



February 1, 2022

Rep. Jan Schakowsky, Chair
Rep. Gus M. Bilirakis, Ranking Member
Consumer Protection and Commerce Subcommittee
House Energy and Commerce Committee
US House of Representatives
Washington, DC 20515

February 2, 2022 Hearing on "Pandemic Profiteers: Legislation To Stop Corporate Price Gouging"

Dear Chair Schakowsky and Ranking Member Bilirakis,

Consumer Reports is pleased the Subcommittee is holding this hearing to examine problems related to price gouging for consumer products and medical supplies during the COVID-19 pandemic.

Price gouging refers to when suppliers, distributors and retailers and others take advantage of spikes in demand by charging exorbitant prices for necessities. In a health emergency, consumers need to have reliable and affordable access to personal protective equipment, medical supplies, groceries, and other products and services that are essential for meeting household needs. They should not be compelled to pay excessive prices because of opportunistic seller behavior. Exploiting an emergency situation by implementing large price increases to boost profits has all the hallmarks of an unfair trade practice, which should be discouraged and regulated by states and the federal government, so that all consumers can have fair access – at fair prices – to products to meet essential needs.

According to the National Conference of State Legislatures, 39 states, Guam, Puerto Rico, the U.S. Virgin Islands and the District of Columbia have statutes or regulations that prohibit price gouging during a time of disaster or emergency. In most states, price gouging is prohibited as a violation of unfair or deceptive trade practices law. Most of these laws provide for civil penalties, as enforced by the state attorney general, while some state laws also enforce criminal penalties for price gouging violations.¹

Federal law does not currently specifically prohibit price gouging. Section 5 of the Federal Trade Commission Act (FTCA) prohibits "unfair methods of competition" and "unfair or deceptive acts or practices," but this statute has not been applied to price gouging. However, the Defense Production Act (DPA) authorizes the president to order that "designated" materials that are necessary to promote the national defense cannot be accumulated beyond reasonable business or personal needs. Using that authority, in March 2020, President Trump issued Executive Order 13910, which delegated the president's authority to designate particular items as protected under the Defense Production Act to the Secretary of Health and Human Services (HHS).² On March 25, 2020, HHS Secretary Azar designated

¹ National Conference of State Legislatures, Price Gouging State Statutes, 5/17/21, available at:

<https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx>

² President Donald J. Trump, Executive Office of the President, *Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19*, 3/23/20, Federal Register, available at:

numerous items to be protected against accumulation under the DPA, including respirator masks, respirators, ventilators, certain types of sanitizing devices and products,, and personal protective equipment (gowns, masks, gloves, etc.).³

The US Department of Justice has taken the lead on price gouging at the federal level by monitoring for and investigating allegations of unlawful price gouging and by bringing criminal prosecutions against the alleged price gougers. The FTC remains less likely to take action regarding price gouging without new legislation, because the issue is not clearly enough within its legal mandate.⁴

Early in the COVID-19 pandemic, many businesses hiked prices for personal protective equipment and household necessities, and state regulators received literally thousands of complaints. For example, a New Jersey company admitted to marking up the price of 100,000 KN95 respirator masks from \$1.09 to \$5.25 apiece for sales through a grocery chain.⁵ Two Long Island, NY brothers admitted hoarding millions of surgical masks and reselling them to the state of Oklahoma at a 900% markup, and were later ordered to pay \$1 million in restitution to the state.⁶ A Troy, NY man purchased 100,000 KN95 face masks and 25,000 surgical face masks at \$1.50 each and offered them for sale at his pizza restaurant for up to 10 times his acquisition cost; he was later sentenced to 3 years of probation.⁷ Pennsylvania Attorney General Josh Shapiro cited a Philadelphia company in August 2020 for marking up the price of bottles of hand sanitizer to \$75, to make “exorbitant profits” from consumers.⁸

In March 2020, more than 30 state attorneys general sent letters to Facebook, Amazon, Craigslist, eBay and Walmart urging them to crack down on price gouging in online sales. Amazon stated that it had removed more than half a million listings for price gouging and suspended 3,900 sellers.⁹

<https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19>

³ Secretary of Health and Human Services Alex Azar, *Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950*, 3/25/20, available at:

<https://www.hhs.gov/sites/default/files/hhs-dfa-notice-of-scarce-materials-for-hoarding-prevention.pdf>

⁴ Hayes, Natalie. *Price Gouging Enforcement During the Covid-19 Pandemic*, Anti-Trust Health Care Chronicle, Vol. 34, Issue 1, December 2020, available at: <https://www.weil.com/-/media/files/pdfs/2020/aba-antitrust-health-care-chronicle-december-2020-vol.pdf>

⁵ Goldman, Jeff. *NJ Company Admits Price-Gouging On 100K Masks at Start of COVID-19 Pandemic*, Newark Star-Ledger 12/9/21, available at: <https://www.nj.com/coronavirus/2021/12/nj-company-admits-price-gouging-on-100k-masks-at-start-of-covid-pandemic.html>

⁶ US Department of Justice, US Attorney’s Office, Eastern District of New York. *Long Island Businessmen Plead Guilty to Hoarding and Price-Gouging of Scarce Personal Protective Equipment*, 9/8/21, available at:1 <https://www.justice.gov/usao-edny/pr/long-island-businessmen-plead-guilty-hoarding-and-price-gouging-scarce-personal>

⁷ Cook, Steven, *Feds: Troy Man Sentenced for Hoarding Masks at Pandemic’s Start, Then Gouged on Resale*, The Daily Gazette, 9/3/21, available at: <https://dailygazette.com/2021/09/02/feds-troy-man-sentenced-for-hoarding-masks-at-pandemics-start-then-gouged-on-resale/>

⁸ Hetrick, Christian, *Philly Company Charged \$75 for Hand Sanitizer Bottles in Illegal Price Gouging, AG Shapiro Says*, Philadelphia Inquirer, 8/20/20, available at: <https://www.inquirer.com/business/price-gouging-hand-sanitizer-amazon-lawsuit-pandemic-20200820.html>

⁹ Levenson, Michael. *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, The New York Times, 3/27/20, available at: <https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html>

By July 2020, over 49,000 complaints were received by state regulators regarding incidents of price gouging in 22 states, according to Accountable.US.¹⁰ The problem has continued throughout the United States over the last year and a half, with state attorneys general and local consumer protection agencies receiving many additional thousands of complaints about incidents of price spikes for essential products. In November 2021, New York City reported that it had received more than 12,000 price-gouging complaints and had issued more than 15,000 violations for price gouging since the inception of the pandemic. The City also reported that incidents of price gouging were more prevalent in low-income and Black and Hispanic neighborhoods, where residents were hardest hit by COVID-19 infections, a pattern that is likely playing out in other parts of the country.¹¹ The high cost of PPE and COVID-19 test kits is especially burdensome for low- and moderate-income consumers, essential workers, parents of school-age children who may need to test more frequently to attend work or school, and people on fixed incomes.¹²

As 2022 began, despite the efforts of state and federal authorities, consumers and medical providers have continued to struggle to obtain adequate supplies of masks and COVID test kits at affordable prices.¹³ In mid-January, Bloomberg News reported that prices for KN95 masks had spiked as demand increased during the Omicron surge, with one pack of 40 masks being sold for \$79.99 from third-party sellers on Amazon, up from just \$16.99 in late November.¹⁴ Washington Attorney General Bob Ferguson reported that he has received 1,300 complaints from consumers who saw at-home COVID-19 test kits being sold online for nearly triple the retail prices charged in local pharmacies.¹⁵

During an unprecedented and enduring crisis like COVID-19, it is crucial to protect consumers from being subjected to unfair and excessive prices for medical supplies and essential consumer goods, and to ensure that federal and state law enforcement officials have the full arsenal of effective enforcement tools they need to stop violations. For these reasons, we urge the committee to carefully consider the extremely negative impacts on consumers that have been caused by exploitative pricing practices by

¹⁰ Accountable.US, *Report: Lack of Price Gouging Enforcement by Department of Justice Has Led to Abuse of Taxpayer Dollars*, 7/6/2020, available at: <https://www.accountable.us/news/report-lack-of-price-gouging-enforcement-from-doj-has-led-to-abuse-of-taxpayer-dollars/>

¹¹ *Federal Court Dismissed Challenge to NYC's Price Gouging Rule: Enforcement During COVID-19 Pandemic Not Unconstitutional*, New York City Department of Consumer and Worker Protection, 11/21/21, available at: <https://www1.nyc.gov/site/dca/media/pr112321-Federal-Court-Dismisses-Challenge-Price-Gouging.page#:~:text=Federal%20Court%20Dismissed%20Challenge%20to%20NYC's%20Price%20Gouging%20Rule&text=Hatch%20announced%20that%20the%20United,during%20the%20pandemic%20was%20unconstitutional.>

¹² *Cost of masks and tests deepens a pandemic wedge between the haves and the have-nots*, NBC News, 1/17/22, available at: <https://www.nbcnews.com/health/health-news/costs-masks-rapid-tests-further-pandemic-response-haves-nots-rcna12300>

¹³ Office of Inspector General Christi A. Grimm, U.S. Department of Health and Human Services, *Hospitals Reported That the COVID-19 Pandemic Has Significantly Strained Health Care Delivery*, 3/23/21, available at: <https://oig.hhs.gov/oei/reports/OEI-09-21-00140.asp> See also Consumer Reports, *How Much Should It Cost To Get Tested for COVID-19?* 1/6/22, available at: <https://www.consumerreports.org/covid-19/how-much-should-it-cost-to-get-tested-for-covid-19-a1011758904/>

¹⁴ Claire Ballentine, C. and Egkolfopoulou, M., *N95 Mask Prices Hit 'Ridiculous' Highs on Speculation Over CDC Guidance*, Bloomberg Wealth, 1/12/22, available at: <https://www.bloomberg.com/news/articles/2022-01-12/n95-kn95-or-cloth-masks-prices-surge-as-cdc-weighs-new-recommendations?sref=rrlvS2th>

¹⁵ Brown, Sydney, *State AG: Price-Gouging on At-Home COVID-19 Draws Scrutiny of State Attorney General*, The Spokesman-Review, 1/18/2022, available at: <https://www.spokesman.com/stories/2022/jan/18/price-gouging-on-at-home-covid-19-tests-has-become/>

retailers, distributors and online sellers, and to develop stronger federal policies to deter and prevent this harmful and unethical conduct.

HR 675, the COVID-19 Price Gouging Prevention Act, would make price gouging during the COVID-19 pandemic an unfair and deceptive practice under the Federal Trade Commission Act, and empower the FTC and state attorneys general to investigate and hold companies that engage in excessive, unconscionable pricing accountable under federal law. The term “good or service,” is defined in the bill to mean a good or service offered in commerce, and includes, but is not limited to, food, water, personal protective equipment, respirators, medical supplies, cleaning supplies, sanitizers, healthcare services, delivery services or cleaning services.

The bill provides the following factors for consideration in determining whether price gouging has occurred:

- Whether the price grossly exceeds the average price that the same good or service was sold for the 90-days before January 31, 2020, or during the same 90-day period of the previous year;
- Whether the price grossly exceeds the average price of the same good or service sold by other similarly situated sellers during the same period; and
- Whether the price reasonably reflects additional costs to the seller or the profitability of forgone sales.

The proposed language in the bill creates a sound and reasonable definition for unconscionable pricing practices that will improve federal and state oversight of the marketplace, encourage more affordable pricing for essential medical supplies and consumer products, and create a stronger national deterrent against predatory pricing practices.

We look forward to working with the Subcommittee and Congress to enact strong and effective federal prohibitions against price gouging.

Sincerely,



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