

117TH CONGRESS
2D SESSION

S. 4214

To make price gouging unlawful, to expand the ability of the Federal Trade Commission to seek permanent injunctions and equitable relief, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 12, 2022

Ms. WARREN (for herself, Ms. BALDWIN, Mr. CASEY, Mr. WHITEHOUSE, Mr. SANDERS, Mr. MARKEY, Mr. MERKLEY, Mr. BLUMENTHAL, Ms. DUCKWORTH, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To make price gouging unlawful, to expand the ability of the Federal Trade Commission to seek permanent injunctions and equitable relief, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Price Gouging Prevention Act of 2022”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.
 Sec. 3. Prevention of price gouging.
 Sec. 4. Disclosures in SEC filings.
 Sec. 5. Funding.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) COMMISSION.—The term “Commission”
 4 means the Federal Trade Commission.

5 (2) CRITICAL TRADING PARTNER.—The term
 6 “critical trading partner” means a person that has
 7 the ability to restrict, impede, or foreclose access to
 8 its inputs, customers, partners, goods, services, tech-
 9 nology, platform, facilities, or tools in a way that
 10 harms competition or limits the ability of the cus-
 11 tomers or suppliers of the person to carry out busi-
 12 ness effectively.

13 (3) EXCEPTIONAL MARKET SHOCK.—The term
 14 “exceptional market shock” means any change or
 15 imminently threatened (as determined under guid-
 16 ance issued by the Commission) change in the mar-
 17 ket for a good or service resulting from a natural
 18 disaster, failure or shortage of electric power or
 19 other source of energy, strike, civil disorder, war,
 20 military action, national or local emergency, public-
 21 health emergency, or any other cause of an atypical
 22 disruption in such market.

1 (4) GOOD OR SERVICE.—The term “good or
2 service” means any good or service offered in com-
3 merce.

4 (5) STATE.—The term “State” means each of
5 the several States, the District of Columbia, each
6 commonwealth, territory, or possession of the United
7 States, and each federally recognized Indian Tribe.

8 (6) ULTIMATE PARENT ENTITY.—The term “ul-
9 timate parent entity” has the meaning given the
10 term in section 801.1 of title 16, Code of Federal
11 Regulations (or any successor regulation).

12 **SEC. 3. PREVENTION OF PRICE GOUGING.**

13 (a) IN GENERAL.—It shall be unlawful for a person
14 to sell or offer for sale a good or service at an unconscion-
15 ably excessive price during an exceptional market shock,
16 regardless of the person’s position in a supply chain or
17 distribution network.

18 (b) AFFIRMATIVE DEFENSE.—

19 (1) IN GENERAL.—Subsection (a) shall not
20 apply to the sale, or offering for sale, of a good or
21 service by a person if—

22 (A) the person’s ultimate parent entity
23 earned less than \$100,000,000 in gross United
24 States revenue during the preceding 12-month
25 period; and

1 (B) the person demonstrates by a prepon-
2 derance of the evidence that the increase in the
3 price of the good or service involved is directly
4 attributable to additional costs that are not
5 within the control of the person and are in-
6 curred by the person in procuring, acquiring,
7 distributing, or providing the good or service.

8 (2) INFLATION ADJUSTMENT.—Starting in cal-
9 endar year 2023, the Commission shall annually ad-
10 just the amount specified in paragraph (1)(A) to re-
11 flect the change in the consumer price index for all
12 urban consumers published by the Bureau of Labor
13 Statistics.

14 (c) PRESUMPTIVE VIOLATIONS.—A person shall be
15 presumed to be in violation of subsection (a) if, during
16 an exceptional market shock, it is shown by a preponder-
17 ance of the evidence that the person—

18 (1)(A) has unfair leverage; or

19 (B) is using the effects or circumstances related
20 to the exceptional market shock as a pretext to in-
21 crease prices; and

22 (2) regardless of the person's position in a sup-
23 ply chain or distribution network, sells or offers for
24 sale a good or service at an excessive price compared
25 to—

1 (A) the average price at which the good or
2 service was sold or offered for sale by all com-
3 peting sellers in the market during the 120-day
4 period preceding such exceptional market shock;
5 or

6 (B) the average price at which the good or
7 service was sold or offered for sale by the per-
8 son in the market during the 120-day period
9 preceding such exceptional market shock.

10 (d) REBUTTAL.—A person may rebut a presumption
11 under subsection (c) if the person demonstrates by clear
12 and convincing evidence that the increase in the price of
13 the good or service involved is directly attributable to addi-
14 tional costs that are not within the control of the person
15 and are incurred by the person in procuring, acquiring,
16 distributing, or providing the good or service.

17 (e) UNFAIR LEVERAGE.—

18 (1) IN GENERAL.—For purposes of subsection
19 (c), a person has unfair leverage if the person—

20 (A) earned at least \$1,000,000,000 in
21 gross United States revenue during the pre-
22 ceding 12-month period;

23 (B) discriminates between otherwise equal
24 trading partners in the same market by apply-
25 ing differential prices or conditions;

1 (C) is a critical trading partner; or

2 (D) has a characteristic described in a rule
3 promulgated by the Commission that further
4 defines unfair leverage.

5 (2) INFLATION ADJUSTMENT.—Starting in cal-
6 endar year 2023, the Commission shall annually ad-
7 just the amount specified in paragraph (1)(A) to re-
8 flect the change in the consumer price index for all
9 urban consumers published by the Bureau of Labor
10 Statistics.

11 (f) ENFORCEMENT BY FTC.—

12 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
13 TICES.—A violation of this section or a regulation
14 promulgated under this section shall be treated as a
15 violation of a rule defining an unfair or deceptive act
16 or practice prescribed under section 18(a)(1)(B) of
17 the Federal Trade Commission Act (15 U.S.C.
18 57a(a)(1)(B)).

19 (2) POWERS OF THE COMMISSION.—Except as
20 otherwise provided, the Commission shall enforce
21 this section in the same manner, by the same means,
22 and with the same jurisdiction, powers, and duties
23 as though all applicable terms and provisions of the
24 Federal Trade Commission Act (15 U.S.C. 41 et
25 seq.) were incorporated into and made a part of this

1 section. Any person who violates this section shall be
2 subject to the penalties and entitled to the privileges
3 and immunities provided in the Federal Trade Com-
4 mission Act.

5 (3) INDEPENDENT LITIGATION AUTHORITY.—If
6 the Commission has reason to believe that a person
7 has violated this section, the Commission may bring
8 a civil action in any appropriate United States dis-
9 trict court to—

10 (A) enjoin any further such violation by
11 such person;

12 (B) enforce compliance with this section;

13 (C) obtain a permanent, temporary, or pre-
14 liminary injunction;

15 (D) obtain civil penalties;

16 (E) obtain damages, restitution, or other
17 compensation on behalf of aggrieved consumers;
18 or

19 (F) obtain any other appropriate equitable
20 relief.

21 (4) CIVIL PENALTIES.—In addition to any other
22 penalties as may be prescribed by law, each violation
23 of this section shall carry a civil penalty not to ex-
24 ceed—

(A) if the person who committed the violation does not have unfair leverage, the lesser of—

(i) \$25,000; or

(ii) 5 percent of the revenues earned by the person's ultimate parent entity during the preceding 12-month period; or

(B) if the person who committed the violation has unfair leverage, 5 percent of the revenues earned by the person's ultimate parent entity during the preceding 12-month period.

(5) RULEMAKING.—

(A) IN GENERAL.—The Commission may promulgate in accordance with section 553 of title 5, United States Code, such rules as may be necessary to carry out this Act, including the guidance required under subparagraph (B), guidance regarding an exceptional market shock, or additional characteristics that demonstrate unfair leverage.

(B) REQUIRED GUIDANCE.—Not later than 180 days after the date of enactment of this Act, the Commission shall promulgate regulations regarding violations of this Act, which shall include guidelines on what constitutes a

1 market, an unconscionably excessive price for a
 2 good or service, and an excessive price for a
 3 good or service.

4 (6) EFFECT ON OTHER LAWS.—Nothing in this
 5 section shall be construed in any way to limit the
 6 authority of the Commission under any other provi-
 7 sion of law.

8 (g) ENFORCEMENT BY STATE ATTORNEYS GEN-
 9 ERAL.—

10 (1) IN GENERAL.—If the attorney general of a
 11 State, or another official or agency designated by a
 12 State, has reason to believe that any person has vio-
 13 lated or is violating this section, the attorney gen-
 14 eral, official, or agency of the State, in addition to
 15 any authority it may have to bring an action in
 16 State court under its laws, may bring a civil action
 17 in any appropriate United States district court or in
 18 any other court of competent jurisdiction, including
 19 a State court, to—

20 (A) enjoin any further such violation by
 21 such person;

22 (B) enforce compliance with this section;

23 (C) obtain a permanent, temporary, or pre-
 24 liminary injunction;

25 (D) obtain civil penalties;

1 (E) obtain damages, restitution, or other
2 compensation on behalf of residents of the
3 State; or

4 (F) obtain any other appropriate equitable
5 relief.

6 (2) NOTICE.—Before filing an action under
7 paragraph (1), the attorney general, official, or
8 agency of the State involved shall provide to the
9 Commission a written notice of such action and a
10 copy of the complaint for such action. If the attor-
11 ney general, official, or agency determines that it is
12 not feasible to provide the notice described in this
13 paragraph before the filing of the action, the attor-
14 ney general, official, or agency shall provide written
15 notice of the action and a copy of the complaint to
16 the Commission immediately upon the filing of the
17 action.

18 (3) LIMITATION ON STATE ACTION WHILE FED-
19 ERAL ACTION IS PENDING.—If the Commission has
20 instituted a civil action for a violation of this section,
21 no State attorney general, or official or agency of a
22 State, may bring an action under this paragraph
23 during the pendency of that action against any de-
24 fendant named in the complaint of the Commission

1 for any violation of this section alleged in the com-
 2 plaint.

3 (4) RELATIONSHIP WITH STATE-LAW CLAIMS.—

4 If the attorney general of a State has authority to
 5 bring an action under State law directed at acts or
 6 practices that also violate this section, the attorney
 7 general may assert the State-law claim and a claim
 8 under this section in the same civil action.

9 (h) SAVINGS CLAUSE.—Nothing in this section shall
 10 preempt or otherwise affect any State or local law.

11 **SEC. 4. DISCLOSURES IN SEC FILINGS.**

12 (a) DEFINITIONS.—In this section:

13 (1) COVERED ISSUER.—The term “covered
 14 issuer” means an issuer that—

15 (A) has a covered quarter; and

16 (B) in the quarter following the covered
 17 quarter described in subparagraph (A), is re-
 18 quired to submit Form 10-Q or Form 10-K.

19 (2) COVERED QUARTER.—The term “covered
 20 quarter” means a quarter during which there is an
 21 exceptional market shock.

22 (3) FORM 10-K.—The term “Form 10-K”
 23 means the form described in section 249.310 of title
 24 17, Code of Federal Regulations, or any successor
 25 regulation.

1 (4) FORM 10-Q.—The term “Form 10-Q”
2 means the form described in section 240.15d-13 of
3 title 17, Code of Federal Regulations, or any suc-
4 cessor regulation.

5 (5) ISSUER.—The term “issuer” has the mean-
6 ing given the term in section 3(a) of the Securities
7 Exchange Act of 1934 (15 U.S.C. 78c(a)).

8 (b) INCLUSION IN FILING.—Each covered issuer, in
9 each Form 10-K or Form 10-Q that the covered issuer
10 is required to file in a quarter following a covered quarter,
11 shall include in the filing the following information with
12 respect to that covered quarter, as compared with the
13 quarter preceding that covered quarter:

14 (1) The percentage change in the volume of
15 goods or services sold, and the percentage change in
16 the average sales price of those goods or services,
17 which shall be broken down by material product cat-
18 egories, when relevant, and presented in a tabular
19 format.

20 (2) The gross margins of the covered issuer,
21 which shall be broken down by material product cat-
22 egories, when relevant, and presented in a tabular
23 format.

1 (3) Presented in tabular format, the share of
2 the increase in revenue of the covered issuer that is
3 attributable to—

4 (A) a change in the cost of goods or serv-
5 ices sold by the covered issuer; and

6 (B) a change in the volume of goods or
7 services sold by the covered issuer.

8 (4) The percentage change in the costs of the
9 covered issuer, which shall be broken down by cat-
10 egory and presented in tabular format.

11 (5) In dollars, the change in the costs of the
12 covered issuer and the revenue of the covered issuer,
13 which shall be presented in tabular format.

14 (6) A detailed narrative disclosure of the pric-
15 ing strategy of the covered issuer, which shall in-
16 clude—

17 (A) an explanation for any increase in the
18 gross margins of material product categories,
19 including all material causes for such an in-
20 crease, an explanation of how each such mate-
21 rial cause affected such an increase, and a de-
22 scription of the relative importance of each such
23 material cause with respect to such an increase;

1 (B) an explanation for the decisions made
2 by the covered issuer with respect to the prices
3 of goods or services sold by the covered issuer;

4 (C) if the covered issuer increased prices at
5 a rate that was greater than the rate at which
6 the costs incurred by the covered issuer in-
7 creased, the rationale and objectives for increas-
8 ing prices in such a manner; and

9 (D) a description of conditions under
10 which the covered issuer plans to modify pricing
11 after the date on which the covered issuer sub-
12 mits the filing.

13 (c) REGULATIONS.—Not later than 180 days after
14 the date of enactment of this Act, the Securities and Ex-
15 change Commission shall issue final regulations, or amend
16 existing regulations of the Commission, to carry out this
17 section.

18 (d) EFFECTIVE DATE.—This section shall take effect
19 on the date on which the Securities and Exchange Com-
20 mission issues final regulations under subsection (c) or
21 completes the amendments required under that sub-
22 section, as applicable.

23 **SEC. 5. FUNDING.**

24 In addition to amounts otherwise available, there is
25 appropriated to the Commission for fiscal year 2023, out

- 1 of any money in the Treasury not otherwise appropriated,
- 2 \$1,000,000,000, to remain available until September 30,
- 3 2032, for carrying out work of the Commission.

