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Clearance to Reduce Capacity May Not Be Clearance to Raise Prices: Can Business Review Letters Impact Price Gouging Compliance?

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In response to the current pandemic, antitrust enforcers at the Department of Justice have been issuing business review letters at record pace. One of these business review letters addressed an inquiry from the pork industry about reducing supply based on the COVID pandemic disruption. This raises the question as to whether the DOJ letter about antitrust has any application to increases in price and price gouging statutes.

In the simplest terms, DOJ business review letters ratify conduct up front, giving companies cover to conduct activities that might otherwise raise antitrust concern. These letters typically state that DOJ enforcers "[do] not presently intend to bring an enforcement action" but do not guarantee they will not do so in the future, leaving room for changed circumstances later. These letters, however, do not address price gouging which is separate from antitrust enforcement. This leaves open the possibility that conduct endorsed by a business review letter later might be challenged under state price gouging statutes. This post will explore the potential conflict between these two regimes and what companies can do to manage the risk.

The Antitrust Division and the Federal Trade Commission both have longstanding processes for issuing ex ante opinions. The DOJ business review letter process, and the FTC advisory opinion process, both traditionally take months. However, in the first five months of 2020, the DOJ has already issued five opinions, more than in the past five years combined. This vigorous pace follows a joint statement the agencies issued in March, in which they committed to addressing Covid-19-related requests within seven calendar days. These Covid-19-specific letters offer companies a one-year limited assurance of a favorable view by the DOJ about antitrust compliance for the activities described, an attractive and often necessary incentive for companies to pursue sometimes unprecedented coordination in response to the current pandemic.

The most recent expedited letter was issued in response to a request from the pork industry. Faced with widespread plant closures, the pork industry stated it may need to euthanize millions of hogs that can no longer be processed into meat. Under orders from the President, the USDA has taken steps to coordinate efforts among pork producers. Still, such conduct potentially could raise antitrust risks. The industry therefore sought a business review letter from the Antitrust Division to address the coordination that will be necessary for these industry-wide efforts.

Similar supply restrictions have led to antitrust complaints in the past. For instance in 2016, a number of dairy companies settled claims they euthanized cows to artificially inflate the price of milk. Basic economics dictates that lowering supply will lead to increased prices, which is why these kinds of supply restrictions can implicate antitrust laws. In the pork industry, plant closures and mass euthanasia of hogs likewise may lead to higher pork prices. While the industry's business review letter offers conditional assurance from federal antitrust enforcers, it says nothing about state price gouging laws. Price increases during an emergency can implicate state price gouging rules.

Price gouging laws are designed to cap or limit certain price increases during a state of emergency. There is no national price gouging law, yet nearly every state either has a price gouging statute, or enforces price gouging rules through consumer protection laws or executive orders. Many of these rules cover food and other consumer goods, which would include pork. Though most price gouging rules include an exception for cost increases, they often do not include exceptions for other circumstances. Many state price gouging laws also apply to supply-chain companies, which could cover the pork suppliers. If pork prices increase dramatically, sellers potentially could face claims of price gouging. The success of these claims would depend, in part, on whether state price gouging exceptions apply.

States have a range of exceptions – from permissive to very limited. For instance, California's law provides that a price increase over 10% (the state's cap) "is not unlawful if that person can prove that the increase in price *was directly attributable to additional costs imposed on it* by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services." Cal. Penal. Code § 396(b). By contrast, other states like Louisiana include broader exceptions for price increases "attributable to fluctuations in applicable commodity markets, fluctuations in applicable regional or national market trends, or to reasonable expenses and charges and attendant business risk incurred in procuring or selling the goods or services during the state of emergency." La. Rev. Stat. § 29:732.A. *Deliberately decreasing supply of a product might not fit within these exceptions.*

In short, applying state price gouging rules to the conduct outlined in the pork industry business review letter implies potential price gouging risk. Neither limited exception states like California nor broader exception states, like Louisiana, include language specifically exempting price increases caused by conduct directed or permitted by federal authorities. Certainly, plant closures caused by Covid-19 fit into the kind of cost increases contemplated by Louisiana's statute. But plant closures may not fit neatly into California's rule or others. And even if cost increases due to plant closures are covered by certain state exceptions, these rules may not cover cost increases one step removed from plant closures – like mass hog euthanasia. At the very least, the ambiguous language in many state statutes invites conflicting interpretations and creates potential risks.

While it may be unlikely State Attorneys General will challenge federally-endorsed conduct in a hard-hit industry that employs thousands, private plaintiffs may bear no such civic-minded checks. As a result, the current pandemic places some companies between a rock and a hard place, as avoiding antitrust risk may invite price gouging scrutiny. Companies face with such a dilemma may want to consider their price gouging compliance programs independent of and in addition to their antitrust compliance efforts. Companies facing these kinds of problems might also consider tracking both their prices (before and after the state of emergency) and the specific rationale and bases for any price increases. Later cases will likely ask parties to justify their price increases and link the change to a specific cost, and contemporary documents often hold more weight than ex-post explanations.

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