

Alerts & Publications



Antitrust Enforcers to be Active Monitoring Marketplace Activity Related to COVID-19

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As countries close their borders and institute societal restrictions to combat the spread of COVID-19, manufacturers and retailers of essential supplies—from surgical masks, to hand sanitizer, to toilet paper—are under tremendous pressure to maintain supply chains and deliver sufficient quantities of goods to meet heightened consumer demand. In part due to widespread panic-buying, empty shelves—both physical and digital—are an increasingly common sight. At the same time, healthcare providers in some locales report that they have no choice but to ration medical supplies and equipment.

While manufacturers and government officials have sought to assure the public that supply chains are robust, perceived supply shocks have in some instances given rise to accusations of “price gouging.” Facing a spreading pandemic that promises to severely disrupt American life for months, antitrust enforcers and politicians have signaled their intent to monitor the marketplace for activity relating to the COVID-19 outbreak. Businesses operating in this turbulent environment should take note of the protections that exist to limit unmerited price increases on supplies and inputs.

Various enforcement agencies share authority for consumer protection violations, including the Federal Trade Commission (FTC) and state attorneys general. The FTC is empowered to investigate and prevent “unfair methods of competition”—which include, but are broader than, antitrust violations—and “unfair and deceptive acts or practices,” such as false advertising. State attorneys general across the country likewise have authority to pursue similar conduct under state-level consumer protection statutes (sometimes referred to as “mini FTC Acts”). In addition, 36 states (including the District of Columbia) have specific price gouging statutes. Attorneys general have announced an intent to investigate complaints of price gouging even in states without specific price gouging statutes, such as [Washington](#) and [Montana](#).

On March 10, 2020, Democratic Senator Ed Markey sent a [letter](#) to FTC Chairman Joe Simons urging the agency to “develop a comprehensive plan for protecting consumers in light of the novel coronavirus and the infection it causes” and requesting a response “outlining [the FTC’s] efforts to date on this issue” by March 24, 2020. Senator Markey’s call for action was echoed on March 17, 2020 by several Democratic members of the House of Representatives, who [wrote](#) to Chairman Simons to request that the FTC “take immediate action to protect consumers from price gouging during this declared public health emergency.”



That same day, Democratic Senators Richard Blumenthal and Mark Warner [asked](#) Chairman Simons to investigate Google's alleged service of advertisements for the sale of face masks and hand sanitizer. In addition, the FTC, working with the Food & Drug Administration, has already [issued warning letters](#) to seven companies for fraudulently selling and promoting products for the treatment of COVID-19.

O'Melveny & Myers has developed a 50-state survey of price gouging statutes to assist you. Please let us know if you are interested in receiving a copy.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Ben Bradshaw, an O'Melveny partner licensed to practice law in California and the District of Columbia, Ian Simmons, an O'Melveny partner licensed to practice law in the District of Columbia and Pennsylvania, Katrina Robson, an O'Melveny partner licensed to practice law in California and the District of Columbia and Steve McIntyre, an O'Melveny counsel licensed to practice law in California, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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