



February 2, 2022

The Honorable Jan Schakowsky
Chair
Consumer Protection & Commerce
Subcommittee of the
House Energy & Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Gus Bilirakis
Ranking Member
Consumer Protection & Commerce
Subcommittee of the
House Energy & Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chair Schakowsky and Ranking Member Bilirakis:

Thank you for holding a hearing on “Pandemic Profiteers: Legislation to Stop Corporate Price Gouging.” The National Association of Convenience Stores (NACS) and its members appreciate the opportunity to address some of these issues with you.

NACS is an international trade association representing the convenience industry with more than 1,500 retail and another 1,500 supplier companies as members, the majority of whom are based in the United States. The industry employed about 2.34 million workers and generated more than \$548.2 billion in total sales in 2020, representing nearly 3 percent of U.S. gross domestic product. The industry processes more than 160 million transactions every single day. That means about half of the U.S. population visits our members on a daily basis. In fact, ninety-three percent of Americans live within 10 minutes of one of our locations. The average time a customer spends in one of our stores is about three and one-half minutes and the industry is focused on ensuring that the customer’s needs are met as efficiently as possible – saving them time and money.

More than 60 percent of the 148,000 convenience stores in the United States are single store operators. These are very small businesses, but they compete with a range of businesses in other retail channels for sales including grocery stores, restaurants, drug stores, big box stores and more. The success of these small, entrepreneurial businesses is a central pillar of the success of the American economy.

Background on Price Gouging

Price gouging can and does occur in emergency situations. When it happens, the law should be enforced to curtail it and help prevent it from recurring in the future. NACS strongly supports proper enforcement of laws against price gouging.

According to the National Conference of State Legislatures, thirty-nine states as well as the District of Columbia, the U.S. Virgin Islands, Guam, and Puerto Rico have laws on price gouging.¹ Generally, these laws create legal penalties for businesses that take advantage of a public emergency to overcharge individual consumers for goods and services subject to the law. A central element of many of these schemes is that the

¹ <https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx>.
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price of the good or service is raised in a way that takes advantage of a dramatic increase in demand or decrease in supply relating to the emergency.

That relationship between any allegation of gouging and the emergency at hand is a key element of these legal claims. We readily accept price fluctuations that are subject to normal, competitive market forces. For example, the price of an airline ticket can vary substantially depending on factors include how long prior to the date of travel a ticket is purchased. Unless an emergency situation actually disrupts the normal ability of consumers to shop-around based on price or decline to make a purchase that is too expensive, we accept that businesses will need to be responsive to those consumer choices.

Emergencies, however, can be different. In those cases, there may be goods or services that are essential to people but may be much more difficult to get or much more important than normal to procure which can upset the normal functioning of the marketplace.

The COVID-19 Pandemic

The question for this Committee, of course, is whether the COVID-19 pandemic presents a situation that merits a new federal law rather than our typical reliance on the various state laws to govern pricing in emergency situations. In the spring of 2020, we saw disruptions to normal market forces with respect to certain goods. Hand sanitizer and personal protective equipment such as masks saw dramatic increases in demand and huge deficits in supply that were directly related to the emergency. And, indeed, there were reports of questionable behavior relating to these products.²

The market emergencies that impacted consumer behavior in those early days of the pandemic, however, have largely dissipated at this point. There are still impacts of the pandemic on the market. These include numerous supply chain problems as well as a labor shortage that impacts businesses across much of the economy. But, overall, the impacts on the market at this time are not of a magnitude that is associated with other emergencies that trigger price gouging laws. These impacts are part of the normal give-and-take of competitive markets across the nation even though they can be frustrating and may lead to higher prices.

Whether we have yet to see additional disruptions relating to the pandemic that go beyond normal market fluctuations remains to be seen. It would not be a stretch to imagine that an emergency demand for certain goods or services (Covid tests, for example) could, based on the pandemic situation at the time, create the conditions in which price gouging could occur. The Committee's view of that possibility should be a central element in its consideration of the need for price gouging legislation relating to this pandemic.

H.R. 675 "COVID-19 Price Gouging Prevention Act

NACS does not have a position on H.R. 675 at this time. We do, however, have some thoughts for the Committee as it considers the legislation.

² See "Tennessee brothers who hoarded hand sanitizer settle to avoid price-gouging fine," by Neil Vigdor, *New York Times* (April 22, 2020)(available at <https://www.nytimes.com/2020/04/22/us/hand-sanitizer-matt-colvin-noah-coronavirus.html>); "Philly company charged \$75 for hand sanitizer bottles in illegal price gouging, AG Shapiro says" by Christian Hetrick, *Philadelphia Inquirer* (Aug. 20, 2020)(available at <https://www.inquirer.com/business/price-gouging-hand-sanitizer-amazon-lawsuit-pandemic-20200820.html>).

We appreciate that the legislation makes clear that for any allegation of price gouging to be proven it would have to be shown that the seller took advantage of the specific emergency at issue to unconscionably raise prices. That relationship between the emergency and the price increase is central to any price gouging law functioning appropriately. The fact that there must be an unconscionable price increase is also important. During this pandemic, we have seen examples of an overzealous state attorney general taking action under a price gouging law against companies that actually *reduced* their prices. That is not consistent with the way price gouging laws should operate. While we might all want lower prices, cuts in those prices should not be considered gouging.

We have several recommendations to improve the legislation. The first area that should be addressed is how the bill deals with actual or anticipated cost increases. Often during emergencies, retailers of goods must pay far more than they normally would to obtain those products. That can include higher costs for the products themselves as well as higher transportation costs. To stay in business given their small margins, they need to have the ability to pass along such increases to their customers without fear of prosecution. If they don't, there is a risk of businesses having to close their doors when Americans need them most rather than going to the effort of finding needed goods and risking prosecution. While the legislation allows these costs to be considered, that is not enough. We have seen from experience that prosecutors and courts simply "considering" these factors does not mean they will give them sufficient weight. There ought to be an affirmative defense clearly in the law so that no one faces liability simply for enduring and passing along cost increases.

It is relevant to the consideration of cost increases that the retail industry in the United States is very competitive on price. That is true to such an extent that the wholesale costs retailers pay to obtain their goods (as measured by the producer price index) often rise faster than the prices that retailers charge for those goods (as measured by the consumer price index). In fact, that has been true during the pandemic. During 2021, the producer price index rose by 9.7 percent while the consumer price index rose by 7 percent.³ These figures indicate the need to take seriously cost increases before making allegations of price gouging and demonstrate that, overall, consumers have been shielded from cost increases during the past year of the pandemic.

An affirmative defense based on cost increases also needs to extend to anticipated costs. The legislation properly recognizes this in the "consideration." But that too needs to be part of an affirmative defense. For many businesses, especially small businesses, they need the cash flow from selling the goods in their inventory to allow them to buy their next delivery of those goods. That is why they need to be able to take into account the prices they will have to pay for goods to replace their inventory.

In addition to an affirmative defense, the time periods used as reference points in the legislation should be changed in light of the passage of time and changes in the market since the bill was first introduced. The time period prior to the pandemic – approximately two years ago – is no longer relevant to a price gouging analysis for most goods and services across the economy. We can't ignore that there has been significant inflation during the past two years and that those cost increases have hit much harder than average in certain sectors. Sellers of goods and services that have been impacted by inflation should not carry additional risk of price gouging allegations simply because the market has changed during the past two years. While most price gouging laws use pricing just before an emergency as a point of comparison, the pandemic has dragged on for quite some time and the economy has returned to operation in a way that distinguishes

³ The U.S. Bureau of Labor Statistics' release on the producer price index can be found here: [Producer Price Index News Release summary - 2021 M12 Results \(bls.gov\)](#) and the 2021 increase in the consumer price index can be found here: [CPI Home : U.S. Bureau of Labor Statistics \(bls.gov\)](#).

this emergency from relatively short-lived disasters such as hurricanes or snowstorms. Early 2020 prices are no longer relevant to an evaluation of potential gouging.

The scope of products covered by the bill also ought to be refined. The sale of most products is no longer related to the pandemic. It would make sense to limit the products covered by the bill to those that relate directly to the pandemic (e.g., health, protective, and cleaning products).

And, the Committee should consider the interplay between state enforcement of any federal price gouging law and enforcement of state laws. Allowing state attorneys general to enforce both laws simultaneously may create difficult confusion regarding the standards to which businesses must adhere – as well as creating a risk of duplicative penalties. That could mean that preemption, changing who can enforce the bill, and protections against penalizing the same conduct may be appropriate.

We would welcome the opportunity to engage with the Committee directly on these and other questions raised by the legislation under consideration.

The Role of Swipe Fees in Higher Prices

We would be remiss if we did not point out that one major driver of increasing prices is credit card swipe fees that merchants must pay to accept those card payments. These fees amounted to more than \$100 billion in 2020. While we do not yet have final figures for 2021, indications are that the fees went up far, far more than the rate of inflation. This makes sense because most of the amount of swipe fees are a percentage of the total amount of the transaction. That means the credit card industry profits from every dollar of inflation when a card is used. And, because of that, swipe fees act as an inflation multiplier. With fees averaging more than 2 percent every time a credit card is used, that multiplier has a real impact on the prices that consumers pay every day.

If swipe fees were the result of a competitive market, we would not raise this topic with you. Unfortunately, they are the result of centrally fixed pricing. The dominant card networks, Visa and Mastercard, each set schedules of fees that all of their thousands of banks across the country agree to charge. Those banks, which compete with one another on every other aspect of their businesses, do not compete to lower their swipe fees. They agree to charge the same thing. That is not the American market system. In fact, how this works is a violation of the antitrust laws but one that happens every minute of every day across the country.

The credit card industry benefits more than any other industry from price increases. It wields a largely unseen hand that dramatically reduces Americans' buying power. It profits from higher prices when it does absolutely nothing new or different. By fixing prices and collecting a percentage, its numbers simply go up. If the Committee is concerned about price increases on consumers, swipe fees should be at the top of the list of issues that need to be addressed.

* * *

We appreciate the Committee's attention to these issues and look forward to working with you on them.

Sincerely,

A handwritten signature in black ink, appearing to read 'Doug Kantor'. The signature is fluid and cursive, starting with a large 'D' and ending with a long horizontal stroke.

Doug Kantor
NACS General Counsel