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S.B. 86 Enrolled

AMENDMENTS TO THE PRICE CONTROLS DURING EMERGENCIES ACT

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lincoln Fillmore

House Sponsor: Rex P. Shipp

LONG TITLE

General Description:

This bill amends provisions of the Price Controls During Emergencies Act.

Highlighted Provisions:

This bill:

• amends the standard of evidence required to cite a person for a violation of the Price Controls During Emergencies Act;

• defines "total cost" and "margin";

• amends provisions regarding when a price is excessive;

• requires the division to consider certain factors in determining whether to investigate, contact, or request information from a seller for a violation of the Price Controls During Emergencies Act;

• prohibits the division from publicly identifying a person under investigation for a violation of the Price Controls During Emergencies Act unless certain conditions are met;

• amends the amount the Division of Consumer Protection may fine for a violation of the Price Controls During Emergencies Act; and

• makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-2-6, as last amended by Laws of Utah 2019, Chapter 115

13-41-102, as last amended by Laws of Utah 2013, Chapter 295

13-41-201, as enacted by Laws of Utah 2005, Chapter 306

13-41-202, as last amended by Laws of Utah 2006, Chapter 153

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-2-6** is amended to read:

13-2-6. Enforcement powers.

(1) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, the division shall have authority to convene administrative hearings, issue cease and desist orders, and impose fines under all the chapters identified in Section 13-2-1.

(2) Any person who intentionally violates a final cease and desist order entered by the division of which the person has notice is guilty of a third degree felony.

(3) If the division has reasonable cause to believe that any person has violated or is violating any chapter listed in Section 13-2-1, the division may promptly issue the alleged violator a citation signed by the division's director or the director's designee.

(a) Each citation shall be in writing and shall:

(i) set forth with particularity the nature of the violation, including a reference to the statutory or administrative rule provision violated;

(ii) state that any request for review of the citation shall be made in writing and be received by the division no more than 20 calendar days ~~following issuance~~ after the day on which the division issues the citation;

(iii) state the consequences of failing to make a timely request for review; and

(iv) state all other information required by Subsection 63G-4-201(2).

(b) In computing any time period prescribed by this section, the following days may not be included:

(i) the day on which the division issues a citation; and

(ii) the day on which the division receives a request for review of a citation.

(c) (i) ~~If~~ Except as provided in Subsection (3)(c)(iii), if the presiding officer finds that there is not substantial evidence that the recipient violated a chapter listed in Section 13-2-1~~,~~ ;

(A) the citation may not become final~~,~~ ; and

(B) the division shall immediately vacate the citation and promptly notify the recipient in writing.

(ii) ~~If~~ Except as provided in Subsection (3)(c)(iv), if the presiding officer finds that there is substantial evidence that the recipient violated a chapter listed in Section 13-2-1~~,~~ ;

(A) the citation shall become final; and

(B) the division may enter a cease and desist order against the recipient.

(iii) For a citation issued for a violation of Chapter 41, Price Controls During Emergencies Act, if the presiding officer finds that there is not clear and convincing evidence that the recipient violated the chapter:

(A) the citation may not become final; and

(B) the division shall immediately vacate the citation and promptly notify the recipient in writing.

(iv) For a citation issued for a violation of Chapter 41, Price Controls During Emergencies Act, if the presiding officer finds that there is clear and convincing evidence that the recipient violated the chapter:

(A) the citation shall become final; and

(B) the division may enter a cease and desist order against the recipient.

(d) (i) A citation issued under this chapter may be personally served upon any person upon whom a summons may be served in accordance with the Utah Rules of Civil Procedure.

(ii) A citation also may be served by first-class mail, postage prepaid.

(e) (i) If the recipient fails to make a request for review within 20 calendar days after the day on which the division issues the citation, the citation shall become the final order of the division.

(ii) The period to contest the citation may be extended by the director for good cause shown.

(f) If the chapter violated allows for an administrative fine, after a citation becomes final, the director may impose the administrative fine.

(4) (a) A person who has violated, is violating, or has attempted to violate a chapter identified in Section 13-2-1 is subject to the division's jurisdiction if:

(i) the violation or attempted violation is committed wholly or partly within the state;

(ii) conduct committed outside the state constitutes an attempt to commit a violation within the state; or

(iii) transactional resources located within the state are used by the offender to directly or indirectly facilitate a violation or attempted violation.

(b) As used in this section, "transactional resources" means:

(i) any mail drop or mail box, regardless of whether the mail drop or mail box is located on the premises of a United States Post Office;

(ii) any telephone or facsimile transmission device;

(iii) any Internet connection by a resident or inhabitant of this state with a resident- or nonresident-maintained ~~internet~~ Internet site;

(iv) any business office or private residence used for a business-related purpose;

(v) any account with or services of a financial institution;

(vi) the services of a common or private carrier; or

(vii) the use of any city, county, or state asset or facility, including any road or highway.

(5) The director or the director's designee, for the purposes outlined in any chapter administered by the division, may administer oaths, issue subpoenas, compel the attendance of witnesses, or compel the production of papers, books, accounts, documents, or evidence.

(6) (a) An administrative action filed under this chapter or a chapter listed in Section 13-2-1 shall be commenced no later than 10 years after the day on which the alleged violation occurs.

(b) A civil action filed under this chapter or a chapter listed in Section 13-2-1 shall be commenced no later than five years after the day on which the alleged violation occurs.

(c) The provisions of this Subsection (6) control over the provisions of Title 78B, Chapter 2, Statutes of Limitations.

Section 2. Section **13-41-102** is amended to read:

13-41-102. Definitions.

For purposes of this chapter:

(1) "Consumer" means a person who seeks to acquire or acquires a good or service for consumption.

(2) "Division" means the Division of Consumer Protection.

(3) (a) "Emergency territory" means the geographical area:

(i) for which there has been a state of emergency declared; and

(ii) that is directly affected by the events giving rise to a state of emergency.

(b) "Emergency territory" does not include a geographical area that is affected by the events giving rise to a state of emergency only by economic market forces.

(4) "Excessive price" means:

(a) for a person that sold the good or provided the service in the 30-day period immediately preceding the day on which a state of emergency is declared:

(i) a price for a good or service that exceeds by more than 10% the ~~average price charged by that person for that~~ highest price the person charged for the good or service in the 30-day period immediately preceding the day on which the state of emergency is declared~~.~~ ; or

(ii) if the person's total cost for the good or service exceeds the average total cost to the person for the good or service in the 30-day period immediately preceding the day on which the state of emergency is declared, a price that exceeds by more than 10% the sum of:

(A) the total cost to the person for the good or service; and

(B) the person's customary margin; or

(b) for a person that did not sell the good or provide the service in the 30-day period immediately preceding the day on which a state of emergency is declared, a price for a good or service that is more than twice the person's total cost for the good or service.

(5) "Good" means any personal property displayed, held, or offered for sale by a merchant that is necessary for consumption or use as a direct result of events giving rise to a state of emergency.

(6) "Margin" means the difference between the sale price and the total cost of the good or service.

~~(6)~~ (7) "Retail" means the level of distribution where a good or service is typically sold directly, or otherwise provided, to a member of the public who is an end user and does not resell the good or service.

~~(7)~~ (8) "Service" means any activity that is performed in whole or in part for the purpose of financial gain including personal service, professional service, rental, leasing, or licensing for use that is necessary for consumption or use as a direct result of events giving rise to a state of emergency.

~~(8)~~ (9) "State of emergency" means a declaration of:

(a) an emergency or major disaster by the president of the United States of America; or

(b) a state of emergency by the governor under Section 53-2a-206.

(10) (a) "Total cost" means an amount equal to:

(i) the sum of all costs associated with a person obtaining a product or service and providing the product or service to a consumer, including fees, shipping, or employee labor; minus

(ii) any trade discount, cash discount, or manufacturer rebate.

(b) "Total cost" does not include an amount that incorporates an ongoing cost to operate a business that is not directly associated with a good or service.

Section 3. Section **13-41-201** is amended to read:

13-41-201. Excessive price prohibited.

(1) ~~Except as provided in Subsection (2), if a state of emergency exists, a~~ A person may not ~~charge a consumer an excessive price for goods or services sold or provided~~ offer for sale, offer to provide, sell, or provide a good or service to a consumer at an excessive price, if:

(a) a state of emergency exists; and

(b) the person offers for sale, offers to provide, sells, or provides the good or service at retail:

~~(a)~~ (i) (A) during the time period for which a state of emergency declared by the governor exists, if the state of emergency described in Subsection (1) is declared by the governor; or

~~(ii)~~ (B) for 30 days after the day on which the state of emergency begins, if the state of emergency described in Subsection (1)(a) is declared by the ~~President~~ president of the United States; and

~~(b)~~ (ii) within the emergency territory.

~~(2) A person may charge an excessive price if:~~

~~(a) that person's cost of obtaining the good or providing the service exceeds the average cost to the person of obtaining the good or providing the service in the 30-day period immediately preceding the day on which the state of emergency is declared; and~~

~~(b) the price charged for the good or service does not exceed the sum of:~~

~~(i) 10% above the total cost to that person of obtaining the good or providing the service; and~~

~~(ii) the person's customary markup.~~

(2) A person may offer for sale, offer to provide, sell, or provide a good or service as otherwise prohibited under Subsection (1), if the person establishes that:

(a) the good or service is identical, similar, or comparable in nature to a good or service that the person sold or provided in the 30-day period immediately preceding the day on which the state of emergency described in Subsection (1)(a) is declared; and

(b) the person applies the same margin to the good or service as the margin applied to the identical, similar, or comparable good or service described in Subsection (2)(a) during the 30-day period immediately preceding the day on which the state of emergency described in Subsection (1)(a) is declared.

(3) Upon request of the division, a person allegedly ~~charging~~ offering for sale, offering to provide, selling, or providing a good or service at an excessive price ~~under Subsection (2)~~ in accordance with this chapter shall provide documentation to the division that the person is in compliance with this chapter.

~~(4) If a good or service has not been sold by a person during the 30-day period immediately preceding the day on which the state of emergency is declared, a price is not excessive if it does not exceed 30% above the person's total cost of obtaining the good or providing the service.~~

Section 4. Section **13-41-202** is amended to read:

13-41-202. Enforcement -- Penalty.

(1) The division shall enforce this chapter.

(2) In determining whether to investigate, contact, or request information from a person in the enforcement of this chapter, the division shall consider:

(a) whether a complaint, information, or evidence reasonably justifies further division inquiry;

(b) the burden contact, investigation, or providing information places on the person;

(c) the result of a previous investigation of the person, including whether the previous investigation suggests that the person did not violate this chapter;

(d) whether the person may benefit from receiving information about requirements under this chapter; and

(e) the potential gravity of harm to consumers, considering price, availability, and volume of a good or service.

(3) In enforcing this chapter, the division may not publicly disclose the identity of a person the division investigates unless:

(a) the person's identity is a matter of public record in an enforcement proceeding; or

(b) the person consents to public disclosure.

~~(2)~~ (4) In determining whether to impose penalties against a person who violates this chapter, the division shall consider:

(a) the person's cost of doing business not accounted for in the total cost to the person ~~of~~ for the good or service, including costs associated with a decrease in the supply available to a person who relies on a high volume of sales;

(b) the person's efforts to comply with this chapter;

(c) whether the average price charged by the person during the 30-day period immediately preceding the day on which the state of emergency is declared is artificially deflated because the good or service was on sale for a lower price than the person customarily charges for the good or service; and

(d) any other factor that the division considers appropriate.

~~(3)~~ (5) (a) If the division finds that a person has violated, or is violating, this chapter, the division may:

(i) issue a cease and desist order; and

(ii) subject to Subsection ~~(3)~~ (5)(b), impose an administrative fine ~~of up to $1,000~~ for each violation of this chapter.

(b) Each instance of charging an excessive price under Section 13-41-201 constitutes a separate violation, but in no case shall the administrative fine imposed under Subsection ~~(3)~~ (5)(a) exceed ~~$10,000 per day~~ double the excessive portion of the price the person charged.

~~(4)~~ (6) The division may sue in a court of competent jurisdiction to enforce an order under Subsection ~~(3)~~ (5).

~~(5)~~ (7) In a suit brought under Subsection ~~(3)~~ (5), if the division prevails, the court may award the division:

(a) court costs;

(b) attorney fees; and

(c) the division's costs incurred in the investigation of the violation of this chapter.

~~(6)~~ (8) All money received through an administrative fine imposed, or judgment obtained, under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

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