



**Price Gouging Webinar**

# The Price Is Right...or Is It? What Supply Chain Businesses Should Know

**Christopher Ondeck**, Co-Chair, Antitrust Practice  
**John Ingrassia**, Senior Counsel  
**Jennifer Tarr**, Associate

June 3, 2020

Proskauer»»

# Speakers

---



**Christopher Ondeck**  
Co-Chair, Antitrust Practice

T: +1.202.416.5865  
condeck@proskauer.com



**John Ingrassia**  
Senior Counsel

T: +1.202.416.6869  
jingrassia@proskauer.com



**Jennifer Tarr**  
Associate

T: +1.212.969.3246  
jtarr@proskauer.com

# Agenda

---

Basics of Price Gouging

Common Questions Facing Supply Chain Companies

Practical Suggestions for Compliance

# Common Questions

---

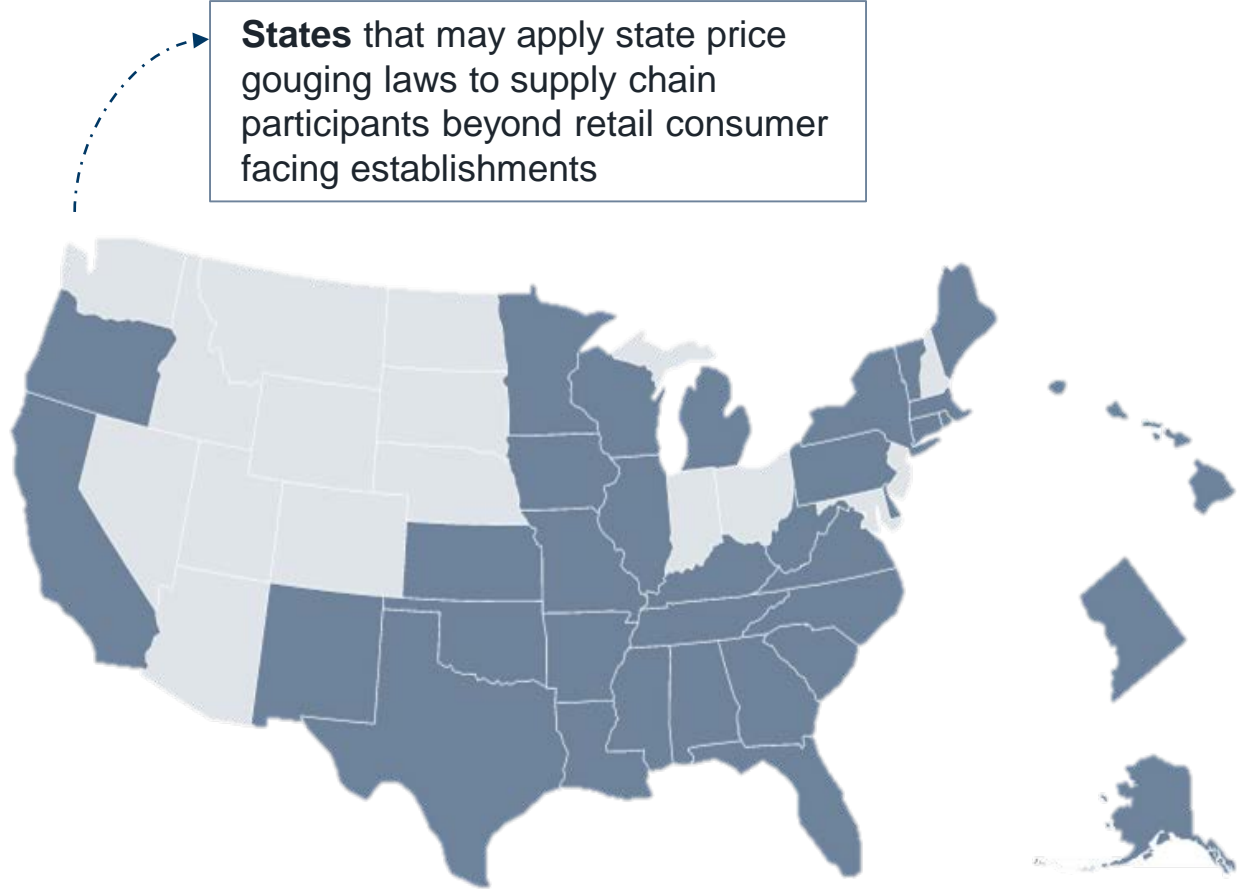
- What is price gouging?
- When are these laws triggered? How long do they run?
- Are my goods covered? What about services?
- Does the reason for the price increase matter?
- What if my costs went up?
- Can I price with the market?
- Can I raise my prices if a competitor does?
- What if my prices were sales prices or unusually low immediately before the emergency?
- What if I only sold a limited number of goods into the region?
- If I start selling in a new region, am I covered by price gouging laws?
- What if I raised my prices beforehand and competitors did not?
- Is pricing on an index safe?
- I'm not a retailer; can I increase my prices?

# When Are Price Gouging Laws Triggered?

---

- Triggered By Emergency
  - National Emergency
    - “during any declared statewide or national Emergency” – [Massachusetts](#)
    - “federal disaster declaration by the president” – [Rhode Island](#)
  - Local or State-Specific Emergency
    - “Upon a declaration of a state of emergency by the Governor” – [Florida](#)
    - “state of emergency declared by the President...or the Governor, or upon the declaration of a local emergency” – [California](#)
    - “...as declared by the parish President” – [Louisiana](#)
- Duration is State-to-State
  - Specific end date, unless extended – California (Sept. 4), New York (Sept. 7)
  - Specific number of days, unless extended – Tennessee (15 days)
  - Duration of the emergency proclamation – South Carolina
  - Duration of emergency and for the subsequent recovery period – Iowa

# Some Statutes Apply Throughout Supply Chain



**States** that may apply state price gouging laws to supply chain participants beyond retail consumer facing establishments

- Price gouging laws in these states may apply to:
- Manufacturers
  - Wholesalers
  - Service providers
  - Companies selling nationwide
  - Companies selling into and out of these states

# What Qualifies as Unlawful Price Gouging?

## Price Freeze (prohibits any increase in prices)

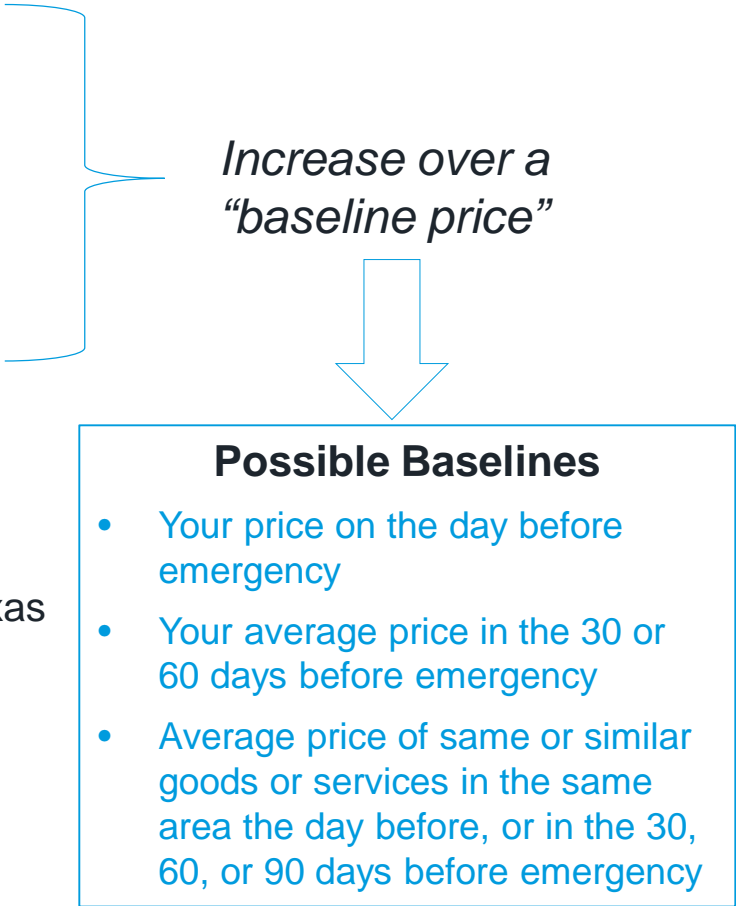
- Connecticut, Georgia, Hawaii, Louisiana, Mississippi

## Objective Standard

- **10%** – Alaska, Arkansas, California, Delaware, D.C., Maryland, New Jersey, Kentucky, Oklahoma, Utah, West Virginia
- **15%** – Maine, Oregon, Wisconsin
- **20%** – Michigan, Minnesota, Pennsylvania
- **25%** – Alabama, Kansas

## Subjective Standard

- **“Excessive”** – Idaho, Iowa, Kentucky, Missouri, New Jersey, North Carolina, Texas
- **“Unconscionable”** – Maine, Massachusetts, New Mexico, Rhode Island, South Carolina, Vermont
- **“Unconscionably Excessive”** – New York, Oregon, Pennsylvania
- **“Grossly Exceeds” / “Substantially in Excess”** – Arizona, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Ohio, Tennessee, Virginia





# How To Calculate a Baseline Reference Price

1. Figure out which states you operate in.
2. Determine the relevant baselines from which those states calculate whether a price increase constitutes price gouging.
  - **Different states use different formulas for their baselines:**
    - Your price the day before the emergency was declared.
    - Your average price in the 30-60 days before the emergency.
    - The average price for similar goods the day before the emergency.
    - The average price for similar goods in the 10-90 days before the emergency.
3. Determine your prices / the relevant average prices on the baseline dates each state provides.
4. Use this baseline when evaluating potential price increases.

## A Practical Example

- Company X sells “essential” widgets across the East Coast.
- NJ considers increases of 10% more than the price for which that seller sold the good the day before the emergency to be excessive.
- NJ declared its state of emergency on March 9.
- On March 8, Company X sold widgets in NJ for \$2/widget.
- Company X’s baseline reference price for NJ is \$2/widget.
- Absent an exception to the law, Company X cannot raise its prices by \$0.20/widget or more in NJ during the emergency.



# What Goods Are Covered?

---

## State Statutes Cover a Range of Goods

- Essential Goods
  - Possible Examples: Food, Water, Pharmaceuticals, Chemicals, Fuel, Cleaning Supplies, Building Materials, Lodging
- Consumer Goods
- Goods Generally
  - Examples: Computers, Software Programs, Storage Space, Motor Vehicle Parts, Pet Food, Personal Care Products
- Gas Only

*States without price gouging laws can target price gouging with other authority. For example:*

### Executive Actions

- Medical Goods – Arizona
- Essential Goods & Services – Minnesota
- All Goods & Services – Delaware

### Attorneys General

- Enforce state consumer protection laws – Colorado, Montana, Washington

# A Range of Covered Goods



# What Services Are Covered?

---

- State Rules Cover a Varying Range of Services
  - “Necessary” or “Essential” Services
  - “Emergency” Services
  - Transportation, Freight, Delivery
  - Construction & Repair
  - Healthcare Services
  - Storage Services
  - Telecommunications, Video Streaming, Website Hosting
  - Child Care
- Attorneys General Are Also Active
  - [North Carolina](#) – Attorney General recently won injunction against towing company accused of price gouging
- Plaintiffs Have Already Filed Cases Alleging Price Gouging For Services
  - [Maldonado v. Columbia Valley Emergency Physicians LLC, 3:20-cv-5428 \(W.D. Wash.\) \(Filed May 6, 2020\)](#)
    - Class-action complaint alleging Envision charged excessive fees for physician staffing services

# Does Good/Bad Motive Matter?

---

**The laws impose a form of strict liability that do not take motive into account. The criminal penalties, however, may require a showing of intent to harm.**

- **Criminal Price Gouging Statutes**
  - California – Misdemeanor punishable by a year in jail or not more than \$10,000 fine
  - Illinois – Misdemeanor for a first offense, and felony for subsequent or second offenses
  - Generally, to violate a criminal law, a party needs to intend to do so.
- **Civil Price Gouging Statutes**
  - Civil cases are likely to be triggered simply by a price increase above a certain amount (though most states have a limited exception for increased costs).
  - Some civil plaintiffs may bring suits under general pro-competition or fair business statutes that are silent as to intent.
  - For states where price gouging statute has both criminal and civil penalties, it is an open question if the intent element will be imputed to the civil claims.

# Can I Raise Prices If Costs Went Up?

---

**In most states, yes. Almost all states include exceptions for price increases directly attributable to unavoidable cost increases**

- Exceptions Tied to Market Conditions (Subjective)
  - [Additional costs incurred in connection with “regional, national, or international market trends.”](#) – Florida
- Exceptions Tied to Benchmark (Objective)
  - [Exception where “\[t\]he selling price does not exceed the seller’s cost plus normal markup.”](#) – Wisconsin
- Exceptions Where Increase is Unrelated to Market Disruption
  - [Price increase unrelated to the market disruption](#) – Oregon

# Can I Raise My Prices If a Competitor Does?

---

**Under a strict reading of most statutes, the answer is no. In the few states that have an express exception enabling prices to be raised to market levels, probably yes.**

- Cost exceptions may not cover price increases by competitors
  - Exceptions predominantly cover increases in costs.
  - Exceptions for market fluctuations may refer to supply chain and other disruptions, not decisions by competitors.
- Price caps are often backward looking
- Some price caps look to contemporaneous pricing

# Can Manufacturers/Wholesalers Raise Prices?

---

## Increasing Amount of Enforcement Up the Supply Chain

- Public Outcry on Prices
  - Retailers pointing to suppliers to explain cost increases
  - State attorneys general have issued dozens of subpoenas to suppliers of covered goods up and down the supply chain

## State Law Varies Greatly

- Many states silent, but potentially apply
- Some states specifically reference applying to supply chain
- One state ([Idaho](#)) specifically applies only to sales to the ultimate customer
- Executive Orders potentially apply





# New York Attorney General Targets Supplier

Quality King Distributors, Inc., and its CEO Glenn Nussdorf, have been charged by the New York Attorney General's office with illegally increasing the company's wholesale prices to sell Lysol in grocery and convenience stores in New York.

- Quality King Increased price of Lysol Disinfectant Spray from \$4.25 to as high as \$9.15, even though the company faced no increased cost for the product.
- Costs passed to consumers, who paid as much as \$16.99 per can of Lysol.
- Investigation prompted by consumer complaints.
- Despite being wholesaler, lawsuit seeks restitution for consumers from Quality King.

# Can I Price On An Index?

---

- Exceptions permitting price increases may not apply
  - Exceptions for increased costs and market trends may not exempt increases due to index pricing.
  - Most state price gouging laws do not specifically exempt increases related to index pricing.
    - Kentucky allows for increases based on established contracts or indexes.
- The Minnesota AG has targeted price increases using index pricing
  - Food producer used market-price agreements that tied prices to a third-party market index.
  - As the index rapidly rose during the pandemic, producer's prices increased by > 150%.
  - Under settlement agreement with AG, food producer agreed to limit prices to a maximum of 20% over pre-emergency prices and abide by prices lower than cap if contracts dictated them.
- Parties should monitor whether their products are included in a basket of goods or services that could trigger price gouging laws

# Am I Limited By My Past Prices?

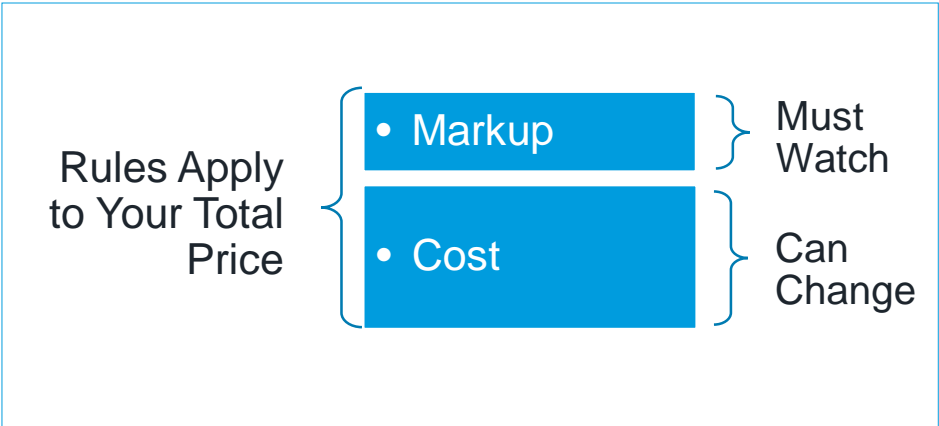
---

- In many states, yes.
- Many states set the “baseline” reference price based on a company’s past pricing (either the day before the emergency or averaged over some period of time).
- I was having a sale when the emergency occurred—can I now return to a normal price?
  - Some states include exceptions for returning to pre-sale prices
  - “The prices ordinarily charged for comparable goods or services in the same market do not include temporarily discounted goods or services.” – Mississippi

# Can I Enter A New Market?

- Determine how that market calculates baseline price.
- What is the baseline price for competitors in this market?
- What if I had sporadic sales in this market, that are different than the baseline?

## Apply Rules to Price Paid By the Buyer



# What If I Don't Sell In a Given State?

---

- To date, some plaintiffs and state AGs have not limited their lawsuits and investigations to companies that sell in a given state.
  - May be due to lack of knowledge about which businesses are involved in which states.
  - May be because business produces goods in the state or because the business sells to a wholesaler that eventually sells into the state.
- Open question whether courts have jurisdiction over businesses that do not sell directly into the state.
- Keep all records showing where your business does and does not sell.
  - Potentially could assist with dismissing the case or closing the investigation.

# Who Is Active In Enforcement?

---

- Private Plaintiffs

- Businesses
- Consumers



- Federal Government

- DOJ is reported to be investigating Tyson Foods, JBS, National Beef, and Cargill
- Increased prices have attracted antitrust scrutiny more generally
  - Price increases are “evidence that something isn’t right in the [beef] industry.” – Sen. Grassley (R-IA)

- State Attorneys General

- New York, California, and Washington are among the AGs who have been active

# What Are The Penalties?

---

## Available Relief Differs State-to-State

- Injunctive Relief
  - Often includes restitution for overcharge amount
- Civil Penalties
  - Penalties range from \$99 to \$40,000 per violation
  - Additional fines in some states for vulnerable populations (e.g. seniors)
- License Revocation
  - Businesses can lose approval to sell in a state
- Criminal Penalties
  - Misdemeanor
  - Can include criminal monetary penalties
- Private Right of Action
  - Possible class action by private plaintiffs' lawyers





# Strategies for Compliance



# Strategies for Compliance: **Process**

---

## Creating a Compliance Tracking Process

- **Set a Compliance Baseline**

Possible Options:

- Determine whether you sell into any states that adopted a price freeze and possibly suspend increases in those states
- Set a limit for price increases based on the strictest state you sell into (ex. 10%)
- Price based on each state's baseline

- **Maintain Documentation**

- Allows accurate tracking of price movement
- Allows businesses to easily demonstrate why applicable defenses apply

- **Tracking Procedures**

- What has historically been the basis for pricing?
- Has COVID caused a change in these procedures?

# Strategies for Compliance: Training

---

- Train employees and agents on price gouging risks, including sales people
- Companies can be held liable for the actions of their sales people
  - A company can be liable for contracts entered into by its sales people if the agent had express, implied or apparent authority to do so
  - Bottom Line: Companies often liable for actions of sales people
- Plaintiffs have tried to hold online retailers accountable for prices set by third parties
  - *Mercado v. Ebay*, (N.D. Cal. May 4, 2020) (alleging that Ebay is liable for high prices set by third parties selling products on Ebay website)
  - *McQueen v. Amazon*, (N.D. Cal. April, 21 2020) (alleging that Amazon is liable under the California Price Gouging Law for products priced by third party suppliers)

# Strategies for Compliance: Documentation

---

- Establish your baseline price and maintain your records about pricing in the period prior to the emergency
- Track and document any price increases
- Consider creating internal documentation with legitimate justification for price increases
- Maintain records showing reasons for any price increases (including cost increases)
  - “Average price of goods readily available” – [New York](#)
  - “Market fluctuation” – [North Carolina](#)
  - “Whether the supplier knew” – [Ohio](#)
  - “Factors unrelated to the emergency” – [Oklahoma](#)
  - “Seasonal fluctuations” – [Kentucky](#)
  - “Duration of disaster and length of emergency declaration” – [Idaho](#)
- Documentation is especially important given that claims likely can be brought for several years

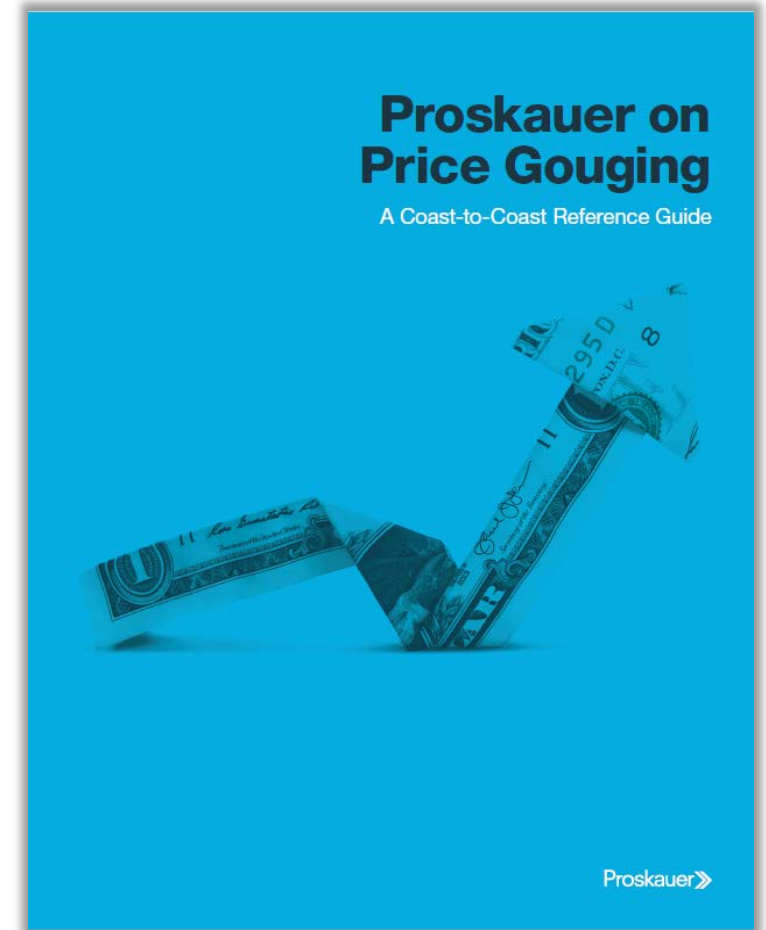
# Strategies for Compliance: Process and Best Practices

---

- Create a tracking system that lists the requirements, price caps, or other controls for your covered products and services in those states
- Be cognizant of your goods priced on an index, as they may not be specifically exempted from price gouging laws
- Be cognizant of antitrust risk. Don't discuss pricing publicly or with competitors
  - Industry wide price movements and statements about “price discipline” or industry pricing guidelines may invite an antitrust suit
- Monitor evolving requirements from state governments
  - Many state laws have their own unique requirements; do not assume uniformity
- Take any inquiry from a state attorney general's office seriously
- Take public complaints and news coverage of price increases seriously
  - Public uproar has led to increased scrutiny by government agencies

# Additional Resources

- **Proskauer on Price Gouging: A Coast-to-Coast Reference Guide**
- **Price Gouging Dos & Don'ts for Supply Chain Companies**
- **Blog Posts and Articles**
  - [Can you Sue for Price Gouging?](#)
  - [Price Gouging Laws and COVID-19: What Supply Chain Businesses Should Know](#)
  - [When Do Price Gouging Laws Expire?](#)
  - [No Country for Price-Gouging: States Can Punish Price Gouging Without Price Gouging-Specific Laws](#)
- **State-Specific Articles**
  - [California's Crackdown on the Price Gouging Gold Rush](#)
  - [Florida Man Fined For... Price Gouging?](#)
  - [A Spartan Approach to Price Gouging in Michigan](#)
  - [Don't Mess With Texas: Price Gouging in the Long Star State](#)







The information provided in this slide presentation is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Proskauer Rose LLP (Proskauer) is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Proskauer Rose LLP. All Rights Reserved.