, and local agencies.” The Strike Force, which we discussed in a prior client memorandum,⁷ focuses on “deterring, detecting, investigating and prosecuting” collusion among companies and individuals involved in government procurement at all levels.

These announcements serve as a reminder that (like other businesses) manufacturers, distributors and sellers of medical products—and especially those involved in government contracting—should consider evaluating and updating their antitrust and other compliance programs to ensure ongoing effectiveness.

* * *

⁶ Press Release, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products*, U.S. Dep’t of Justice (Mar. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

⁷ *DOJ Announces Government Procurement Collusion Strike Force* (Nov. 5, 2019), <https://www.paulweiss.com/practices/litigation/antitrust/publications/doj-announces-government-procurement-collusion-strike-force?id=30178>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Andrew C. Finch

+1-212-373-3417

afinch@paulweiss.com

Jonathan S. Kanter

+1-202-223-7317

jkanter@paulweiss.com

Brad S. Karp

+1-212-373-3316

bkarp@paulweiss.com

William B. Michael

+1-212-373-3648

wmichael@paulweiss.com

Charles F. (Rick) Rule

+1-202-223-7320

rrule@paulweiss.com

Aidan Synnott

+1-212-373-3213

asynnott@paulweiss.com

Associate Robert J. O'Loughlin contributed to this Client Memorandum.