COVID-19: COVID-19 CRISIS INCREASES RISK OF ANTITRUST AND PRICE GOUGING VIOLATIONS: PRACTICAL GUIDANCE AND MITIGATION STRATEGIES

Date: 25 March 2020

U.S. Antitrust, Competition & Trade Regulation Alert

By: Lauren Norris Donahue, Christopher S. Finnerty

The impacts of the COVID-19 pandemic are affecting nearly every industry around the world, creating unprecedented issues and challenges for businesses. Given these challenges, it is understandable if antitrust compliance is not likely top of mind for most business. However, companies that (1) recognize the increased risk of antitrust and price gouging infringements during this period of economic volatility; (2) understand where those risks are highest in their organization; and (3) take reasonable steps to mitigate that risk will be better positioned for the future and more likely to avoid significant penalties arising from any violations. Below, we explain why the COVID-19 crisis increases the risk of anticompetitive and price gouging violations and enforcement; discuss high-risk conduct that could lead to allegations of price gouging, price-fixing, bid-rigging, or market allocation; describe the types of competitor collaborations that would not run afoul of the antitrust laws, including new guidance from the U.S. antitrust agencies issued on March 24 regarding collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic; and provide practical guidance for mitigating the risk of infringement during the COVID-19 crisis.

COVID-19 CRISIS INCREASES RISK OF ANTITRUST AND PRICE GOUGING INFRINGEMENTS AND ENFORCEMENT ACTIONS

The COVID-19 pandemic is wreaking havoc on the global economy and within industries and businesses around the world. Supply and demand patterns have shifted almost overnight. There is an unprecedented demand for—and shortage of—personal protective equipment ("PPE") and other medical supplies, including face masks, ventilators, and hand sanitizer. Some businesses and factories are shifting production to these products given the increased demand, while many others have been forced by government orders or safety concerns to shut their doors and send workers home to help battle COVID-19 through social distancing. Consumer demand has quickly changed due to stay-at-home orders by businesses and/or governments. The cumulative effect has been significant strains on, and disruptions to, supply chains around the globe.

Companies selling products that are now in high demand may be tempted to increase their prices to maximize short-term profit, while others may be facing supply chain disruptions or an increase in costs that require price adjustments. Businesses selling products that have suddenly decreased in demand are facing the prospect of significant losses and, thus, will be eager to halt any price declines caused by the drop in demand. Coordinating with competitors may seem like a reasonable and efficient way to tackle some of these challenges, but doing so

©2005-2026 K&L Gates LLP. All Rights Reserved.

may increase a company's risk of violating the antitrust laws. Additionally, increasing prices for certain products during this time could run afoul of various state price gouging laws.

Many companies mitigate antitrust risk by implementing robust antitrust compliance programs that incorporate various policies and procedures meant to prevent and detect anticompetitive conduct. High-risk employees, such as those with sales and pricing responsibilities, usually receive antitrust training and may be required to comply with certain procedures to obtain pricing and/or sales approvals, or to communicate or coordinate with competitors in certain situations. However, the level of urgency and economic volatility caused by COVID-19 is creating unprecedented challenges for businesses and individuals, which may create an environment in which employees may be tempted to short circuit or even ignore their companies' antitrust compliance programs. Additionally, smaller businesses that do not have a formal antitrust compliance program may be unaware of the antitrust laws, and their employees may not have received the benefit of antitrust training, further increasing their antitrust risk during this crisis.

In addition to the increased risk of infringement, there is also an increased likelihood that misconduct will be detected, reported, and prosecuted. Enforcement agencies have already warned companies and individuals that they are closely monitoring business conduct during the COVID-19 crisis and that a failure to adhere to the antitrust laws (as well as other types of fraudulent conduct)[1] may result in severe consequences. Many have created dedicated hotlines for reporting suspect conduct. For example, on March 9, 2020, the Department of Justice ("DOJ") Antitrust Division released a public warning to the business community that they must remain compliant with U.S. antitrust laws during the COVID-19 crisis.[2] DOJ warned that they will "hold accountable" anyone who takes advantage of "emergency response efforts, healthcare providers, or the American people" by violating the antitrust laws.[3] In particular, DOJ warned that individuals or companies that fix prices or rig bids—particularly for PPE such as sterile gloves and face masks—could face criminal prosecution. Likewise, competitors who enter into agreements with each other to allocate markets amongst themselves could face criminal prosecution. While the warnings specifically referenced companies involved in the manufacture, distribution, and sale of public health products, businesses should expect DOJ to closely scrutinize suspect conduct involving any product or service during COVID-19. This is especially true for any sales to U.S. government entities in light of the DOJ's recent creation of the Procurement Collusion Strike Force ("PCSF"), which is specifically targeting anticompetitive conduct in the government procurement space (as discussed in depth here). DOJ specifically warned companies that the PCSF will be on high alert for collusive practices in the sale of personal health protection products to federal, state, and local agencies.

There have also been numerous warnings at the state level by the state attorneys general that state and local authorities are closely monitoring business conduct amid COVID-19 and will not hesitate to enforce state antitrust, price gouging, and consumer protection laws. Moreover, various state attorneys general are amending state laws to ensure that they are suited to address and enforce anticompetitive and other unfair conduct during the COVID-19 crisis.[4] Many of the state attorneys general have created dedicated hotlines for reporting potential misconduct—especially price gouging—and are encouraging citizens to make such reports.

Adding to the seriousness of these warnings, history has shown that there is almost always an increase in enforcement investigations and prosecutions following an economic crisis. Customer complaints to the various government agencies about suspect pricing or conduct tend to increase significantly. Competitors involved in the misconduct may be incentivized to quickly report misconduct to DOJ to take advantage of the DOJ's Amnesty

©2005-2026 K&L Gates LLP. All Rights Reserved.

Program or Amnesty Plus Program in an attempt to limit criminal liability. These risks are further magnified for sales to U.S. government entities due to the PCSF, which has been working closely with local agencies and procurement officers to educate them on the federal antitrust laws and train them to detect the red flags of anticompetitive conduct. Companies should expect the PCSF to work closely with local agencies and procurement officers to take a close look at all sales of PPE and other medical supplies that were made to the government leading up to and during the COVID-19 crisis. There is also an increased risk of civil actions, especially by customers or competitors who suffered financially during the crisis, and who later seek reimbursement for damages allegedly caused by misconduct.

VIOLATIONS OF THE U.S. ANTITRUST LAWS CAN RESULT IN SEVERE PENALTIES

The purpose of the federal antitrust laws is to promote a competitive marketplace and protect consumers. Violations of these laws can result in serious consequences for companies and any individuals directly or indirectly involved in an illegal agreement. Such consequences include:

- **Criminal Prosecution** under felony charges for both the corporation and culpable individuals (e.g., internal management, employees, or third parties). Corporations found guilty of criminal violations of the antitrust laws face significant fines (up to $100 million), while individuals may be subject to imprisonment (up to 10 years) and significant fines (up to $1 million).
- **Civil Enforcement Actions** by the DOJ and Federal Trade Commission ("FTC") that can result in broad-ranging injunctions governing future conduct.
- **Private Civil Lawsuits** by customers, employees, competitors, or third parties alleged to have been injured by the violation. Such lawsuits can be extremely costly to defend, both in terms of monetary costs and lost time of officers and employees, and can result in joint and several and treble damages (three times the losses suffered by the complaining party).

Many states also have state statutes that prohibit anticompetitive conduct. These state laws are enforced by state attorneys general, who generally have broad investigatory and enforcement powers. Penalties for violations vary by state, but many provide for substantial fines, damages, restitution, and injunctive relief. Many also allow for private rights of action.

PRICE GOUGING RED FLAGS AND PRACTICAL GUIDANCE

Price gouging refers to a seller's increase in price of an item or service during a declared state of emergency or other similar disaster. There is no federal anti-price gouging law (although President Trump's March 23 Executive Order formally implementing the Defense Production Act could have implications on the resale price of items that are deemed "scarce" by the Secretary of Health and Human Services);[5] rather, state statutory law prohibits price gouging. To date, 34 states and the District of Colombia have price gouging prohibitions. For states that prohibit price gouging during a declared state of emergency or similar event, there are generally three criteria to determine whether the law is applicable to a manufacturer or retailer's conduct:

- **Items Covered:** Most states do not prohibit an increase in price for all retailer products. Rather, whether price gouging laws apply depends on the product at issue–generally whether the product is considered

©2005-2026 K&L Gates LLP. All Rights Reserved.

necessary or essential. While certain states only target specific products, such as gasoline and fuel, PPEs are likely to be covered by a majority of the state statutes;

- **Extent of Price Increase:** Generally, price gouging laws prohibit an increase in price above a certain threshold or ceiling, generally above a given percentage of the average price preceding the state of emergency. Many, however, allow for a price increase if there is a legitimate cost increase due to the state of emergency; and
- **Length of Prohibition:** Price gouging laws typically extend for a period of time after a declared state of emergency—i.e., thirty (30) days thereafter.

Penalties for violating the anti-price gouging statutes vary by state, but many provide for serious penalties in the form of potential jail time, substantial fines, or prohibition of future sales.[6] Further, while a state may not prohibit price gouging by statute, an aggrieved consumer or other plaintiff may still address price gouging under general deceptive trade practice or consumer protection laws, depending on the specific circumstances under which the price increase occurred.

During the COVID-19 crisis, state attorneys general have been vocal in warning individuals and businesses that they will be closely monitoring for price gouging and will strictly enforce their state laws against any violators.[7] Moreover, as noted above, certain state attorneys general have gone so far as to amend their states' price gouging laws to specifically address price gouging with respect to public health and safety in the wake of COVID-19.[8] Many states have set up dedicated complaint hotlines, are encouraging citizens to report suspected price gouging, and are reporting a significant number of complaints.[9]

Companies should consider the following practical guidance to avoid running afoul of state price gouging and consumer protection laws:

- If you are selling a product that has significantly increased in demand since the start of the COVID-19 crisis (particularly PPE and other medical supplies that are in short supply), and have either increased or are considering increasing the price of your product, ensure a legitimate basis for doing so that is tied to an increase in costs and is not simply a significant increase in profit margin.
- Educate your sales team on the limitations imposed by the various state price gouging and consumer protection laws. This may be accomplished efficiently with the assistance of antitrust counsel through a list of do's and don'ts, a short teleconference, or a short online training.
- If possible, add checks and balances to the pricing-approval process to mitigate the risk of rogue employees pricing outside of the company's policies or directives. For example, depending on your company's IT software, it may be possible to flag pricing that could raise concerns and require further business approval or legal advice prior to making the sale.
- On the buyer side, antitrust counsel can provide talking points for your supply chain team to assist in combatting price gouging and can also advise on any legal recourses that may be available to you.
- Consult antitrust counsel on specific state statutes and/or if you have any concerns or questions.

©2005-2026 K&L Gates LLP. All Rights Reserved.

PRICE-FIXING, BID-RIGGING, MARKET ALLOCATION AGREEMENT RED FLAGS, AND PRACTICAL GUIDANCE

As noted above, many businesses are currently experiencing significant increases or decreases in demand and changes to cost structure that may impact pricing structures. Businesses may be tempted to discuss these changes or coordinate approaches to the market with their competitors. While companies are generally free to independently price their products and services as they see fit, agreements between competitors regarding prices or components of price (such as discounts or emergency surcharges), or agreements to divvy up customers or markets, may be per se illegal agreements that violate federal and state antitrust laws and are subject to criminal prosecution and civil liability. Businesses should be mindful of the following types of agreements that pose the highest antitrust risk amid COVID-19:

- **price-fixing,** whereby competitors agree to raise, stabilize, or even lower prices or price levels for a product or service; "price-fixing" broadly includes any agreement intended to manipulate the free-market determination of price;
- **bid-rigging,** whereby competitors agree to manipulate a competitive bidding process to eliminate competition, the result of which is usually to increase the price of the product or service to the customer; and
- **market or customer allocation,** whereby competitors agree to divide up markets or customers of a product or service, including exclusive rights to certain customers or types of customers, divisions of geographic portions of a market, or divisions based on total market percentages or numbers of customers.

An agreement need not be formal or in writing to violate the antitrust laws; instead, any kind of informal or "gentlemen's agreement" or other tacit or implied understanding of anticompetitive conduct is similarly prohibited. In this regard, unlawful arrangements may be inferred from circumstantial evidence. For example, exchanges of competitively sensitive information related to facets of competition—e.g., pricing, customers, markets, etc.—among competitors can be used to infer an agreement.

As noted above, violations of the antitrust laws can result in serious consequences and the risk of infringement is significant at this time given the volatility and challenges created by COVID-19. Below are a few important steps businesses and individuals can take to avoid liability under the antitrust laws during the COVID-19 crisis:

- Ensure high-risk employees (e.g., those with sales or pricing responsibilities) are familiar with the antitrust laws, particularly the do's and don'ts of competitor communications. If you previously provided training, this may mean circulating a quick refresher on the key do's and don'ts. If you have not provided training, consider scheduling a training webinar or teleconference with antitrust counsel to ensure your sales staff is sufficiently familiar with the antitrust laws and the type of conduct the antitrust laws prohibit.
- Continue to make independent business decisions regarding pricing, customers, markets, discounts, and other competition-related facets of your business. To the extent that there are concerns that certain decisions may be inferred by a third party as having been based on an anticompetitive agreement, the decision-makers should contemporaneously document their independent bases for the business decisions so as to memorialize their competitive nature.

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Abstain from sharing competitively sensitive information with competitors regarding prices, sales, margins, or customers, absent a reasonable and legitimate purpose for doing so. This precludes sharing both current and future-looking competition-related information.
- If your company has an antitrust compliance program, exercise hyper vigilance in following its policies and procedures, although some aspects of it may require tweaks to allow for expedited action (e.g., pricing approvals). If there are aspects of your compliance program that are hindering the speed and/or efficiency of business decisions needed to respond to the current crisis, consult with antitrust counsel to determine alternative solutions that will continue to mitigate the company's antitrust risk.
- Consult antitrust counsel if you have any concerns or questions.

COLLABORATIONS AMONG COMPETITORS IN RESPONSE TO COVID-19

While the antitrust laws are designed to protect consumers from illegal activity among competitors, the laws also recognize that there are many types of beneficial collaborations that produce net procompetitive benefits for consumers and that these procompetitive collaborations should be accommodated and encouraged. This is particularly true during times of national emergency, where outside forces like COVID-19 disrupt or shutter vital production facilities and numerous other business, thus requiring a range of collaborative efforts among competing firms.

On March 24, DOJ and FTC (the "Agencies") issued a joint statement addressing competitor collaborations amid COVID-19, detailing an expedited antitrust procedure and providing guidance for collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic.[10] The Agencies recognized the increased need for, and procompetitive benefits of, certain types of collaborations during this time. For example, "health care facilities may need to work together in providing resources and services to assist patients, consumers, and communities affected by the pandemic and its aftermath," while other "businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies." The Agencies committed to providing "expeditious guidance" to any individuals or businesses responding to the national emergency "about how to ensure their efforts comply with the federal antitrust laws." While these types of business reviews usually take several months, the Agencies committed to responding to all COVID-19-related requests within seven (7) calendar days of receiving all necessary information.

Companies considering or currently engaging in coordination or collaboration with competitors in response to the COVID-19 crisis—particularly high-risk collaborations or exchanges of competitively sensitive information—should seek the opinion and guidance of antitrust counsel and, if appropriate, expedited guidance and/or approval from the Agencies. Key to the analysis will be ensuring that a legitimate business justification exists that would pass antitrust muster and putting in place appropriate safeguards to avoid any anticompetitive conduct that would fall outside of the legitimate collaboration.

PLANNING AHEAD: CONSIDER CONDUCTING A COMPLIANCE AUDIT IN THE AFTERMATH OF COVID-19

©2005-2026 K&L Gates LLP. All Rights Reserved.

The COVID-19 crisis will eventually—and hopefully in the near future—end, and normal marketplace activities and conditions will resume. At that time, it is reasonable to expect an increase in the government's antitrust investigations and enforcement proceedings, as well as private civil actions brought by consumers and competitors.

In preparation, it would be prudent for companies to consider conducting an antitrust audit as soon as possible in the aftermath of COVID-19 to ensure they remained compliant with the antitrust laws during the crisis. In the event misconduct is uncovered, a company may be able to reduce its liability by applying for amnesty under the Antitrust Division's Leniency Program.[11] Speed is of the essence, however, as only the first to report will receive the full benefits of leniency.[12]

CONCLUSION

This is an extremely challenging time, and we recognize that many businesses may be overwhelmed with the unprecedented challenges they are facing. The K&L Gates Antitrust, Competition & Trade Regulation team is closely monitoring the COVID-19 situation and stands ready to assist companies who are navigating multiple and sometimes conflicting demands. We are well positioned to provide antitrust guidance and to help companies with all aspects of their compliance programs to mitigate antitrust risk. We also have significant experience advising and defending companies and individuals facing actual or potential investigation or prosecution for antitrust violations.

---

[1] For an in depth discussion of other government enforcement priorities by federal and state authorities amidst the COVID-19 crisis—including various fraudulent schemes—see our Investigations, Enforcement and White Collar practice group's alert here.

[2] Department of Justice Antitrust Division, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products* (Mar. 9, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing.

[3] *Id.*

[4] *See, e.g.,* Amendment to 940 CMR 3:18, *Price Gouging* (On March 20, 2020, the Massachusetts attorney general amended the state's price gouging law, explaining: "this regulation in its present form addresses only the sale of gasoline and other petroleum products. Accordingly, the attorney general now amends 940 CMR 3:18 to add two additional paragraphs that prohibit price gouging with regard to goods or services necessary for the health, safety or welfare of the public during a declared statewide or national emergency.").

[5] Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, Mar. 23, 2020, *available at*: https://www.whitehouse.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/.

[6] Enforcement of the various anti-price gouging statutes varies by state, although most are enforced exclusively by the state attorney general and do not allow for a private right of action. However, many of these statutes

©2005-2026 K&L Gates LLP. All Rights Reserved.

specifically state that a violation of the anti-price gouging statute is also a violation of the state consumer protection act, which generally does allow for a private right of action.

[7] *See, e.g.,* Illinois Office of the Attorney General, "Attorney General Raoul Will Take Action to Stop Price Gouging on Items Related to the Coronavirus," (Mar. 17, 2020) *available at* https://illinoisattorneygeneral.gov/pressroom/2020_03/20200317b.html; California Office of the Attorney General, "Attorney General Becerra Calls on Online Marketplaces to Up Their Game to Combat COVID-19 Price Gouging on Their Platforms," (Mar. 20, 2020) available at: https://oag.ca.gov/news/press-releases/attorney-general-becerra-calls-online-marketplaces-their-game-combat-covid-19; Texas Office of the Attorney General, "AG Paxton: Retail Supply Chains Will Be Held Liable for Price Gouging," (Mar. 21, 2020) *available at:* https://www.texasattorneygeneral.gov/news/releases/ag-paxton-retail-supply-chains-will-be-held-liable-price-gouging.

[8] *See, e.g.,* Amendment to 940 CMR 3:18, Price Gouging (amendment to Massachusetts' price gouging prohibition).

[9] *See, e.g.,* Pennsylvania Office of the Attorney General, "UPDATE: AG Price Gouging Complaints Surpasses 1,000 Tips," (Mar. 17, 2020) *available at:* https://www.attorneygeneral.gov/taking-action/updates/update-ag-price-gouging-complaints-surpasses-1000-tips/ (reporting that the Pennsylvania Office of Attorney General received over 1,000 reports of suspected price gouging as of Mar. 17, 2020); New York Office of the Attorney General, "Price Gouging Complaint Form," *available at* https://ag.ny.gov/price-gouging-complaint-form (reporting a significant volume of price gouging complaints and directing consumers to further file complaints with the NYC Department of Consumer Affairs, which recently adopted a temporary emergency rule making it illegal to drastically increase prices (10 percent or more) on the following items, absent an increase in costs: cleaning products; diagnostic products and services; disinfectants (wipes, liquids, sprays); face masks; gloves; hand sanitizer; medicines; paper towels; rubbing alcohol; soap; and tissues).

[10] *See* Joint Antitrust Statement Regarding COVID-19, Department of Justice Antitrust Division & Federal Trade Commission (Mar. 24, 2020), *available at* https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[11] Under the Antitrust Division's Leniency Program, corporations and individuals who report their anticompetitive conduct and cooperate in the DOJ's investigation of the cartel reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program.

[12] While only the first to report will receive the full benefits of the Leniency Program, DOJ recently acknowledged that it will consider a company's antitrust compliance program—including timely self-reporting—when deciding whether to bring criminal antitrust charges against a company and when making a sentencing recommendation. See Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, U.S. Department of Justice, Antitrust Division (July 2019), *available at* https://www.justice.gov/atr/page/file/1182001/download. To read more about DOJ's evaluation of a company's antitrust compliance program, go here.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



LAUREN NORRIS DONAHUE
PARTNER

CHICAGO
+1.312.807.4218
LAUREN.DONAHUE@KLGATES.COM



CHRISTOPHER S. FINNERTY
PARTNER

BOSTON
+1.617.261.3123
CHRIS.FINNERTY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.