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Tips For Companies Crafting Tariff Surcharge Disclosures

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As the Trump administration imposes tariffs on imports, businesses that rely on these imports are facing higher costs. In response, they are considering itemizing "tariff-related" costs separately to explain the price hikes to consumers. This approach is intended to prevent the perception that businesses are simply raising prices for profit. By clearly labeling the additional charges as "tariff surcharges," companies hope to avoid accusations of exploiting economic instability to justify price increases.

Attributing part of the cost to "tariffs" is not categorically prohibited, but calculating and disclosing the precise amount of tariff surcharges will be subject to truth-in-advertising principles, including the Federal Trade Commission (FTC) "junk fee" rule and California Honest Pricing Law. This article reviews the requirements regarding disclosures of tariff surcharges.

At the outset, one should consider what labeling something a "tariff surcharge" might imply to a potential consumer of the product. In the abstract, it appears to convey a message that the amount assessed is due to forces outside of the seller's control and is used merely to offset the excess tariff costs that increase the price of the product. Although a seller could merely charge a higher price to include tariff impacts, calling out the line item informs consumers that the higher total price is not for the seller's profit and that the "base" price would be the same if it were not for the imposition of the tariff. In essence, it says, "Don't blame us for the price increase on the same item; blame the tariff." The claim is voluntary. The administration's recent statement regarding the listing of tariff surcharges by retailers could suggest that such surcharges may draw scrutiny from federal regulators.

1. The surcharge must be demonstrably tied to the impact of the tariff

The surcharge amount must be reasonably aligned with the impact of the tariff. For example, if a bucket of bolts is ordinarily $10 at wholesale, but $2 is added to the wholesale cost as a "tariff," a buyer, regulator or potential plaintiff will look for evidence that the tariff adds $2 to the final retail price (i.e., in this example, $12). Most products are marked up from wholesale, and tariffs are based on a percentage of wholesale costs, so calculating the precise effect of the tariff may be tricky. A tariff surcharge is not usually calculated as a percentage of the ordinary retail cost. Moreover, tariffs can be passed through directly or absorbed by the seller in whole or in part. Tariffs can also vary over time and by supplier. So, determining the surcharge amount can be complex.

If your business is investigated or sued, it likely will have to justify that the amount of the tariff surcharge is directly related to the impact of the tariff on the price charged. This leads to a few caveats:

- "Made in USA" items should have no tariff surcharge.
- Tariff surcharges must reflect actual increased costs unless some other calculation is otherwise disclosed; this will impose challenges for retailers who sell items with complex supply chains that can vary over time.
- Unless stated otherwise, some buyers are likely to assume that a tariff surcharge has not been pocketed by the seller but is rather a reflection of increased costs due to some payment having been made to the government for tariffs (more on this below).
- The seller imposing the surcharge will bear the burden of demonstrating that such charges are reasonably related to increased prices they must pay for the ability to resell the item.

2. Calling out a 'tariff surcharge' is a free speech issue

Any seller may choose how much to charge, but a lawsuit and laws underpinning it would likely seek to curtail how that price increase is described. *See, e.g., Expressions Hair Design v. Schneiderman,* 581 US 37 (2017). The use of the term "tariff surcharge" can be construed as a description of the reason for the charge, not the amount of the charge. Therefore, a plaintiff would likely need to show the description was false or potentially misleading in order to obtain relief.

It would be false if no tariff caused the surcharge. It might be misleading if the fee was not substantially related to the underlying tariff.

3. Honest pricing and junk fee requirements

Under state and federal laws and rules relating to "junk fees," all mandatory fees must be included in any up-front price quote. *See* California “Honest Pricing” Law. SB 478[i] (applies broadly); FTC "Junk

Fee Rule"[ii] (applies only to short-term lodging and tickets); *see also* Proposed NY Junk Fee Prevention Act, AB A6663[iii]; Proposed IL Junk Fee Ban Act, SB 1486[iv]. If the business intends to levy a mandatory tariff surcharge, the amount of the tariff surcharge must be included in any up-front price quote, and disclosure should not be reserved until the final buy screen (on the Internet). It is not sufficient to disclose a base price and couple it with a vague disclaimer stating "plus tariff surcharges," assuming that inclusion of those surcharges in the total price is mandatory. Moreover, these surcharges are not, strictly speaking, government fees. In other words, unlike taxes, there is no law that compels their addition to the total bill or separation out as a line item. The seller could choose to "eat" the additional costs (that is, not pass it through), or the seller could simply raise the overall price it charges without labeling any part of the price increase as a tariff surcharge. Disclosing them as tariff surcharges is voluntary.

The specific state price disclosure laws tend to be privately enforceable under state Unfair and Deceptive Acts and Practices (UDAP) laws, thus opening the door to consumer class actions. Where specific laws and rules do not apply, plaintiffs may seek to characterize the fees as unessential and over-compensatory. There have been many complaint filings already seeking to characterize failure to disclose various fees as unlawful or deceptive "drip pricing." Courts will scrutinize the relationship between the asserted surcharge and the government interests asserted to be responsible for the surcharge. *See. e.g., MetroPCS v. Picker*, No. 3:17-cv-05959-SI (N.D. CA. 2018)

4. Regardless of the amount charged, the description should not mislead

No truth-advertising laws or litigation seek to curtail what a private business may charge for its goods or services. However, they all purport to prohibit misleading descriptions of the price charged. In any category impacted by tariffs, there may be an incentive to quote the "tariff-free" price first while disclosing additional tariff costs later to enhance or sustain competitive positioning. This could violate the "junk fee" and Honest Pricing laws and rules described above. Moreover, the description of the reason for the price hike must be supported. In practice, this means that the excess fee must be traceable to actual costs imposed on the seller due to tariffs. One can envision a few traps for the unwary:

- Setting tariff surcharge at the same flat amount across the board on all items sold — regardless of the amount of tariff on individual goods; this may be feasible, subject to an appropriate disclosure.
- Relatedly, describing the surcharge to suggest that the surcharge is being applied to offset the individually increased costs of every item sold; the reality may be that the surcharge applies to all items sold, so purchases of those items that are not actually subject to any tariff subsidize the purchase of other items that are impacted by the tariff.

- The tariff surcharge is too high, such that it overcompensates the seller, resulting in a windfall to the seller.
- The tariff surcharge persists well after the tariff has been removed or changed, again resulting in a windfall to the seller.
- The tariff surcharge is applied to "Made in USA" items.

Conclusion

In the coming months, "tariff surcharges" are likely to appear on bills. Given the current political environment, any company that highlights a tariff surcharge may face heightened scrutiny, which could result in regulatory enforcement and private lawsuits. Therefore, it is important for companies to ensure that any disclosures they make are both accurate and defensible.

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i "Honest Pricing" Law. SB 478

ii FTC "Junk Fee Rule"

iii Proposed NY Junk Fee Prevention Act, AB A6663

iv Proposed IL Junk Fee Ban Act, SB 1486

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