

Legislative Analysis



PROHIBIT PRICE GOUGING DURING STATE OF EMERGENCY OR MARKET DISRUPTION

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bills 5895 and 5896 as introduced
Sponsor: Rep. Jason Hoskins

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5897 as introduced
Sponsor: Rep. Laurie Pohutsky

Committee: Economic Development and Small Business
Complete to 12-2-24

SUMMARY:

Together, House Bills 5895, 5896, and 5897 would create three new acts that would prohibit charging excessively increased prices (generally an increase of greater than 10%) for emergency supplies, other commodities, and hotels during a *state of emergency*, or for energy products and services during a *market disruption*.

State of emergency would mean a natural or man-made disaster or emergency resulting from a tornado, earthquake, flood, fire, riot, storm, act of war, threat of war, military action, or period of instability following a terrorist attack, or a threat to the public health, for which the governor declares a state of emergency.

Market disruption would mean a change in the market, whether actual or imminently threatened, resulting from weather or other force of nature; failure, shortage or disruption of energy production or distribution; strike; civil disorder; military action; act of war; threat of war; national or local emergency; or other abnormal market condition.

The bills are tie-barred together and are generally identical, with some differences in the covered goods, services, and circumstances as described below.

REGULATED GOODS AND SERVICES

House Bill 5895 would create the Commodities and Emergency Services and Supplies Pricing Protection Act, which would generally prohibit a person from charging excessive prices for goods and services during or reasonably after the declaration of a state of emergency.

The act would apply to any person conducting business in any chain of distribution for *building materials*, *consumer food items*, *goods*, *services*, *emergency supplies*, or *medical supplies*.

Building materials would mean lumber, tools, windows, or other materials used in the construction or reconstruction of a building, structure, or other real property.

Consumer food item would mean an item that is used or intended for use as a food, drink, confection, or condiment by a person or animal.

Goods would mean any bought or leased tangible property, coupons, or certificates.

Services would mean any work, labor, or services, such as services furnished in connection with the sale or repair of goods or real property or improvements to real property.

Emergency supplies would include water, flashlights, radios, batteries, blankets, soaps, diapers, temporary shelters, tape, toiletries, plywood, nails, and hammers.

Medical supplies would include prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products.

During or reasonably after a declaration of a state of emergency, a person could not charge a price for those materials, items, goods, services, or supplies that is grossly in excess of the price at which similar materials, items, goods, services, or supplies are sold; charge an **excessively increased price** for those materials, items, goods, services, or supplies; or otherwise offer those materials, items, goods, services, or supplies at an excessively increased price.

With respect to HB 5895, **excessively increased price** would mean a price that demonstrates an **unjustified disparity** between the price for building materials, consumer food items, goods, services, emergency supplies, or medical supplies sold or offered for sale in the market where those items or services are sold immediately before a declaration of a state of emergency and the price of those items or services sold or offered for sale in that market during or reasonably after a declaration of a state of emergency.

An **unjustified disparity** would be a disparity of more than 10%, unless the person selling or offering the items or services demonstrates that the price increase is attributable to an increase in the cost of bringing those items or services to market or an extraordinary discount in effect before the declaration of emergency.

House Bill 5896 would create the Hotel and Lodging Pricing Protection Act, which would generally prohibit a person from charging an excessive price for **lodging** during a state of emergency.

Lodging would mean a building or structure kept, used, maintained as, or held out to the public to be an inn, hotel, or public lodging house (such as a full- or limited-service hotel, resort, conference center, extended-stay hotel, vacation ownership, convention hotel, bed and breakfast, or rented space in a mobile home park or campground).

During or reasonably after a declaration of emergency, a person engaged in the business of offering, selling, or renting lodging could not charge a price that is grossly in excess of the price at which similar lodging is advertised, offered, or sold; charge an **excessively increased price** for lodging; or otherwise offer lodging at an excessively increased price.

With respect to HB 5896, **excessively increased price** would mean a price that demonstrates an **unjustified disparity** between the price of lodging advertised or offered for the market where the lodging is located immediately before a declaration

of a state of emergency and the price of lodging advertised or offered in that market during or reasonably after a declaration of emergency.

An *unjustified disparity* would be a disparity of more than 10% unless the person offering, selling, or renting the lodging can demonstrate that the price increase is attributable to an increase in the cost of the goods or labor used in its business, an extraordinary discount in effect before the declaration of emergency, or a regularly scheduled seasonal adjustment in rates.

(The act would not prohibit an owner from evicting a tenant for a lawful reason.)

House Bill 5897 would create the Energy Pricing Protection Act, which would generally prohibit a person from charging an excessive price for *energy products or services* during or reasonably after a market disruption.

Energy products or services would mean gasoline, propane, or home heating oil (or a service necessary to the provision of those products) that is vital and necessary for the health, safety, and welfare of Michigan residents. The term would not include a product or service regulated by the Michigan Public Service Commission.¹

During or reasonably after a market disruption, a person conducting business in any chain of distribution for energy products or services could not charge a price for those products or services that is grossly in excess of the price at which similar products or services are sold, charge an *excessively increased price* for energy products or services, or otherwise offer those products or services at an excessively increased price.

With respect to HB 5897, *excessively increased price* would mean a price that demonstrates an *unjustified disparity* between the price of an energy product or service sold or offered for sale in the market where that product or service is sold immediately before a market disruption and the price of the product or service sold or offered for sale in that market during or reasonably after a market disruption.

An *unjustified disparity* would be a disparity of more than 10% unless the person selling or offering the energy product or service demonstrates that the increase in price is attributable to an increase in the cost of bringing the product or service to market or an extraordinary discount in effect before the market disruption.

ENFORCEMENT AND REMEDIES

House Bills 5895, 5896, and 5897 contain substantively identical provisions, described below, regarding enforcement of the acts and the remedies (investigations, class action lawsuits, and fines and other penalties) that would be available after a violation.

¹ The Michigan Public Service Commission generally has the power to regulate all public utilities in Michigan, except municipally owned utilities and renewable resource power production facilities with a rated power production capacity of up to 30 megawatts.

Investigations

If the attorney general or a local prosecuting attorney has reasonable cause to believe that an individual has information or is in possession, custody, or control of a document or tangible object that is relevant to an investigation for a violation of any of the acts, they could serve a written demand upon the individual to compel them to appear and be examined under oath and to produce the document or object for inspection and copying. The demand would have to comply with all of the following:

- Be properly served upon the individual in accordance with Michigan law.
- Describe the nature of the conduct constituting the alleged violation and sufficiently describe the document or object so that it can be fairly identified.
- If applicable, contain a copy of the written interrogatories.²
- Prescribe a reasonable time at which the individual must appear to testify and before which the individual must have answered the interrogatories and produced the document or object.
- Advise the individual that they must file objections to or reasons for not complying with the demand with the attorney general or prosecuting attorney on or before appearing to testify.
- Specify a place for the taking of testimony or for production of the document or object and designate the custodian of the document or object.

If the individual does not comply, the attorney general or prosecuting attorney could file an action to enforce the demand in the circuit court of the county in which the individual resides or maintains a principal place of business, or in the circuit court for Ingham County. Notice of hearing, a copy of the pleadings, and other relevant papers would have to be served on the individual, and the individual could appear in opposition. If the court finds that the demand to appear or produce the materials is proper, it would have to order the individual to comply, subject to any applicable modifications. Upon the individual's request and for good cause shown, the court could also make any further order as justice requires to protect the individual from unreasonable burden or expense. (This information would have to be included in the demand described above, along with the relevant MCL citation.)

Testimony and material produced during the investigation would be kept confidential, unless an enforcement action is brought against a person for a violation of the act. (The fact that an investigative demand has been issued, however, would not be confidential). Once the action has been filed, the investigative material could only be disclosed in the course of discovery (in accordance with a protective order, as applicable), and in support of or in opposition to the claims and defenses raised in the action.

Remedies

An individual who charges a grossly excessive or excessively increased price for the goods or services covered by the acts or who otherwise offers those goods or services at an excessively increased price during or reasonably after either a state of emergency (HBs 5895 and 5896) or a market disruption (HB 5897) with an intent to accomplish a prohibited result would be guilty of a misdemeanor punishable by up to one year's imprisonment, a fine of up to \$10,000, or both. A person other than an individual would be guilty of a misdemeanor and subject to a fine of up to \$1.0 million.

² <https://www.law.cornell.edu/wex/interrogatory>

For each violation, the attorney general could bring an action for appropriate injunctive relief or other equitable relief and civil penalties in the name of the people of Michigan. The state, a political subdivision, or a public agency directly or indirectly injured by a violation also could bring an action for injunctive or other equitable relief, in addition to actual damages sustained, interest on those damages from the date of the complaint (as determined by the court), and taxable costs. For a flagrant violation, a trier of fact (the judge or jury responsible for evaluating the evidence and making findings of fact) could increase the amount of damages recovered to up to three times the actual damages sustained.

Additionally, the attorney general could bring a class action on behalf of persons residing or injured in Michigan to recover the greater of the amount of actual damages caused by the prohibited conduct or \$100. (The attorney general would have to bring an action within six years after the occurrence of the violation or one year after the last payment in a transaction involving the prohibited conduct, whichever period ends on a later date.) Upon a motion of the attorney general and without bond, a court could make an order to reimburse persons who have suffered damages, carry out a transaction in accordance with the aggrieved persons' reasonable expectations, strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result, or grant other appropriate relief.

The attorney general could petition for the defendant to bear the cost of any notices required to be sent to the class at any stage of the proceedings, and in determining whether to impose those costs on the defendant, the court would have to consider the probability that the attorney general will succeed on the merits of the action.

If the court determines after a hearing that the defendant threatens or is about to remove, conceal, or dispose of its assets to the detriment of the members of the class, it could appoint a receiver or order the sequestration of the defendant's assets.

The amount of allowable recovery would be limited to actual damages if the defendant shows, by the preponderance of evidence, that a violation of the act resulted from a bona fide error despite the maintenance of procedures reasonably adopted to avoid the error.

These remedies would be cumulative.

Additional provisions

The acts would not exempt, limit, or impair the attorney general's ability to investigate, determine, or impose liability under the Michigan Consumer Protection Act (see **Background**, below) or other state laws.

If the attorney general asserts to a court that, in their judgment, testimony or other information provided by a witness in a proceeding under or related to any of the acts may be necessary to the public interest and the witness has refused or is likely to refuse to testify on the basis of the privilege against self-incrimination, the court could order the witness to provide the testimony or other information. The order would have to provide that the witness could not be prosecuted or subjected to any penalty or forfeiture for or on account of any matter to which they testify, provide information, or provide evidence, and that the testimony, information, or evidence could not be used against the witness in any criminal investigation, proceeding, or trial other than prosecution for perjury for giving a false statement or for otherwise failing to comply with the order.

BACKGROUND:

The bills are similar to Senate Bills 954 to 956 of the current legislative session and to Senate Bills 846 to 848 of the 2019-20 legislative session. Senate Bills 846 to 848 received a hearing in the Senate Economic and Small Business Development committee but were not reported from committee. (Senate Bill 846, which would have regulated prices for hotels and lodging, also would have prohibited rent increases of more than 10% and evictions, with some exceptions, during and 30 days after termination of a declaration of a state of emergency.)

In 2020, Governor Whitmer issued a series of executive orders that generally prohibited the offering or selling of goods, materials, and consumer food items with a fair market value of less than \$1,000 and of emergency supplies at a price more than 20% higher than the price offered or charged for that product as of March 9, 2020, and the reselling of any of those products at a price that grossly exceeds the price at which the product was acquired, unless the price increase was attributable to an increase in the cost of bringing the product to market or to an extraordinary discount in effect on March 9, 2020.³ (The orders were in effect through June 12, 2020.)

As of 2022, 37 states and the District of Columbia regulated price gouging.⁴

MICHIGAN CONSUMER PROTECTION ACT

The Michigan Consumer Protection Act was enacted to protect consumers from deceptive business practices, including price gouging.⁵ Section 3 of the act states that unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and currently lists 37 activities that constitute such a method, act, or practice. In addition, the act specifically prohibits certain actions (for which a civil fine may be imposed) and imposes additional requirements on certain transactions, such as vehicle rental transactions. However, as described below, the Michigan Supreme Court has ruled that the act does not apply to individuals or businesses that are regulated under state or federal law.

Remedies

A person who suffers a loss due to a violation of the Michigan Consumer Protection Act can sue to recover \$250 or actual damages, whichever is greater, along with reasonable attorney fees. Any person can sue for a declaratory judgment that an act or practice is unlawful under the act or for an injunction against someone engaging or about to engage in such conduct. In addition, the attorney general or a prosecuting attorney can bring an action to permanently enjoin a person from engaging in an unlawful act or practice, and a court may assess a fine of up to \$25,000 if the conduct is found to be unlawful. The act also allows for a class action to be brought under certain circumstances.

³ <https://www.michigan.gov/whitmer/-/media/Project/Websites/Whitmer/Documents/Exec-Orders/EO-20208-Emergency-order-enhanced-restrictions-on-price-gouging-final-signed.pdf?rev=26df5258b9940548a33fe41818a462a&hash=2B721536BAC38C133005380109A0BC29>

⁴ <https://www.ncsl.org/financial-services/price-gouging-state-statutes>

⁵ For more information on the Michigan Consumer Protection Act, see: https://www.house.mi.gov/hfa/PDF/FiscalSnapshot/GG_AttyGen_Michigan_Consumer_Protection_Act_Jan2023.pdf.

Applicability

Section 4(1)(a) of the Michigan Consumer Protection Act exempts a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under state or federal law. The Michigan Supreme Court has held that this exemption applies when “the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.”⁶ That is, rather than a business practice being exempt from the act if it is specifically authorized by law, the court ruled that a practice whose legality under the act is in dispute is exempt from the act if the general activity being engaged in is authorized and regulated under law. For example, if a business is an industry regulated under a state or federal law and the transaction or conduct alleged to be deceptive is within the regulatory scheme of that industry, the exemption under section 4(1)(a) would likely apply and a person could not—under the Michigan Consumer Protection Act—sue for damages or petition to have the business stop engaging in the conduct alleged to be deceptive.

FISCAL IMPACT:

The bills would have an indeterminate fiscal impact on the state and local units of government. Violations of provisions in the bills could result in either civil fines or misdemeanors punishable by imprisonment for up to one year or fines, or both. In cases of civil fines and misdemeanor fines, up to \$10,000 could be imposed for individuals, and up to \$1.0 million could be imposed for persons other than individuals. The number of violations that would result under provisions of the bills is not known. Revenue collected from payment of civil fines is used to support public and county law libraries. Also, under section 8827(4) of the Revised Judicature Act, \$10 of the civil fine would be required to be deposited into the state’s Justice System Fund, which supports various justice-related endeavors in the judicial branch and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. The fiscal impact on local court systems would depend on how provisions of the bills affected court caseloads and related administrative costs. Because there is no practical way to determine the number of violations that will occur, an estimate of the amount of additional revenue the state would collect, revenue for libraries, or costs to local courts cannot be made.

The Department of Attorney General, if it chose to prosecute violations of the bills, would be able to support the added enforcement activities with the ongoing existing resources of the Consumer Protection Division.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

⁶ *Smith v Globe Life Insurance Company*, 460 Mich 446 (1999). The court affirmed *Smith* in *Liss v Lewiston-Richards, Inc.*, 478 Mich 203 (2007).