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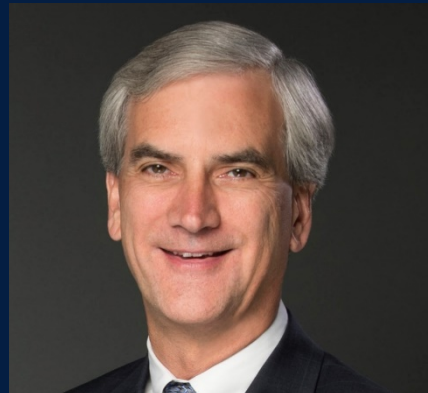
PRICE GOUGING ENFORCEMENT IN THE ERA OF COVID-19:  
STRATEGIES FOR RESPONDING  
WHEN THE AUTHORITIES COME KNOCKING

*JULY 22, 2020*

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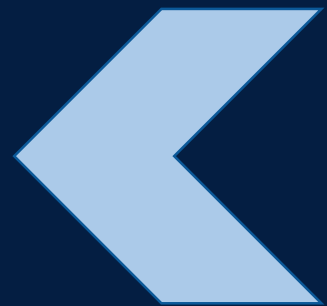
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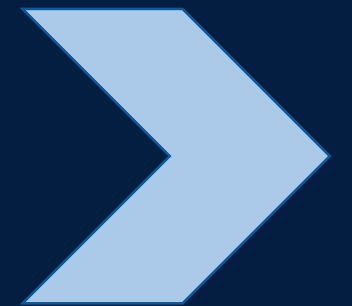
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# OVERVIEW

- Federal Laws Regulating Price Gouging
- State Laws Regulating Price Gouging
- Current Enforcement Actions
- Practical Pointers for Anticipating and Dealing with Enforcement Actions



# FEDERAL LAWS



# THE FEDERAL DEFENSE PRODUCTION ACT

- Enacted in 1950 in response to Korean War based on prior War Powers Acts
- DPA grants federal government broad authority to direct national economy to produce and distribute supplies for national defense
- Congress has expanded national defense definition to include “domestic preparedness, response and recovery from natural hazards, terrorist attacks, and other national emergencies”
- The administration chose not to exercise power to make federal government the sole customer of critical medical equipment
- Instead, the administration chose to let the market operate subject to criminal prosecution for hoarding or price gouging of scarce materials

# DPA DECLARATIONS OF SCARCITY

- 3/18/20: Executive Order 13909 declares ventilators and medical PPE as scarce materials critical to the national defense and delegates authority to Secretary of HHS to make further declarations
- 3/23/20: Executive Order 13910 declares policy that PPE and sanitizing and disinfecting products not be hoarded
- 3/30/20: Secretary of HHS designates a variety of masks, gloves, gowns, face shields, and other PPE and medical equipment as scarce materials

# SECTION 102 OF THE DPA

- Section 102 prohibits accumulation of scarce materials:
  - “(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”

# WHAT ARE “PREVAILING MARKET PRICES”?

- No case law or regulatory guidance
- Government has cited percentage markup from manufacturers’ benchmark prices or seller’s cost
- No set percentage has been put forward to determine what is “in excess”
- Lack of clarity may make prosecutions subject to void for vagueness attack



## POP UP QUESTION

- When was the Defense Production Act enacted?
  - A. 1941
  - B. 1950
  - C. 1968
  - D. 2020



# STATE LAWS



# DIFFERING STATE APPROACHES TO PRICE GOUGING

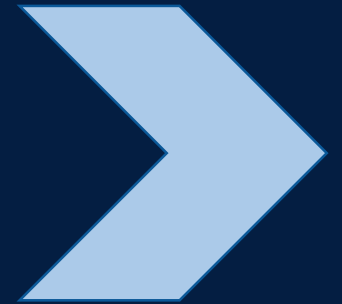
- No Explicit Price Gouging Laws
- No Increases Allowed
- Percentage Limitations on Price Increases
- Other Standards
  - Grossly Higher/In Excess/Disparity
  - Unconscionable
  - Exorbitant or Excessive
  - Unjustifiable

# EXCEPTIONS TO PRICE LIMITATIONS

- Additional costs imposed by the supplier of goods
- Additional costs for labor or materials used to provide services
- Additional transportation costs
- Additional costs of distribution or sale
- May still be limited in setting prices to a percentage of costs (e.g. California – 10% of costs)



# ENFORCEMENT ACTIONS



# ACTIONS TAKEN AGAINST PRICE GOUGING

- Pennsylvania
  - Selling N95 masks for \$8.00 - \$1,765.00 in civil penalties; \$741.30 in restitution for consumers
  - Selling 8 oz. bottles of “Purell Hand Sanitizer” to Pennsylvania pharmacies for \$7.98 and \$9.50 per bottle - \$2,150.00 in civil penalties; \$160.51 in restitution for consumers
  - Selling 28 two-packs of facemasks for \$23.95 per pair - \$1,400.00 in civil penalties; \$224.00 in restitution for consumers
- New York
  - Increasing wholesale prices for Lysol disinfectant from \$4.25 to \$9.15 per can, even though no increased costs
- Michigan
  - Selling hand sanitizer, gloves, and masks at grossly inflated prices - \$2,000 fine
- Tennessee
  - Price gouging involving medical supplies - defendant agreed to donate all remaining products

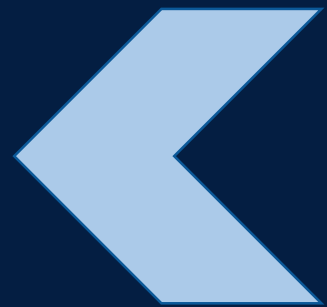
# ACTIONS TAKEN AGAINST PRICE GOUGING

- Ohio
  - Hoarding N95 masks and selling on Ebay for 18 times regular price
- Vermont
  - Importing masks for \$0.10 and selling to hospitals for \$2.50
- Texas
  - Selling 16 N95 Masks for \$180, after warnings not to do so
  - Funeral home imposing charges for dealing with COVID-19
- California
  - Class action lawsuit against Albertson's grocery chain for selling toilet paper at twice the regular price

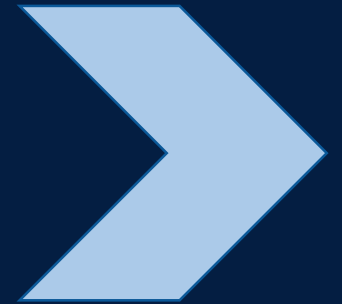
# PRIVATE PARTY ACTIONS

- 3M
  - 3M company started its own fraud detection unit after the coronavirus pandemic wiped out its supplies of medical-grade N95 masks, creating a market for profiteers — including one who allegedly targeted Wisconsin.
  - Since March, the company has fielded hundreds of reports from government and hospital officials desperate to protect their workers and concerned about getting ripped off. The worst cases tend to land first in civil courts, where 3M uses trademark claims to ask judges to shut down those advertising the company's wares at inflated prices.





# PRACTICE POINTERS



# WHAT TO DO BEFORE ENFORCEMENT ACTIONS

- Plan Ahead
  - Identify states where products are sold and know price limitations
  - Maintain records of “baseline” prices prior to pandemic
  - Track price increases, as well underlying costs driving pricing
  - Create a strategy for responding to complaints from customers about increased pricing
  - Create a strategy for responding to inquiries from law enforcement

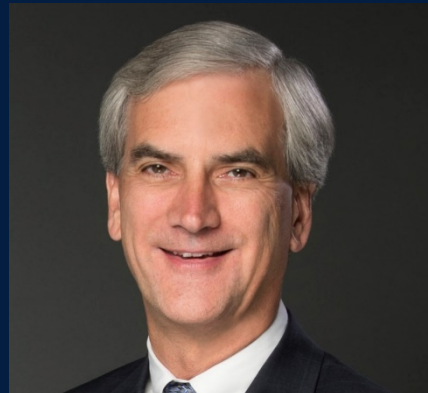
# WHAT TO DO IN RESPONSE TO ENFORCEMENT ACTIONS

- Responding to Law Enforcement
  - Be Proactive and Cooperative When the Inquiry Comes
  - Provide Data to Support Pricing – But Protect Proprietary Information
  - Get Local Assistance – Your ALFAI Lawyer Can Help

THANK YOU! IF YOU HAVE ANY QUESTIONS,  
PLEASE CONTACT ONE OF THE PRESENTERS



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