

Price Gouging During a Pandemic

The Federal Government's Response

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On March 11, 2020, the World Health Organization (WHO) characterized the COVID-19 outbreak as a pandemic. Two days later, the US president declared a state of emergency in Proclamation No. 9994. One of the many problems that arise with a public health crisis is the shortage of essential medical supplies like ventilators, masks, and hand sanitizer. When these items become scarce, some businesses or entrepreneurs try to inflate their prices to make a higher profit when they know they can still sell these necessary items. These high costs on goods during disasters or emergencies can seem unfair and make it difficult for those who need them able to afford them. During these stressful times, it's important for Americans to recognize and report price gouging when they suspect fraudulent activity when purchasing items. Where do people find the authority on anti-price gouging laws? Typically, it is each state's responsibility, however, in times of crisis, the federal government could also do what is necessary to protect the public interests. This paper will assist people in understanding what price gouging is, how to recognize when price gouging is occurring, and how to report it. Additionally, this paper will address what responsibility the federal government has to protect Americans from price gouging schemes in times of crisis and what it is currently implementing to prevent these fraudulent actions.

At the beginning of 2020, many Americans were optimistic about what the new decade would bring. The economy was doing well, unemployment was low, and it was going to be an exciting election year. No one expected that less than three months into the year the world would be in a global phenomenon. On March 13, the US President Donald Trump announced a “National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreaks.”¹ The world was experiencing a pandemic. Within weeks many lost their jobs, restaurants, offices, and schools were closed, citizens were dying due to COVID-19, and essential items like personal protective equipment (PPE) became scarce.² Emergencies, like a

pandemic, create openings for fraudulent sales of demanded materials. Price gouging becomes an easy scam on unsuspecting consumers who are in a panic. Currently, there are no federal price gouging statutes, although several federal bills have been attempted through the decades.³ In fact, legislation against price gouging is mostly left up to the states. Thirty-four states, territories, and the District of Columbia have price gouging regulations for times of disaster or crisis.⁴ Although these price gouging penalties are mainly regulated by state and local governments, it is still important for citizens to know what the federal government's responsibility is to address price-gouging during a national crisis. Since this pandemic started, the federal government has begun to address this issue in many ways, including complaint forms, task forces, executive orders, legislation, and case law through district courts.

Defining, Recognizing, and Reporting Price Gouging During COVID-19

The term “price gouging” has been recently defined by the Senate in the bill “Prevent Emergency and Disaster Profiteering Act of 2020.” This bill states price gouging is “the sale of a good or service at an unconscionably excessive price by a person during an emergency period and in an emergency area.”⁵ It can be difficult to determine what “unconscionably excessive price” means and how that is determined. Many states, including California and Arkansas, declare goods sold at 10 percent or higher than what the good is normally sold for is considered price discrimination and is illegal.⁶ A good rule of thumb for consumers to follow is to ask themselves several simple questions to determine if price gouging is occurring: Do they think the seller has priced the item(s) unfairly? Do they feel taken advantage of with this price? Can they find the good(s) sold elsewhere for cheaper or did they see the item cheaper before there was a disturbance in the market? All of these questions are good indicators as to whether or not they are being unfairly treated

as a consumer. Finally, when in doubt, it never hurts to report the suspicion of price gouging. When reporting price gouging, it is important to remember the company or store name, their address, product details, the date, time, and location (online or physical) of where the product is being sold. It can also be useful to take a picture of the item and its information.⁷ Reporting can be done at the federal and state level.

The Department of Justice (DOJ) is the executive office that is responsible for investigating and prosecuting any potential federal criminal offenses. US Attorney General William Barr initiated the COVID-19 Hoarding and Price Gouging Task Force, which was formed to protect Americans from hoarding and price gouging of critical supplies. “Critical supplies” has been identified by the secretary of Health and Human Services (HHS) in a *Notice* listing items that may not be hoarded or sold for “exorbitant prices,” including personal protective equipment (PPE) (masks, shields, and gloves), respirators, ventilators, sterilization services, disinfecting devices, and medical gowns or apparel.⁸ The new HHS order makes it illegal for individuals to accumulate an excessive amount of materials that are now considered protected and scarce healthcare and medical items. Furthermore, this statute prohibits any persons from collecting these items and selling them “in excess of prevailing market prices.”⁹ The creation of this task force functions to oversee any price gouging, hoarding, and excessive market profiteering related to the COVID-19 pandemic.

The DOJ has created a page called “Combatting Hoarding and Price Gouging,” which states the department is committed to preventing fraudulent actions such as hoarding or price gouging of scarce medical supplies during an emergency. Any speculation of hoarding or price gouging should be reported by filling out a National Center for Disaster Fraud (NCDF) Disaster Complaint Form or by directly calling the NCDF. The NCDF complaint form should be used to report COVID-19–related price gouging on items like disinfecting devices, sterilization services, respirators, ventilators, face masks, gloves, and medical gowns.¹⁰ Barr states the DOJ “will aggressively pursue bad actors who amass critical supplies either far beyond what they could use or for the purpose of profiteering. Scarce medical supplies need to be going to hospitals for immediate use in care, not to warehouses for later overcharging.”¹¹ Additionally, if citizens need to report the conduct of price gouging on nonmedical or essential items, the DOJ recommends going to the USA.gov website to report this conduct to their individual state attorney general’s office or their local law enforcement agency. USA.gov lists each states’ attorney general contact information, which consumers can use to report price gouging at the state level.¹²

Executive and Congressional Action Against Price Gouging during COVID-19

Although the US government is committed to not interfering with the market, this *laissez-faire* attitude can be overturned in times of emergency when individuals are using this economic dislocation to extort consumers through high profiteering. Within the early months of the COVID-19 pandemic, the federal government has taken several steps to intercept price discrimination and hoarding of medical equipment and other scarce items.

One of the first steps of price-gouging prevention came on March 18, 2020. President Trump issued Executive Order 13909, providing HHS the authority to determine which health and medical resources were necessary to limit for preventative measures against COVID-19. This executive order, titled “Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19,” declares HHS has authority to work with other executive departments and agencies to prioritize and allocate all health and medical supplies, which includes controlling and overseeing distribution of scarce materials circulating in the market.¹³ A few days later, on March 23, Executive Order 13910, “Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19,” was signed by the president. This order gives authority to HHS to use whatever means necessary to negate price gouging and hoarding of medical resources imperative to stopping the spread of COVID-19.¹⁴

The president has the authority to impose necessary price and wage stabilization to supplies like PPE under The Defense Production Act of 1950 (henceforth “Act”). Under section 101 (a) of the Act, the president may create orders to “promote the national defense” and may allocate materials and services for this purpose as he sees fit. Section 101 (b) allows the president to manipulate the civilian market if “such material is a scarce and critical material essential to the national defense.”¹⁵ Additionally, the “Hoarding of Designated Scarce Materials” section states, “to prevent hoarding, no person shall accumulate . . . for the purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the president as scarce materials or materials the supply of which would be threatened by such accumulation.”¹⁶ The COVID-19 crisis is unlike anything the United States has ever experienced before in modern history. Therefore, under this Act, the president has the ability to prevent price gouging and hoarding of scarce medical resources to protect US citizens.

On the legislative level, the House and Senate are simultaneously working on several bills regarding price gouging and hoarding during COVID-19. At the time of this paper, none

of these bills have become law. The House has introduced three bills: H.R. 6450, H.R. 6472, and H.R. 6800. “The Price Gouging Prevention Act” (H.R. 6450) was introduced into the House on April 3. Its purpose is to “prevent price gouging during emergencies” and recognize that individuals may do business in bad faith in order to take an unfair advantage.¹⁷ If passed, it will curb excessive pricing to no more than 10 percent above the total cost to the seller, plus the customarily applied markup to make a profit once an emergency declaration has been made. This law would be enforced through the Federal Trade Commission (FTC), which has authority through the “Unfair or Deceptive Acts or Practices” section of The Federal Trade Commission Act.¹⁸ The bill also grants enforcement to state attorney generals to bring an action in state or district courts.¹⁹ The bill clarifies that under normal circumstances, the pricing of consumer goods should not be a government issue. However, when there is a disruption in the marketplace, like a crisis, then it is in the public’s interest to have the government enforce fair and just prices of essential goods. Several days after the “Price Gouging Prevention Act” was introduced into the House, a similar bill, the “COVID-19 Price Gouging Prevention Act” (H.R. 6472) was introduced. This bill’s purpose is to protect the public from price gouging connected to public health emergencies during the COVID-19 pandemic. Selling consumer goods or services at excessive prices due to the advantages of an unstable market caused by a public health emergency is deemed illicit.²⁰ Finally, the most recent bill involving price gouging was passed in the House on May 15: “The Heroes Act” (H.R. 6800) has the entire text of “COVID-19 Price Gouging Prevention Act” incorporated into it. H.R. 6800 is a multi-part bill that encompasses various aspects of COVID-19 prevention and preparation.²¹ Additionally, Subtitle A of the bill, “Supply Chain Improvements,” states that any price discrimination of essential medical resources related to COVID-19 detecting, diagnosing, preventing, and treating will be reported to the FTC and law enforcement.²² The Senate received this bill on May 20 and it was read for the first time on the following day.²³

On the other side of the aisle, the Senate has introduced three price gouging bills since the COVID-19 crisis: S. 3574, S. 3576, and S. 3853. “The Disaster and Emergency Pricing Abuse Prevention Act” (S. 3576) was introduced in the Senate on March 24. This bill gives authority to the FTC to condemn unjust price increases during an emergency where there have been significant disruptions in the market. Section 3 (a) of the bill states that “selling, or offering for sale, essential goods and services, in or affecting commerce, at an unconscionably excessive price during, or in anticipation of, a natural disaster, pandemic, or state of emergency, shall constitute an unfair or

deceptive act or practice under the Federal Trade Commission Act.”²⁴ The bill also would require the FTC to implement a “price gouging hotline” to receive complaints from consumers regarding excessive prices from sellers during states of emergency or during major disasters.²⁵ On May 7, the Senate introduced the “Prevent Emergency and Disaster Profiteering Act of 2020” (S. 3647). This bill prevents price gouging of essential items during national emergencies. This bill states it is unlawful “for any person to engage in price-gouging with respect to necessary good or services” listed and published by the secretary of the HHS or the administrator of the Federal Emergency Management Agency.²⁶ Currently, the only list identifying “necessary good or services” published by either of those agencies was by HHS. The most recent bill on prevention of price-gouging during emergencies was introduced on June 1. At the time of this paper’s publication, the title and text of the S. 3853 were still unavailable.²⁷

Federal Cases Involving Price Gouging

Since the COVID-19 pandemic was announced by the WHO on March 11, there have been multiple complaints of price gouging filed at the federal district court level. One company currently pursuing legal action in several lawsuits regarding price gouging is 3M. 3M is currently awaiting judicial orders for eight pending cases regarding trademark infringement, false advertising, and deceptive acts by other companies who are using 3M’s logo to sell N95 masks and respirators to the government and other consumers at excessive prices. 3M states that by using their signature “3M,” third-party actors are using price gouging to get more money from customers who believe they are purchasing supplies from 3M.²⁸ In the case, *3M Co. v. Performance Supply*, the plaintiff claims the “Defendant is using the ‘3M’ trademarks to perpetuate a false and deceptive price-gouging scheme on unwitting consumers, including agencies of government, in connection with the attempted sale of 3M’s N95 respirators during the global COVID-19 pandemic.”²⁹ 3M is one of the leading manufacturers of N95 respirators and has been selling these respirators to the federal government for decades. They claim these actions are tarnishing their reputation because their trademark is being misused and falsely advertised to consumers. Furthermore, these third parties are using this crisis to exploit customers and increase the demand of 3M-branded N95 respirators by claiming 3M’s prices increased due to lack of supply and therefore, these third-party distributors must sell these counterfeit ventilators at exorbitant prices (figure 1).³⁰ In this case, the court stated the trademark was being used falsely and under deceptive acts and the trademark owner would likely suffer if these actions continued. Additionally, it is in the

9. Defendant stated that it would sell the respirators for \$6.05 per mask for 2 million 3M 8210 masks and for \$6.35 per mask for 5 million 3M 1860 masks. See *id.* As shown in the table below, Defendant's mark-up over 3M's listed single-case prices is more than five times as much:

3M Model	3M's Per-Respirator List Price	Defendant's Per-Respirator Price	Markup
1860	\$1.27	\$6.35	500%
8210	\$1.02-\$1.31	\$6.05	460-590%

Figure 1. Defendant's mark-up over 3M's listed single-case respirator prices is more than five times as much.

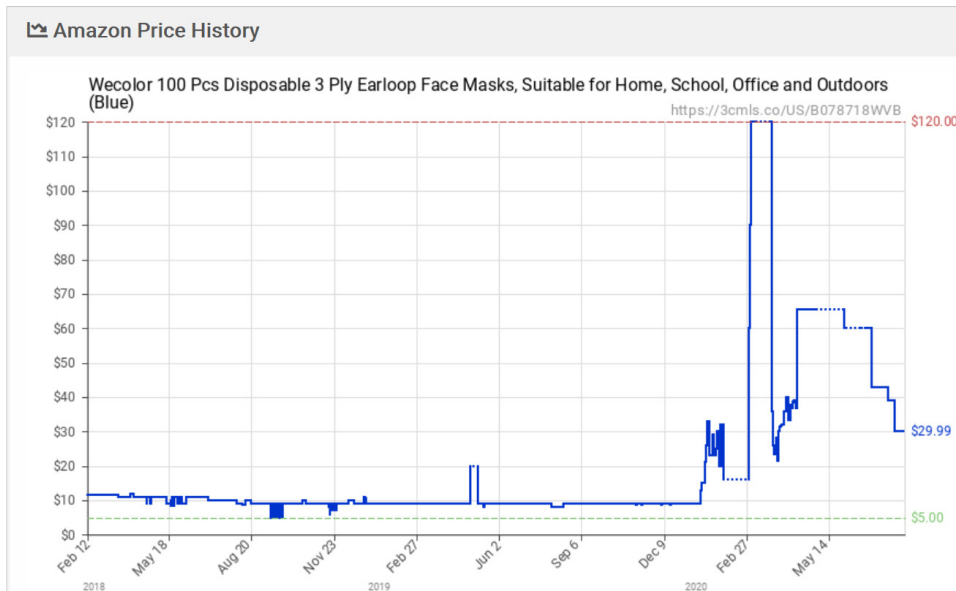


Figure 2. Amazon's Price History of 100 Pcs Disposable Earloop Face Masks from 2018-2020, <https://camelcamelcamel.com/product/B078718WVB>.

public's best interest if these actions were to cease: healthcare professionals and the public deserve trustworthy supplies "that are free of misrepresentations, false designation of origin, and unscrupulous profiteering."³¹ The court granted 3M's application for a temporary restraining order and a motion for preliminary injunction.

Large global corporations like Amazon are also being scrutinized for increasing their prices on basic necessities during the COVID-19 crisis. In a class action complaint, *McQueen v. Amazon.com, Inc.*, the plaintiffs claim that since the start of the pandemic, Amazon's prices for some categories, such as home items, have increased more than 1,000 percent. Face masks had been priced at \$20, and after the state of emergency was declared, they were increased to \$120, an increase exceeding 500 percent (figure 2).³² Additionally, pain relievers have increased in price from \$18.75, to \$62.40, an increase of 233 percent,

and disinfectants have increased more than 100 percent, from \$14.99 to \$29.99.³³ The plaintiffs state "Amazon has exploited vulnerable consumers by selling, and offering for sale, products at excessive prices during COVID-19 pandemic. Facing retail scarcity, and official warnings as to the risks of public interaction, consumers have turned to Amazon as a lifeline to obtain goods vital to their safety, health, and well-being."³⁴ Multinational corporations, like Amazon, who millions of people rely on for essential goods to be delivered to their houses, need to be leaders in times of crisis. Deceptive practices during times of hardship should not be tolerated and need to be remedied by the courts. As of June 4, this case is still pending.

More cases are still swiftly being filed with the district courts due to essential items being excessively priced. As of June 6, three more cases were filed regarding price gouging, including *Redmond v. Albertsons Companies, Inc.* in the US District Court for the Northern District of California on June 3.³⁵ Since case disputes could take weeks or months to be finalized, how the courts are handling these cases will become more apparent as time goes on.

Dissemination of Information and Access Issues

Accessing information on anti-gouging laws can be difficult for anyone. It can also be hard to understand who has authority and where to appropriately report price gouging. Most anti-gouging regulations resources come from each state's attorney general office, which can also be found on the USA.gov "Common Scams and Frauds" page (<https://www.usa.gov/common-scams-frauds>). More information on state laws and regulations on anti-gouging can be found on the website FindLaw on the "Price Gouging Laws by State" page (<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>). Additionally, state and territory regulations against price gouging can be found on the National Conference of State Legislatures (NCSL) website. The NCSL provides

a simple way for residents to compare price gouging restrictions between state and local governments.³⁶ If citizens are looking for federal action against price gouging, they can start with the DOJ's "Combating Price Gouging and Hoarding" page (<https://www.justice.gov/coronavirus/combatingpricegouginghoarding>). This can help them identify what price gouging is and whether reporting at the federal or state level is appropriate for their situation. If an investigation or criminal cases are initiated by the DOJ, these reports and cases should be accessible to the public on the DOJ website. Additionally, civil suits against bad actors of price gouging can be found through free case law sources like Google Scholar and Justia. All federal legislation regarding price gouging can be found on [Congress.gov](https://www.congress.gov). This website allows individuals to read the full text of each bill and it also allows bills to be monitored for their progress through Congress. Executive orders and other presidential documents can be found on the [Whitehouse.gov](https://www.whitehouse.gov/presidential-actions/) website on the "Presidential Actions" page (<https://www.whitehouse.gov/presidential-actions/>). All other executive documents regarding price gouging can be found on each executive department or agency website or in the Federal Register (<https://www.federalregister.gov/>). It is vital for consumers to understand their rights against excessive prices, especially during a pandemic. All of the resources stated above are great places to start searching for anti-gouging materials.

Conclusion

Over the past few months, the federal government has made increasing efforts to take on price gouging. It is evident by the executive orders, House and Senate bills, and the cases in federal court that price gouging during an emergency is not tolerated at the federal level. All three governmental branches have made it clear that it is their duty to intervene in the economic market during a national disaster for the public good. As time goes on, more cases against price gouging predators will arise in federal courts and, hopefully, federal anti-gouging bills will become law. Presently, there are no federal laws prohibiting gouging, but that all could change in the coming months.³⁷ All information regarding rights to fair prices during a crisis needs to be accessible to the public so they can take necessary action when they discover unfair prices.

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