

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-2-22

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS the Legislature has declared its intent to protect individuals from price gouging during states of emergency, and has enacted statutes consistent with that purpose, including by enacting legislation during the State of Emergency proclaimed in response to COVID-19 that strengthened statutory protections against price gouging; and

WHEREAS consistent with these statutory enactments and Legislative intent, the March 4, 2020 Proclamation of a State of Emergency triggered certain protections against price gouging set forth in Penal Code section 396, and I issued Executive Orders (including Executive Orders N-44-20, N-78-20, and N-03-21) that further implemented protections against price gouging during the State of Emergency; and

WHEREAS as a result of the effective actions of Californians, the successful and on-going distribution of COVID-19 vaccines, and decisive, meaningful actions taken by the State to reduce the spread and mitigate the impacts of COVID-19, rates of newly reported cases of COVID-19 diminished greatly in the spring and summer of 2021, and Executive Order N-08-21, issued on June 11, 2021, rolled back certain previously implemented protections against price gouging in light of the then-current state of the pandemic; and

WHEREAS despite sustained efforts, the newly emergent Omicron variant of the COVID-19 virus, which the State first confirmed to be present in California on or around December 1, 2021, is more transmissible than the Delta variant and is currently causing a dramatic increase in the number of reported COVID-19 infections in California and across the United States, posing a significant threat to public health and safety; and

WHEREAS progress in authorizations by the United States Food and Drug Administration has made COVID-19 At-Home Test Kits available to consumers at the current stage of the pandemic, and the heightened transmissibility of the Omicron variant has increased the need for widely available, affordable COVID-19 At-Home Test Kits that can be administered by members of the public at their convenience; and

WHEREAS it is vital that residents of California have access to COVID-19 At-Home Test Kits in order to protect public health and safety, and enable the continued operation of California schools, businesses, and other institutions in as safe a manner as possible; and

WHEREAS the State is prepared to take strong action against price gouging, profiteering, and other unscrupulous business practices that threaten these vital interests, including the protection of public health and safety.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8627, and 8665, do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1. For the purposes of this Order, "COVID-19 At-Home Test Kit" shall mean a test that (i) is authorized for use by the United States Food and Drug Administration, (ii) detects the presence of the SARS-CoV-2 virus, and (iii) is intended for non-prescription home use by an individual.
2. Similar to the restrictions set forth in Penal Code section 396, a person or other entity (including, but not limited to, any business enterprise of any kind) shall not—until March 31, 2022, and except as set forth below—sell or offer to sell any COVID-19 At-Home Test Kit for a price that is more than 10 percent greater than the highest price charged by that person or entity for that COVID-19 At-Home Test Kit on December 1, 2021.

A price increase greater than the 10 percent increase specified above shall not be unlawful if the seller can prove either of the following:

- a) The increase was directly attributable to additional costs imposed on the seller by its supplier(s) of the COVID-19 At-Home Test Kit, and the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that item in the usual course of business on December 1, 2021; or
- b) The seller was offering the COVID-19 At-Home Test Kit for sale at a reduced price on December 1, 2021, and the increased price is not more than 10 percent greater than the price at which the seller ordinarily sold the COVID-19 At-Home Test Kit.

Additionally, and notwithstanding the foregoing, it shall not be a violation of this Paragraph 2 to sell or offer to sell any COVID-19 At-Home Test Kit to the State (including, but not limited to, any agency, department, board, commission, or office of the State), or to any political subdivision of the State, on terms acceptable to the State or to the relevant political subdivision of the State, as determined by the

Governor's Office of Emergency Services (as to sales or offers of sale to the State) or by the officer or entity within the political subdivision that is responsible for procuring such COVID-19 At-Home Test Kits (as to sales or offers of sale to that subdivision).

3. If a person or other entity (including, but not limited to, any business enterprise of any kind) did not offer any COVID-19 At-Home Test Kits for sale on December 1, 2021, that person or entity shall not—until March 31, 2022, and except as set forth below—sell or offer to sell such items for an unconscionably excessive price.

For purposes of this Paragraph 3, a price of a COVID-19 At-Home Test Kit is unconscionably excessive if that price is more than 50 percent greater than whichever of the following applies:

- a. The amount that the person or entity paid for the COVID-19 At-Home Test Kit; or
- b. If the person or entity did not purchase the COVID-19 At-Home Test Kit, the total cost, to the person or entity, of producing and selling the COVID-19 At-Home Test Kit.

Notwithstanding the foregoing, it shall not be a violation of this Paragraph 3 to sell or offer to sell any COVID-19 At-Home Test Kit to the State (including, but not limited to, any agency, department, board, commission, or office of the State), or to any political subdivision of the State, on terms acceptable to the State or to the relevant political subdivision of the State, as determined by the Governor's Office of Emergency Services (as to sales or offers of sale to the State) or by the officer or entity within the political subdivision that is responsible for procuring such COVID-19 At-Home Test Kit (as to sales or offers of sale to that subdivision).

4. Each instance in which a COVID-19 At-Home Test Kit is sold or offered for sale in a manner prohibited by Paragraph 2 or Paragraph 3 shall constitute a separate violation of this Order. Each violation of this Order shall be a misdemeanor punishable as set forth in Government Code section 8665. Each such violation shall also be redressable in the same manner as any other unlawful business practice under the Unfair Competition Law, Business and Professions Code section 17200 et seq., and as otherwise provided by the laws of the State. These remedies are cumulative.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 8th day of January 2022.



GAVIN NEWSOM
Governor of California

ATTEST:

SHIRLEY WEBER, PH.D.
Secretary of State