

Written Testimony of

Alex Harman
Competition Policy Advocate, Public Citizen

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on

“Pandemic Profiteers: Legislation to Stop Corporate Price Gouging”

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Thank you, Chairwoman Schakowsky, Ranking Member Bilirakis, and other members of the Subcommittee for the opportunity to testify before you on corporate price gouging and profiteering during the Coronavirus pandemic.

I am Alex Harman, Competition Policy Advocate for Public Citizen's Congress Watch division. Public Citizen is a national nonprofit organization with more than 500,000 members and supporters across the country. For the past 50 years, we have successfully represented the public interest through litigation, research, public education, and legislative, administrative, and grassroots advocacy on a broad range of issues, including consumer protection and consolidation of corporate power.

I think it is important to first explain what price gouging is. For those of us who remember our basic economics classes we learned that supply and demand are supposed to result in a market-based price that reflects what consumers are willing to pay, and when a price rises too high above that, a competitor will respond with a lower price or consumers will find an alternative. Price gouging is where that supply and demand process is distorted by an emergency situation that puts the seller in the position of dictating a price above market because consumers have no other choice but to pay. At its best, it is exploitive of consumers across the board—but at its worse, it specifically targets people at their most vulnerable, making conditions even worse for them.

Price Gouging During the Pandemic

Unfortunately, even before the country faced the lockdowns, closures, and shortages of essential goods that were to come due to a result of the Coronavirus pandemic, price gouging was already underway. In fact, by the time the first U.S. death from COVID-19 had been reported on February 29, 2020,¹ reports of price gouging on sales of protective masks on Amazon had already resulted in a warning from Amazon to third-party sellers against engaging in price gouging.² Then, brick and mortar retail stores such as Target, Costco, and Kroger began to impose quantity limits on products such as toilet paper, hand sanitizer, and disinfectants.³ But where physical stores had empty shelves, online sellers instead charged excessive prices⁴. As the pandemic worsened, so too did the price gouging.

¹ Nicole Acevedo and Minyvonne Burke, *Washington State Man Becomes First U.S. Death From Coronavirus*, NBC NEWS (Feb. 29, 2020), <https://www.nbcnews.com/news/us-news/1st-coronavirus-death-u-s-officials-say-n1145931>. Note, it was later reported that the first U.S. death from COVID-19 was actually February 6, 2020: Dennis Romero, *1st U.S. Coronavirus Death Was Weeks Earlier Than Initially Believed*, NBC NEWS (Apr. 21, 2020), <https://www.nbcnews.com/news/us-news/first-u-s-coronavirus-death-happened-weeks-earlier-originally-believed-n1189286>.

² Louise Matsakis, *As Covid-19 Spreads, Amazon Tries to Curb Mask Price Gouging*, WIRED (Feb. 25, 2020), <https://www.wired.com/story/covid-19-amazon-curb-face-mask-price-gouging/>.

³ Bailey Miller and Steve Nielsen, *Panic Buying Continues Amidst Coronavirus Outbreak as Stores Impose Purchase Limits*, FOX 10 PHOENIX (Mar. 9, 2020), <https://www.fox10phoenix.com/news/panic-buying-continues-amidst-coronavirus-outbreak-as-stores-impose-purchase-limits>.

⁴ Jessica Guynn, Mike Snider, and Kelly Tyko, *Coronavirus Fears Spark 'Panic Buying' of Toilet Paper, Water, Hand Sanitizer. Here's Why We All Need to Calm Down*, USA TODAY (Mar. 2, 2020),

As prices spiked on Amazon, leading to continued accusations of price gouging on its online marketplace, the company responded by blaming the skyrocketing prices on “bad actors” that sell on its website.⁵ Amazon claimed that it took several steps to curb price gouging including calling for price gouging legislation.⁶

However, six months into the pandemic Public Citizen issued a report in which we uncovered an ongoing pattern of significant price increases on essential products sold directly by Amazon, as well as price gouging by third-party sellers.⁷

As the pandemic has continued, price gouging has shifted to a broad array of products and unfortunately normalized. Most recently, as the Omicron variant took hold, there were reports of price gouging on COVID tests.⁸ Consumers and policymakers cannot be blamed for wondering if price increases on essential products are at least in part due to price gouging.

Soaring Corporate Profits

Many Americans experienced the pandemic facing unemployment, financial hardship, or in dangerous conditions on the front lines of the health and service industries.⁹ However, for the biggest companies the pandemic proved to be goldmine of increased profits and significant growth. Amazon, Walmart, Kroger, and many others experienced significant profit increases in 2020.¹⁰ In the second year of the pandemic sales profits continued to rise to record levels for

<https://www.usatoday.com/story/money/2020/03/02/coronavirus-toilet-paper-shortage-stores-selling-out/4930420002/>.

⁵ Jeff Bezos, *2019 Letter to Shareholders*, Amazon (Apr. 16, 2020),

<https://www.aboutamazon.com/news/company-news/2019-letter-to-shareholders>.

⁶ Brian Huseman, *It's Time for Congress to Establish a Federal Price Gouging Law*, AMAZON (May 13, 2020), <https://www.aboutamazon.com/news/policy-news-views/its-time-for-congress-to-establish-a-federal-price-gouging-law>.

⁷ Alex Harman, *Prime Gouging*, PUBLIC CITIZEN (Sept. 9, 2020), <https://www.citizen.org/article/prime-gouging/>.

⁸ Kate Gibson, *Reports of price gouging amid shortages of COVID-19 tests*, CBS NEWS (Jan. 7, 2022), <https://www.cbsnews.com/news/at-home-test-covid-price-gouging/>; Lauren Feiner, *Consumers accuse small retailers of price gouging on Covid tests*, CNBC (Jan. 25, 2022), <https://www.cnbc.com/2022/01/25/consumers-accuse-small-retailers-of-price-gouging-on-covid-tests.html>.

⁹ Kim Parker, Rachel Minkin, and Jesse Bennett, *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW RESEARCH CENTER (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>; David Andone and Paul P. Murphy, *What it's like for health care workers on the front lines of the coronavirus pandemic*, CNN (Mar. 29, 2020), <https://www.cnn.com/2020/03/27/us/inside-hospitals-coronavirus-vignettes/index.html>.

¹⁰ Alicia Adamczyk, *Profits are 'soaring' for large retailers—but frontline workers are barely earning more*, CNBC (Nov. 27, 2020), <https://www.cnbc.com/2020/11/27/large-retailers-are-making-record-profits-but-not-paying-workers-more.html>.

retailers.¹¹ This reality of massive corporate profits has been true for consumer packaged goods and food manufacturers as well. The latest earnings report from Procter and Gamble is just another example of manufacturers and retailers announcing significant sales increases during the pandemic.¹²

In addition to record sales and profits, these companies have no shame about their plans to raise prices. In fact, they are bragging to investors about how they are able to raise prices without driving down sales.¹³ The Procter and Gamble Chief Financial Officer told investors that the company “ha[s] not seen any material reaction [to price increases] from consumers,” and Kroger’s CFO told their investors “we’ve been very comfortable with our ability to pass on the increases that we’ve seen at this point.”¹⁴ These companies are only making more profit in the face of higher costs and increased prices. Is it any wonder then that, in the face of record sales and profits, companies are so eager to raise prices? In a recent piece by former U.S. Labor Secretary, Robert Reich he argues that these companies are exploiting higher costs as an excuse to make even bigger profits.¹⁵ It is hard to disagree.

The pandemic has put Americans under economic and emotional stress that has left us vulnerable. Corporate price gouging is unacceptable and should be stopped.

State Responses to Pandemic Price Gouging

Between February 29, and March 18, 2020, every U.S. state and territory declared an emergency due to the pandemic. Many of these orders were renewed, but today less than half of the states are still under emergency declarations.¹⁶

In some states, such as New Jersey and Illinois, the governors’ emergency declarations expressly prohibited price gouging, typically defined as unreasonable or excessive price increases on certain essential products during an emergency. While in other states, the disaster declaration triggered an existing statute prohibiting price gouging.¹⁷

¹¹ Bridget Goldschmidt, *Independent Grocers Attain Record Sales, Profits Amid Pandemic*, PROGRESSIVE GROCER (Oct. 28, 2021), <https://progressivegrocer.com/independent-grocers-attain-record-sales-profits-amid-pandemic>.

¹² Coral Murphy Marcos, *Procter & Gamble’s sales jump as consumers brush off rising prices*, NEW YORK TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/business/procter-gamble-2q-2021-earnings.html>.

¹³ Dominick Reuter, *America’s biggest companies can’t stop bragging to investors about how they’re charging you more*, BUSINESS INSIDER (Nov. 2, 2021), <https://www.businessinsider.com/big-companies-keep-bragging-to-investors-about-price-hikes-2021-11>.

¹⁴ *Id.*

¹⁵ Robert Reich, *We need to talk about the real reason behind US inflation*, THE GUARDIAN (Nov. 11, 2021), <https://www.theguardian.com/commentisfree/2021/nov/11/us-inflation-market-power-america-antitrust-robert-reich>.

¹⁶ *States’ COVID-19 Public Health Emergency Declarations and Mask Requirements*, NATIONAL ACADEMY FOR STATE HEALTH POLICY (Updated Jan. 11, 2022), <https://www.nashp.org/governors-prioritize-health-for-all/>.

¹⁷ Office of the Governor, *Executive Order No. 103, STATE OF NEW JERSEY* (Mar. 9, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf>; Office of the Governor, *Gubernatorial Disaster*

Most states have a law against price gouging during a declared emergency, but laws vary widely. New Jersey considers price gouging to be selling goods and services at a price that is at least 10% higher than it was immediately preceding the declared emergency. In New York, selling “goods and services vital and necessary for the health, safety, and welfare of consumers” at an “unconscionably excessive price” during a declared emergency is considered price gouging. Illinois only covers petroleum products, though the emergency declaration set to expire in a few days covers other goods and services.¹⁸

In states where there is no explicit prohibition on price gouging there is typically a consumer protection law which prohibits unfair or deceptive trade practices and likely covers price gouging. There are also a handful of states with no prohibition on price gouging.

Defining Federal Price Gouging

There is not a federal price gouging law, or a prohibition found in existing federal consumer protection laws. The Federal Trade Commission (FTC) has not previously taken enforcement action against price gouging.¹⁹ Because the FTC has not taken action, on March 17, 2020, Chairman Pallone (D-N.J.) and Rep. Schakowsky (D-Ill.) of the House Energy and Commerce Committee, and Chairmen Nadler (D-N.Y.) and Rep. Cicilline (D-R.I.) of the House Judiciary Committee sent a letter to the Chair of the FTC urging him to “take immediate action to protect consumers from price gouging during this declared public health emergency.”²⁰

H.R. 675, the “COVID-19 Price Gouging Prevention Act,” the subject of this hearing, was introduced by Chairwoman Schakowsky in response to the initial reports of pandemic profiteering and price gouging.

As members of Congress consider efforts to stop price gouging, it is worth examining what constitutes price gouging in state laws, and where a federal statute would be useful to protect consumers.

Unfortunately, price gouging is not well defined. As noted previously, there is a wide variance between definitions where state laws prohibiting price gouging exist, however they do share the requirement that there must be a declared emergency, that the price increase must be on specific products that are deemed necessary, and the price increase must be substantial. Typically,

Proclamation on COVID-19, STATE OF ILLINOIS (March 9, 2020), <https://www2.illinois.gov/sites/gov/Documents/CoronavirusDisasterProc-3-12-2020.pdf>.

¹⁸ Heather Morton, *Price Gouging State Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 17, 2021), <https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx>.

¹⁹ Alexei Alexis, *Senators scrutinize FTC powers to curb COVID-19 price gouging*, ROLL CALL (Apr. 15, 2020), <https://rollcall.com/2020/04/15/senators-scrutinize-ftc-powers-to-curb-covid-19-price-gouging/>.

²⁰ *Letter to FTC on Price Gouging from Members of Congress* (Mar. 17, 2020), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FTC.2020.03.17.%20Joint%20Letter%20re%20Price-Gouging.CPC_0.pdf.

passing along increased costs or a price increase imposed by a supplier is not considered price gouging.

The absence of a federal law, the inconsistency or absence of laws in the states, combined with online shopping that transcends state borders, has created gaps in protection from price gouging, and has led to the potential for state price gouging laws to be ineffective at addressing online price gouging.

A federal price gouging statute should seek to supplement state statutes in several ways. First, it could set a floor for the amount of a price increase that would trigger a violation. Second, it could provide coverage in states where there is an inadequate, or no, price gouging statute. Third, it could address national, regional, or sustained emergencies that state emergency declarations are not typically designed to address. Finally, a federal statute should ensure that online and national retailers are not able to evade state statutes.

Recommendations for a Federal Price Gouging Statute

We recommend a uniform, federal protection against price gouging that would serve as a floor, while allowing states to have greater protections. Specifically, a federal price gouging law should:

- Provide a clear and unambiguous definition of price gouging such as a 10% increase in prices during an emergency. It should not incorporate ambiguous or subjective language from state statutes. However, in egregious cases where broad price increases are implemented and are not justified by increased costs, even smaller increases should potentially be violations;
- Include a very broad list of products, goods, and services that would be covered, and give federal authorities the power to identify additional products that may be implicated in a future emergency;
- Establish significant civil penalties enforceable by the Federal Trade Commission and state attorneys general;
- Apply wherever price gouging occurs in the supply chain, not simply at the end retailer;
- Be applicable during the current COVID-19 pandemic as well as any disaster or health emergency now and in the future; and
- Require large online retailers to provide price transparency and history that gives consumers an opportunity to quickly determine if a given product has had a price increase. This could include suggested retail price, average price, and a link to price history next to every item listed on such retail sites. Consumers would benefit from the ability to see if the listed price is comparable to the manufacturer's suggested retail price. An average price would show the consumer whether the current price is more or less than

the typical price paid. The average price could be especially useful for products with significant price volatility.

Conclusion

Price gouging is an exploitive business practice that manipulates markets and takes advantage of people at their most vulnerable and desperate. A federal price gouging statute that augments state laws is needed to address this problem. It should be in place as soon as possible to help stop price gouging now, and so that the next emergency, big or small, does not result price gouging as this one has.

During emergencies, people are scared, desperate, and in need. Price gouging is an insidious exploitation of the most vulnerable. There is no excuse for the most profitable corporations preying on vulnerable consumers by price gouging.

Thank you again for the opportunity to testify on this important topic.