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## CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

### MEMORANDUM

TO: Julie Anna Potts, President and CEO, NAMI  
Mark Dopp, Senior VP, General Counsel, NAMI

FROM: Karen Kazmerzak

RE: Pricing Considerations in Light of State Price Gouging Laws Triggered by  
Covid-19 States of Emergency

DATE: March 23, 2020

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In response to your request, this memorandum provides an overview of what may constitute unlawful price gouging in the United States. Price gouging is generally understood to refer to significant price increases, frequently in conjunction with unusual market conditions. Despite this general understanding, there is no federal statute identifying price gouging as a legal violation, and states that prohibit price gouging have not adopted a common definition or standard to describe the practice.

As governors across the country declare states of emergency in response to the Covid-19 pandemic, a number of states' price gouging laws were triggered, and companies will enter new terrain when it comes to the parameters they must follow when setting prices. Under normal circumstances, a company acting independently typically is free to set prices for its goods and services if done independently. The U.S. does not prohibit a company from unilaterally increasing its prices absent anticompetitive conduct, even in a state of emergency. Many states, on the other hand, have enacted "price gouging" laws prohibiting the practice of raising prices on certain types of goods and services to an unfair level whenever the state has declared an emergency.

When in effect, a price gouging law deems a company's pricing to be unlawful if the company raises prices by some amount deemed to be "unconscionable" or "excessive." Most state laws cover excessive pricing of food, gasoline, and other goods and services that are vital and necessary, such as medical supplies.

Because price gouging is governed at the state level, each state has its own definition for price gouging, with some using a set percent increase and others applying a more subject standard. For example, California defines excessive as price increases on basic goods that exceed 10%. [California Penal Code 396 – Price Gouging](#). New Jersey, Oklahoma, and Utah also use a 10% threshold. Utah's price gouging prohibition is triggered by the sum of 10% above the total cost to the company of obtaining the good and the company's customary markup, [UT Code 13-41-201](#) et seq., whereas New Jersey's law is triggered if prices increase more than 10% over what the company had priced its goods prior to the state of emergency, [NJ 56 § 8-107](#) et seq.

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Arkansas also uses a 10% cap as a general rule for increased pricing on “essential consumer goods and services” in a state of emergency. This broadly includes “goods and services that are vital and necessary for the health, safety, and welfare of consumers,” and is meant to “be liberally construed so that its beneficial purposes may be served.” [AR Code § 4-88-301](#).

Other states do not define price gouging in specific terms. While Connecticut, Florida, Washington, D.C., and Georgia also prohibit excessive price increases on certain goods and services, they (and other states) do not provide a threshold. Such broad definitions make it far more difficult for a company to know where the line is between lawful and unlawful price adjustments.

States have already been actively monitoring price gouging activities since the Covid-19 crisis arose. Attorney generals in [California](#) and [Arkansas](#) sent letters urging online marketplaces to combat price gouging. The California Attorney General characterized price gouging during a national emergency as “disgraceful” and “illegal,” and encouraged platforms to supplement algorithms with human review to track any potential price gouging and to alert the California Attorney General to any bad actors on their platform. In letters to Amazon, eBay, and Walmart, the Arkansas Attorney General commended the efforts of the online retail platforms to stop bad actors and “committed to working with online retail platforms to hold pandemic profiteers accountable to the full extent of the law.”

Some states have announced investigations or alleged possible violations. The [New Jersey Division of Consumer Affairs](#) has redirected its resources to investigating price gouging complaints while the [New York Attorney General](#) issued a cease and desist letter to merchants that charged excessive prices for hand sanitizer and disinfectant sprays. Many states will likely initiate similar investigations soon if they have not done so already.

Although a company’s unilateral decision to increase prices is not unlawful under the federal antitrust laws, if followed by others, it can raise scrutiny that competing firms have used some mechanism to coordinate their interactions. The [U.S. Attorney General](#) announced that the Department of Justice would hold companies accountable for any antitrust violations in connection with the Covid-19 crisis and [Canada’s Competition Bureau](#) has issued a similar reminder. Even if an allegation is baseless, any alleged antitrust violations against one company in an industry, can broaden into an industry-wide investigation. For example, the [Federal Trade Commission initiated a months-long investigation](#) of alleged price gouging after Hurricane Katrina. It looked at operating margins and pricing relative to market trends at all levels, across the entire industry. It is likely the federal antitrust agencies would engage in similar investigations into any industries that demonstrate a pattern of price increases during this crisis.

Do not hesitate to reach out to me if you have additional questions relating to pricing conduct during the Covid-19 crisis.