

## Five Tips To Keep Your Business Off Regulators' Radars During Supply Chain and Other Economic Disruptions

As consumers and businesses recover from the frenzy of holiday commerce and look ahead to the new year, the supply chain disruptions that grabbed headlines in late 2021 may seem like a distant memory. However, these issues are not yet a thing of the past, particularly in the eyes of regulators. Businesses must educate themselves about the federal and state regulations that are implicated by supply chain disruptions, and stay attuned to regulators' signals regarding what these laws require — economic phenomena with global impact do not excuse non-compliance with state or federal regulations.

When supply chain disruptions, pandemic, inflation, or other forces converge to create the perfect storm of economic pressures, businesses need to stay vigilant to avoid attracting the attention of state regulators — specifically, state attorneys general — in addition to the FTC, CFPB, or other federal agencies. The potential risks include violation of state consumer laws that prohibit unfair and deceptive acts and practices, price gouging prohibitions, the FTC Act, and federal regulations promulgated thereunder such as the Mail, Internet, or Telephone Merchandise Order Rule or the Made in USA Standard, or even state and federal antitrust laws.

The FTC's recent inquiry into supply chain disruptions provides clear evidence of regulators' interest in how businesses are handling the current economic pressures. In late November 2021, the FTC ordered nine large retailers to provide information to the FTC, so it can better understand the causes of the disruptions and their impact on consumers and competition in the economy.<sup>1</sup> The results of this study will undoubtedly be of great interest to both federal and state regulators.

Some economists predict more supply chain disruption in the first quarter of 2022, and businesses would do well to remember the lessons of the past year when confronting these continued supply chain issues, further disruptions in commerce due to the COVID-19 pandemic, or other unforeseen economic challenges.<sup>2</sup>

### Five Tips to Deter Regulatory Scrutiny

Businesses should pay close attention to the following as they navigate through supply chain and other economic disruptions.

#### 1. Ship Goods Within the Timeframe Promised, Communicate Delays to Consumers, or Allow Consumers to Cancel

The federal Merchandise Order Rule requires that sellers ship goods within the time promised or, if goods cannot be shipped within the promised timeframe, provide the consumer with a new shipping date or opportunity to cancel the order.<sup>3</sup> In addition to federal enforcement, state AGs may also rely on this regulation as a benchmark for potential consumer protection violations. For example, Kansas AG Derek Schmidt issued an alert during the 2021 supply chain disruptions informing consumers of this federal requirement, while more generally warning consumers to be wary of increased fraud during supply chain disruptions.<sup>4</sup>

#### 2. Manufacturers and Retailers Also Need To Be Wary of Price Gouging

With the onset of the COVID-19 pandemic, AGs were not shy about exercising their powers to prosecute price gouging — *i.e.*, increasing the prices of goods, services, or commodities to unreasonable or unfair levels after a demand or supply shock. AGs also made it clear that price gouging laws do not just apply to sales to consumers. Other parties in the supply chain, such as manufacturers and distributors, are also prohibited from exploitative pricing practices. For



Keturah Taylor

Associate

ktaylor@cozen.com  
Phone: (202) 304-1460  
Fax: (202) 499-2945

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example, Texas AG Paxton warned retail suppliers of grocery stores and pharmacies that price gouging prohibitions include supply retailers, and “[n]o one is exempt from price gouging laws[.]”<sup>5</sup>

Indeed, the pandemic has prompted some AGs to push or expand the limits of their respective states’ price-gouging laws — for example, then-Virginia AG Mark Herring’s bill to amend the state’s Anti-Price Gouging Act to also apply to manufacturers and distributors was signed into law in October 2020.<sup>6</sup> AG Herring’s bill followed the actions of 20 AGs across the country in the Spring of 2020 to address price gouging in the PPE supply chain.<sup>7</sup>

### 3. Double-Check “Made In USA” Claims

The federal Made in USA Standard requires that any product advertised as Made in USA must be “all or virtually all” made in the United States, which includes the origin of any component parts used. For example, if a piece of furniture is constructed in the United States, but the component pieces are from other countries, that item is not “Made in USA” by federal standards. Sellers can remain compliant with this rule if they make appropriate qualifications, *e.g.*, “Made in USA of U.S. and imported parts.” A 2021 update, reportedly promulgated in response to “rampant Made in USA fraud,” further specified the requirements for labeling products as Made in USA, and increased the civil penalties that the FTC may impose for violations of the rule.<sup>8</sup>

During times of economic distress and supply complications, businesses may be tempted to overstate the degree to which products are Made in USA, overlook changes in manufacturers that would render products ineligible for Made in USA claims, or fail to notice a supplier switching to components from a different country of origin. However, paying close attention to the origin of products and component parts is well worth the effort, as Made in USA violations are actionable under the FTC Act, and can form the basis for a state consumer protection claim.

### 4. Avoid the Appearance of Colluding with Other Businesses

Refusal to supply goods to another party down the supply chain may risk violating federal and state antitrust laws. As the FTC has opined, while companies have the right to choose their business partners, refusal cannot be the product of an anticompetitive agreement, or part of a predatory or exclusionary business strategy.<sup>9</sup> For example, a manufacturer can decline to supply a dealer for independent reasons, but not if the manufacturer has agreed with the dealer’s competitors to cut off the dealer to maintain a certain market price for the goods.

In addition to the FTC, most state AGs have broad authority to enforce antitrust laws. Businesses should be thoughtful about turning down contracts to supply another party and ensure that their reasons for doing so do not include excluding the other party from the marketplace.

### 5. Stay Alert for Scams and Fraud by Other Parties in the Supply Chain

When economic pressures are high, reputable businesses must be even more vigilant than usual to protect against scams or fraud in the supply chain, which could both negatively impact their business, and inadvertently lead them to pass on delays or costs to consumers. As AG Schmidt warned during the late-2021 supply chain disruptions, such conditions provide a ripe opportunity for increased fraud and scams, particularly online scams.<sup>10</sup> Moreover, price gouging or misrepresentations about a product’s origin at any point in the supply chain could lead to serious consequences for all parties involved.

By following these tips, businesses can better serve their customers, while at the same time avoiding close scrutiny from regulators. And any businesses that do find themselves caught up in scams or fraud in the supply chain should act quickly to avoid serious consequences and penalties.

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<sup>1</sup> See Press Release, FTC, *FTC Launches Inquiry into Supply Chain Disruptions* (Nov. 29, 2021).

<sup>2</sup> See, e.g., Writankar Mukherjee & Ketan Thakkar, *More Component Disruptions Likely in January-March Quarter*, ECON. TIMES (Jan. 3, 2022); ‘COVID Zero’ Hong Kong Pushes Supply Chain to Breaking Point, AL JAZEERA (Jan. 11, 2022).

<sup>3</sup> See 16 C.F.R. Part 435.

<sup>4</sup> See Press Release, Kan. Att'y Gen., *Consumer Corner: Supply Chain Disruptions, Holiday Rush Provide Opportunity for Online Scammers* (Nov. 8, 2021).

<sup>5</sup> See Press Release, Tex. Att'y Gen., *AG Paxton: Retail Supply Chains Will Be Held Liable for Price Gouging* (March 21, 2020).

<sup>6</sup> See Press Release, Va. Att'y Gen., *Attorney General Herring's Criminal Justice Reform and COVID Response Bills Signed Into Law* (Oct. 21, 2021).

<sup>7</sup> See Press Release, Va. Att'y Gen., *Attorney General Herring Leads National Effort to Get PPE Into the Hands of Healthcare Workers* (April 21, 2020).

<sup>8</sup> See Press Release, FTC, *FTC Issues Rule to Deter Rampant Made in USA Fraud* (July 1, 2021).

<sup>9</sup> See FTC, *Refusal to Supply* (last visited Jan. 9, 2022).

<sup>10</sup> See Press Release, Kan. Att'y Gen., *Consumer Corner: Supply Chain Disruptions, Holiday Rush Provide Opportunity for Online Scammers* (Nov. 8, 2021).