

# Price Gouging Updates: Federal Price Gouging Legislation; Addressing Infant Formula Shortages; Resolution of Online Merchants Guild

**Minding Your Business Blog** on May 20, 2022

Two federal price gouging bills were recently introduced in Congress. Senator Elizabeth Warren led the introduction of the [Price Gouging Prevention Act of 2022](#). The bill prohibits “unconscionably excessive price[s]” at any point in a supply chain or distribution network during an “exceptional market shock” triggered by a range of events – including public health emergencies. The law would apply to any good or service offered in commerce, and would authorize the Federal Trade Commission and State Attorneys General to enforce the prohibition. Additionally, during “exceptional market shocks,” the law would require public companies to disclose and explain changes in pricing and gross margins in quarterly SEC filings—raising the specter of SEC enforcement with respect to those disclosures.

Under Senator Warren’s bill, a defendant would presumptively violate the act if, during an “exceptional market shock,” it is shown that they (1) either have “unfair leverage” *or* are using circumstances related to the market shock to increase prices; *and* (2) sell or offer to sell a good or service at an excessive price compared to the average price during the 120-days prior to the market shock. Unfair leverage is defined as: (1) earning \$1 billion in revenue in the last year; (2) discriminating between otherwise equal trading partners; (3) being a critical trading partner; or (4) having a characteristic described in any rule issued by the FTC further defining unfair leverage. Businesses earning less than \$100 million in gross U.S. revenue during the preceding year can raise an affirmative defense by showing by a preponderance of evidence the increase in price is directly attributable to additional costs outside of the business’s control. Larger business can rebut the presumption of a violation only if they demonstrate by clear and convincing evidence the price increase is directly attributable to additional costs outside of the business’s control.

Representative Katie Porter led the introduction of the [Consumer Fuel Price Gouging Prevention Act](#), which would prohibit “unconscionably excessive” prices, at wholesale or retail, of consumer fuel, including gasoline and home energy fuel. Price controls would be triggered by the President issuing an energy emergency proclamation, as prescribed by the Act. The energy emergency proclamation would specify the covered geographic area, consumer fuel type, and time period, not to exceed 30 consecutive days at a time, though renewable for consecutive periods. An affirmative defense would be available for price increases that reasonably reflect additional costs paid, incurred, or reasonably anticipated, or that reasonably reflect additional risks taken by the seller. The FTC would have enforcement power at the wholesale or retail level, with “enforcement priority” for companies that exceed \$500 million annually in U.S. consumer fuel sales. State Attorneys General would have authority to enforce the prohibition only at the retail level.

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Elected officials were quick to warn against price gouging stemming from the nationwide infant formula shortage. On May 12, 2022, the White House released a [statement](#) asking the FTC and State Attorneys General to investigate price gouging or unfair market practices in the industry. In response to the shortage, on May 18, 2022, the [White House invoked provisions of the Defense Production Act \(“DPA”\)](#), which gives the President broad authority to provide financial incentives and redirect resources to expand productive capacity and supply. [The DPA also penalizes hoarding or price gouging](#) of any materials deemed scarce under the Act. However, President Biden had not to date designated infant formula as “scarce.”

On May 11, 2022, New York Attorney General Leticia James issued a [press release](#) warning retailers against price gouging and pointing to existing NY law – “[t]he last thing any family needs is to be price gouged on critical nutrition for their little ones, which is why I am putting profiteers seeking to take advantage of this crisis on notice. If New Yorkers see exorbitant price increases for baby formula, I encourage them to report it to my office immediately.” On May 13, 2022, the House Committee on Oversight and Reform issued a [press release](#) publicizing an inquiry into four baby formula companies. In letters sent to each company, Chairwoman Rep. Carolyn Maloney and Subcommittee Chairman Rep. Raja Krishnamoorthi warned, “[i]t is critical that your company take all possible steps to increase the supply of formula and prevent price gouging.” The Chairs requested detailed information and a briefing by May 26, 2022.

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### *Online Merchants Guild v. Cameron*, 3:20-cv-00029-GFVT (E.D.K.Y.)

A seminal case addressing price gouging claims and restrictions during the pandemic has resolved. After Kentucky Attorney General Daniel Cameron initiated civil price gouging investigations into various Kentucky-based merchants in 2020, the Online Merchants Guild (“Guild”) brought suit to enjoin application of the state price gouging laws against its member suppliers. The district court granted a preliminary injunction halting the investigations, predicated on the Dormant Commerce Clause. In April 2021, the Sixth Circuit vacated the preliminary injunction, allowing the investigations to [resume](#). Relying on the Sixth Circuit opinion, the Attorney General moved for judgment on the pleadings arguing that Kentucky’s price gouging statute posed “no extraterritoriality problem.” On October 12, 2021, the Guild moved to [voluntarily dismiss without prejudice](#), which the Attorney General opposed. On May 2, 2022, the district court issued an order to the Guild to show cause to explain why the case should not be dismissed with prejudice. The Guild responded to the show cause order by withdrawing its opposition to the dismissal with prejudice, noting that the Attorney General had reasonably addressed “certain concerns underlying this case.”

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