

White Collar & Criminal Law News

INSIGHT: How to Manage Price Increases Without Triggering an Investigation

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Most companies would not actively engage in price gouging, but the surge in demand for particular goods during an emergency often results in shortages, increasing supply costs along the supply and distribution chains. Crowell & Moring attorneys outline steps to assess pricing and make sure state laws are obeyed.

Many states have laws forbidding price gouging. These laws, often triggered by a declaration of emergency, typically trigger state consumer protection law remedies; however, in some states, specific remedies are triggered.

And while some states do not have specific price gouging laws, state attorneys general have announced they will use state consumer protection laws to combat price gouging.

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Companies then must assess pricing so they may cover their costs without violating anti-price gouging laws.

Lessons Learned

Attorneys general and private counsel have been watching for price gouging since the beginning of the Covid-19 crisis. Accordingly, several companies have become subject to attorney general investigations and class action lawsuits. For example, a California class action lawsuit accuses eBay of price gouging goods such as N95 masks. In Texas, retailers have been sued for raising egg prices. Companies should treat these matters as lessons and become aware of the intricacies of price gouging laws to avoid liability as they are considering price increases.

Assessing State Anti-Price Gouging Laws

Companies should recognize that each state's price-gouging laws are different, and even small differences in these laws can greatly impact the risk associated with a price increase. Accordingly, each state's law must be reviewed for the following factors.

Is Your Product Covered?

The first factor to consider is what products are covered by each law. While some laws cover a wide variety of products, others only apply to specific products.

For example, Pennsylvania's law broadly covers consumer goods, while Idaho's only covers fuel, food, pharmaceuticals, and water. Other states primarily focus on goods in growing demand due to an emergency.

The law's definitions should be carefully analyzed in states that enumerate specific products. For example, "consumer food" items might include food for animals, as in Tennessee. However, "consumer goods" might actually be limited to emergency goods. South Carolina's law broadly covers "commodities," but the definition indicates a focus on emergency goods.

Price gouging laws also may not apply at the supply level. Some laws only apply at the retail level, while others explicitly apply to any party within the chain of distribution. Others are silent. For example, New York's law applies to all parties within the supply chain, while Connecticut's is limited to retail. Companies should therefore carefully check both the supply level and goods covered under the law.

Is Your Product Covered by an Exception?

Second, companies should carefully check for applicable exceptions. Almost every price gouging law has language allowing the pass through of increased supply costs. However, these laws sometimes contain vague language.

A few states, such as Utah and Washington, allow a price that represents the increased cost plus "customary markup," capped at a percentage, usually 10%. Others, such as Wisconsin, do not allow for any increase above the increased cost, so no markup. However, terms such as "customary markup" are often undefined.

Other states, such as North Carolina, indicate that the pass through of costs is a factor to consider, rather than an automatic defense to a price gouging claim. It will be important for any company to consider permissive language related to supply cost increases, particularly if it seeks to maintain its profit margin rather than pass through costs dollar by dollar.

How are Price Increases Capped?

Third, companies should assess how price increases are limited. Many laws specify particular percentages above which companies cannot increase prices for covered goods.

For example, Kansas allows for an increase of up to 25%, while California, only allows up to 10%. Some states, like Connecticut, do not allow any price increase. Other laws, like those in Texas, broadly prohibit “unconscionable” or “excessive” price increases, sometimes with these terms undefined. Some states, like Missouri, define these terms, but in separate portions of the statute.

Companies should also check to see if the law allows them to make a profit. Some states, such as Iowa, allow the supplier to make a reasonable profit, and some cap the profit at a certain percentage, such as Maryland, which allows an increase in value of profit by up to 10%. Other states, such as Oklahoma, provide that no profit may be accounted for.

Language about allowances for customary markup will also be crucial in assessing whether the company may profit.

What Price Is the Starting Point?

Lastly, companies should assess what pricing considerations are allowed. For example, some laws provide exceptions for promotional pricing, for goods that were sold at a discount, or for seasonal fluctuations in price.

Kentucky and Virginia allow an exception for a good sold at a reduced price, and South Carolina accounts for seasonal fluctuations. North Carolina and Pennsylvania consider attendant business risk and taxes.

Recent provisions, such as California’s executive order, also contemplate negotiating a price with government entities.

Each of these steps will involve a deep dive into each state’s particular price gouging law. The analysis may also require researching any announcements or actions the state’s attorney general has made or brought in order to clarify the law’s scope and focus. However, carefully considering these questions will allow companies to correctly assess risks in their pricing plans and avoid future liability.

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