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Does ‘New and Improved’ Products Mean I Can Charge a New and Improved Price?

Minding Your Business Blog on **July 24, 2020**

State price gouging laws do not typically address product improvements or reformulations. Still, businesses should consider price gouging restrictions when releasing “new and improved” products, as the same pricing considerations that may apply to new products may also apply to improved, updated or reformulated products.

A company that is developing or considering releasing a reformulation of its current product may have previously evaluated whether the product is subject to state price gouging laws. Where the previous version of the product was covered, any reformulation is likely covered as well.

Given the additional costs that may accompany a reformulation, there may be additional justifications for price increases when releasing a new version of a product. In California, for example, a company can increase the price for its reformulated product to factor in the costs for, among other things, sourcing new or more expensive ingredients. As long as the total price does not exceed fifty percent greater than the total costs of producing and selling the product, it should not run afoul of that state’s law. A business that resells that reformulated product arguably may then price it at up to, but no more than, fifty percent greater than the amount it paid for the product to the extent it is treated as essentially a new product

In other states, a company considering reformulation may want to reference the price of similar goods as a baseline, while also gauging what the state statute considers to be legal justifications for setting prices that exceed the price of similar goods. Under Pennsylvania law, the state typically presumes prices are unconscionably excessive if they are 20% or more above “the average price at which the same or similar consumer goods or services were obtainable in the affected area during the last seven days immediately prior to the declared state of emergency.” But those provisions do not apply where a higher price is “substantially attributable to additional costs that arose within the chain of distribution in connection.”

In Florida, the price gouging statute suggests there would be a comparison of the amount charged for the reformulated product to "the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to [the] declaration of a state of emergency," which, for purposes of the current COVD-19 emergency, was March 9, 2020 in Florida. If the reformulated product is more expensive than similar products, companies can provide evidence that "the increase in the amount charged is attributable to additional costs incurred," or due to "regional, national, or international market trends," and thereby rebut a presumption of price gouging.

Given the lack of direct treatment of this category of products in the price gouging laws, pricing in these instances may require additional thought to ensure compliance. As a general rule, however, businesses looking to bring reformulated products to the market should be aware that price increases for reformulated products likely fall within the majority of the allowable exceptions if they reflect cost increases and maintain (or even, in some cases, increase) a measure of profit margin.

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