

Investigations, Compliance and Defense State Enforcement and Regulation

Price Gouging and Law Enforcement: Is Your Compliance Program Ready?



By: [Erin R. Schrantz](#), [Brian Hauck](#) and [Jonathan A. Enfield](#)

As ongoing business disruption and consumer anxiety provoked by the Coronavirus (COVID-19) outbreak have led to shortages of certain critical goods, from N95 masks to food staples and hand sanitizer, efforts to take unfair advantage of the situation—in the form of hoarding and “price gouging”—are attracting the attention of law enforcement. Some of the [attention](#) has focused on small-scale actors, like the ones in Tennessee who drew the attention of their State Attorney General for buying up thousands of bottles of hand sanitizer and thousands of packs of wipes, or the individual shops that have received [cease-and-desist letters](#) from an Attorney General for increasing prices on critical items.

But law enforcement attention is also squarely focused on larger, corporate entities—like the major online and brick-and-mortar retailers that received letters from 33 Attorneys General (AG) last week, [warning](#) the companies to take steps to curb price gouging during the COVID-19 pandemic and other emergencies. And with the Secretary of Health and Human Services (HHS) set to [issue](#) rules and regulations to prevent hoarding critical resources or selling them at above-market prices, the US Department of Justice has [established](#) a COVID-19 task force to address price gouging, as well as hoarding and market manipulation, and has [instructed](#) US Attorneys to appoint Coronavirus Fraud Coordinators who will direct, among other things, the prosecution of crimes relating to COVID-19. Several US Attorneys have already taken up the mantle.

These unusual times are introducing unusual compliance and legal risks. Businesses that ordinarily set prices according to market demand must ensure that they are complying with state laws, triggered by declarations of states of emergency, that can restrict price changes in certain situations. Companies that are not used to selling products (or certain products) to the government are now doing so and must comply with extensive regulations governing those sales. The risks multiply for companies that allow third-party sellers to offer items through the companies’ online platforms. A number of State AGs have suggested that companies may be held responsible for price gouging or similar violations by third-party sellers who use their platforms. Even for the most upstanding of corporate citizens, the new circumstances and the intensified interest from law enforcement increase the risk of consumer complaints, internal and external whistleblowers, subpoenas and other potentially serious civil and criminal exposure.

To reduce the risk of ending up in the crosshairs of a price gouging accusation, companies would be smart to fall back on tried and true compliance principles:

- Assess how much risk the company has when it comes to price gouging in the current climate. Does the company sell, or allow to be sold, relevant items such as those identified by [HHS](#) or the [State AGs](#), including, for example, respirators, portable ventilators, facemasks, hand sanitizer or other personal protective equipment for healthcare providers? Do they have products that might eventually be added to lists of such items? That may include not only medical and protective products but also everyday necessities such as milk, diapers and toilet paper that are [attracting](#)

the attention of authorities responding to consumer complaints about price gouging. An honest risk assessment will inform the extent to which a company needs to implement the following compliance measures.

- Establish a clear tone from the top. It is critical that senior leadership and middle management send a clear, strong message that they will not tolerate hoarding and price gouging, whether by employees or third parties, and that the company is enacting measures to detect any such misconduct. That messaging can include reference to the company's code of conduct or other policies and procedures that define appropriate pricing practices and spell out the penalties for engaging in unethical or non-compliant behavior.
- Reinforce the message with monitoring. To help enforce those policies, companies should design and implement monitoring protocols to detect irregularities associated with hoarding or price gouging. Robust inventory controls can help companies monitor precisely what products they have on hand and to ensure that products going out the door match up with purchase orders. Active monitoring of pricing fluctuations can also help companies root out pricing spikes that may indicate price gouging. Indeed, the letters from the 33 State AGs emphasized the need to track historical pricing data in order to detect and prevent pricing spikes promptly, even before an official emergency declaration. With that bar set, it is fair to assume that State AGs will measure a company's compliance efforts against that standard.
- Consider whether data analytics can help to detect inventory and pricing anomalies. Companies may find data analytics helpful in implementing inventory controls and price monitoring. The good news is that many companies already regularly monitor inventory and pricing data to track financial performance. Rather than start from scratch, they can instead analyze that data to monitor for compliance risk. Of course, there may be additional difficulties in detecting whether third-party sellers hosted on a company's online platform are engaging in price gouging. Companies often know what their own products cost historically and whether price increases are driven by legitimate market factors; however, when it comes to third-party sellers, acquiring comparable knowledge may require companies to devise means to track both a particular seller's pricing history, if any, and the broader market history for that seller's product. But those hurdles may not amount to much of a legal defense if the company turned a blind eye to the potential risks of third-party sellers and had reasonable tools to monitor for price gouging that it chose not to deploy.

Turmoil encourages opportunism, and opportunism involving critical products needed during the COVID-19 outbreak invites scrutiny from law enforcement. Times like these test the mettle of a robust compliance program and ethical corporate culture. Like any compliance risk, a company that stays rooted in the core principles of a strong compliance program will be more successful in discouraging opportunism by their employees and affiliates and mitigating potential legal complications.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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Contact Us



Erin R. Schrantz

eschrantz@jenner.com | [Download V-Card](#)



Brian Hauck

bhauck@jenner.com | [Download V-Card](#)



Jonathan A. Enfield

jenfield@jenner.com | [Download V-Card](#)

Meet Our Investigations, Compliance and Defense Team

Meet Our State Enforcement and Regulation Team

Practice Leaders

Anthony S. Barkow

Co-chair, Investigations,
Compliance and Defense

abarkow@jenner.com

[Download V-Card](#)

Christine Braamskamp

Co-chair, Investigations,
Compliance and Defense

cbraamskamp@jenner.com

[Download V-Card](#)

Katya Jestin

Co-chair, Investigations,
Compliance and Defense

kjestin@jenner.com

[Download V-Card](#)

Reid J. Schar

Co-chair, Investigations,
Compliance and Defense

rschar@jenner.com

[Download V-Card](#)

Thomas J. Perrelli

Co-chair, State Enforcement
and Regulation

tperrelli@jenner.com

[Download V-Card](#)

Brian Hauck

Co-chair, State Enforcement
and Regulation

bhauck@jenner.com

[Download V-Card](#)