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The House Targets Price Gouging, Again

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Even though states are leading the way on price gouging enforcement, recent action in Congress may lead to overlapping federal government enforcement. Recent Congressional letters, statements, and proposed bills show a strong appetite for action on price gouging. House Democrats tried but failed to add price gouging language to the coronavirus relief package in March. Senators Klobuchar and Tillis have both introduced price gouging bills in the past month. This week, Representatives Schakowsky, Pallone, Cicilline, and Nadler introduced a standalone bill to create a federal price gouging regime for the current state of emergency.

Congress has tried and failed to pass price gouging legislation in the past, for example after Hurricane Katrina. In addition to the bills currently pending, at least two other price gouging bills from the past three years made very little progress. It remains unclear how much support the current bills have and whether they would fare differently. It seems highly likely that Congressional focus on this issue will continue, due to the extended length of the current emergency.

The current House bill, the "COVID-19 Price Gouging Prevention Act," would give the FTC explicit authority to attack price gouging, while also authorizing actions by state attorneys general. Interestingly, the bill would provide the FTC with authority that some argue it already possesses. The bill would make price gouging a violation the FTC Act's prohibition on unfair or deceptive practices. This is similar to the basis on which numerous senators petitioned the FTC to take action last month. If the FTC has authority to regulate price gouging, it has never done so before.

The House bill applies to "any person" who sells or offers for sale a "good or service" at an "unconscionably excessive" price that "indicates the seller is using the circumstances related to such public health emergency to increase prices unreasonably." H.R. 6472.

Rather than offering exceptions, like many state laws, the House Bill offers three criteria for judging whether a price is unreasonably excessive:

1. Whether the price "grossly exceeds" the average price during the 90-days prior to January 31, 2020 or the same 90-days the previous year;
2. Whether the price "grossly exceeds" the average price of similar goods or services readily obtainable from competing sellers before January 31, 2020;
3. Whether the price "reasonably reflects additional costs" not within the control of the seller, or reasonably reflects the "profitability of foregone sales or additional risks taken to produce, distribute, obtain, or sell" the good or service.

The House bill defines a "good or service" as "a good or service offered in commerce" and specifically lists food, water, ice, chemicals, personal protective equipment, respirators, medical supplies, and healthcare services. The penalties under the House bill piggy back on the FTC Act, with the note that violations of the bill would be treated as violations of an FTC regulation. *See* 15 U.S.C. §§ 57a(a)(1)(B); 57b(b). Unlike other portions of the FTC Act, rules violations do not have a defined maximum fine. *Compare* 15 U.S.C. §§ 57b, *with* 45(m)(1) (providing for a civil penalty of not more than $10,000 for each violation) (adjusted to $43,280). Courts cannot grant exemplary or punitive damages for rules violations, but they can grant other relief deemed necessary, such as rescission or reformation of contracts, the refund of money or return of property, the payment of [actual] damages, and public notification respecting the rule violation or the unfair or deceptive act or practice under §57b(b).

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