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Pricing in an Emergency: Where Price Gouging Meets Antitrust

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As state investigators across the country launch price gouging investigations, one thing is becoming clear – state price gouging investigations can look a lot like antitrust investigations. Price gouging enforcement is at an all-time high, and more and more it is being combined with antitrust and unfair trade practice investigations. This overlap can be bad news for companies facing potential price gouging claims, and it further highlights the need for compliance with *both* price gouging and antitrust statutes. This article explores the interaction between antitrust enforcement and price gouging enforcement, and sets forth key issue-spotting guidance for companies that are potentially impacted.

The clearest connection between antitrust and price gouging enforcement is price. Both types of investigation often begin with consumer complaints about higher prices. Investigators then look for the reason prices are high or have been increased. Antitrust investigators are looking for evidence of a conspiracy to raise prices. By contrast, price gouging investigators are looking for evidence that prices increased beyond a permitted level during times of emergency. The investigations and possible violations are not mutually exclusive, and attorneys in State AG offices frequently are choosing simultaneously to investigate both as possible enforcement mechanisms for the same price increases.

It would be expected and typical that in an emergency, an entire industry might independently move to higher prices, often in response to common market conditions, such as shortages, supply difficulties, increased demand, and higher common input costs. For a state attorney general who is scrutinizing whether industry-wide price increases are unlawful, it can be difficult to tell whether price increases were the result of an antitrust conspiracy, price gouging, or a natural and legal response to common market conditions. Therefore, many investigators now are asking all these questions at once. This raises the very real risk that consumer price gouging complaints become antitrust investigations – and this is in fact occurring in states around the country.

Antitrust and price gouging are also ostensibly connected by a shared purpose – consumer protection. Antitrust protects competition to promote lower prices, more innovation, efficiency, and better service, and as a result, consumer welfare. Unlike price gouging, antitrust does not prohibit excessive prices, though supra-competitive prices can be evidence of market power. High prices incentivize other competing companies to enter the market, a fact that has led some economists to criticize price gouging laws as inefficient and contrary to broader competition policy. Nevertheless, most states have price gouging laws, and in line with competition policy, these laws are limited in time and scope.

Antitrust and price gouging enforcement are also related statutorily. Many states use the same or similar statutes for both kinds of enforcement. For example, Montana's Attorney General has specifically argued the state's consumer protection laws cover price gouging. This is the same argument Congressional lawmakers made to the FTC in March. In letters to FTC Chairman Simons, members of Congress argued that the FTC's authority to prosecute unfair methods of competition includes authority to target price gouging. While the FTC has never done so, on May 7, 2020, Senator Kamala Harris (D-CA), along with Senator Elizabeth Warren (D-MA), Congressman Joe Neguse (D-CO), and Congressman Ted Lieu (D-CA), sent a letter to Congressional leadership asking for provisions from recently proposed legislation – the Price Gouging Prevention Act – to be included in the next Covid-19 stimulus package.

Antitrust investigations can involve detailed probes into almost everything a company does. These investigations often take months or years and come with the risk of trebled damages and follow-on class actions. State Attorneys General historically have not been the leading antitrust enforcers, but that changed over the past few years. State attorneys general are now more active than ever and their investigations have the potential to heap costs on already burdened companies. While many companies with national footprints are putting how best to manage their price gouging compliance front and center, there is no better time to keep a keen eye on the state of their regular antitrust compliance policies and programs.

Because price gouging statutes are activated only in rare emergencies, many companies do not have a pre-existing risk monitoring and compliance program in place. Companies can consider three concrete steps to monitor compliance with both legal regimes:

1. Consider calculating the company's price from before the emergency and monitoring and tracking increases above that pre-pandemic price.
2. If price increases are industry-wide, consider monitoring any communications with competitors that could touch on prices or conditions that could impact prices.
3. Consider tracking the reasoning and any cost justification behind any price increases. In response to claims of price gouging and/or an unlawful conspiracy, companies are often asked to provide a legitimate business justification for a price increase and ex post explanations often hold less weight than contemporaneous documents.

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