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Pricing Controls under the Defense Production Act

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With the federal government's increasing focus on enforcing price gouging compliance, attention has turned to the Defense Production Act (the "DPA"). Passed in 1950 in response to the Korean War, the DPA is modelled on the War Powers Acts of 1941 and 1942 and gives the President, among other things, sweeping power to control the domestic economy during times of crisis. Despite these origins, the DPA is routinely invoked in a variety of circumstances, including in response to natural disasters like Hurricane Katrina and now COVID-19 (the DPA as later amended in 1988 is also the basis for the president's authority to block certain foreign investment into the U.S. on national security grounds through the Committee of Foreign Investment in the U.S. – or CFIUS).

Beyond CFIUS, much of the federal government's recent work under the DPA has focused on combating the COVID-19 pandemic through market intervention and pricing controls. For example, President Trump has used the DPA to order several companies to produce ventilators and PPE for the federal government, and the CARES Act authorizes the Department of Defense to spend nearly $1 billion pursuant to the DPA to help fight COVID-19 and stabilize impacted economies. Along with these powers to control production and spending, however, the DPA also penalizes hoarding or price gouging of any materials deemed scarce. On March 25, 2020 the Secretary of Health and Human Services announced 15 categories of goods covered by the Act.

The DPA provides in part: "to prevent hoarding, no person shall accumulate (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." 50 U.S.C. § 4512. While such prohibitions may ring similar to state price gouging laws, there are several noteworthy distinctions.

First, the DPA specifically prohibits "accumulation" as a triggering condition for price gouging liability, while states price gouging statutes simply focus on the price charged. Accumulation is not defined in the Act, highlighting perhaps the key challenge in DPA compliance: many of the DPA's key terms are undefined, and there exists almost no case law applying this part of the statute.

Along with "accumulation," it is unclear what "the reasonable demands of business … consumption" are, particularly given that many of the products identified by HHS and covered by the DPA have seen extreme price and supply fluctuations over the past few months. How exactly is one to calculate "reasonable demands" for products whose relevance has exploded, but whose use may quickly recede again in the near future (for example, news of a COVID-19 vaccine would seriously affect the value of various COVID-related goods and services)?

Moreover, precisely what constitutes price gouging under the Act is not clear. While most state statutes provide specific benchmarks like "unconscionable" or 10% above normal market prices, the DPA simply bans "prices in excess of prevailing market prices." Arguably, the statute would not ban *any* price increases above prevailing market prices, but there is little guidance on what would be too much. Other ambiguous language such as *prevailing* market price leads to further uncertainty. Is the market price defined as the price at the beginning of the pandemic? If so, what then was the start of the pandemic? While the DPA does not provide these answers, recent enforcement by the Department of Justice may provide some insights.

Until courts have dealt more with the price gouging provisions of the DPA and defined some of the key terms, state law may provide the closest analogue to shed light on unanswered DPA questions. While "excess" may not be defined, existing state laws provide for price increases between 10% and 30%, and this range provides a reasonable starting point for any pricing decisions. Accordingly, best practices for DPA compliance, much like compliance with state price gouging prohibitions more generally, include determining whether your goods or services are covered, making sure to track and document pricing and cost information as well reasons for any price movements, and making efforts to ensure that prices do not exceed any conservative benchmarks.

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