New York Attorney General Proposes New Rules to Enforce Prohibition on Price Gouging

March 17, 2023

Key Points

- The New York Attorney General issued a Notice of Proposed Rulemaking in which she offered seven proposed rules concerning enforcement of New York's price gouging law.
- If the proposed rules are enacted, companies will likely face additional hurdles in defending against enforcement actions brought by the Attorney General.

On March 2, 2023, New York Attorney General Letitia James (the "Attorney General") issued a Notice of Proposed Rulemaking (NPRM) regarding enforcement of the state's price gouging statute. The Attorney General's action continued an administrative process that began a year ago with an Advanced Notice of Proposed Rulemaking (ANPRM), and effectuated an authority afforded the Attorney General at the height of the COVID-19 pandemic.

New York's Price Gouging Law

New York's General Business Law 396-r prohibits any "party within the chain of distribution of . . . goods or services or both" from "sell[ing] or offer[ing] to sell any such goods or services . . . for an amount which represents an unconscionably excessive price" during an abnormal disruption of the market. Gen. Bus. Law § 396-r(2). The statute authorizes the Attorney General to enforce its provisions, but makes clear that "[w]hether a price is unconscionably excessive is a question of law for the court." *Id*. § 396-r(3).

The court's determination "that a violation of [the law] has occurred" is based on two factors, either alone or in combination: "that the amount of the excess in price is unconscionably extreme; or . . . that there was an exercise of unfair leverage or unconscionable means." *Id*. § 396-r(3)(a). In an action brought by the Attorney General, "prima facie proof" of a violation of the price gouging statute is established by evidence that "the amount charged represents a gross disparity between the price of the goods or services" sold during the abnormal market disruption and the price "immediately prior"; or "the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area." *Id*. § 396-r(3)(b). A defendant can rebut the Attorney General's showing with evidence that the price increase "preserves

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the margin of profit that the defendant received . . . prior to the abnormal disruption of the market," or that the increase is attributable to costs imposed that were not "within the control of the defendant." *Id*. § 396-r(3)(c).

The Rulemaking Process

In 2020, following an increase in price gouging complaints related to the COVID-19 pandemic, the price gouging statute was amended. Among other changes, the New York State Legislature expressly authorized the Attorney General to issue "such rules and regulations as are necessary to effectuate and enforce" the law. *Id*. § 396-r(5).

Advanced Notice of Proposed Rulemaking

The Attorney General began the rulemaking process by issuing an ANPRM on March 3, 2022. In the ANPRM, the Attorney General laid out the provisions of the statute and described the "abnormal disruption of the market" attributable to COVID-19 across various industries and products, including some developed in response to the pandemic. She also opined on the "economic context" in which she expected price gouging to occur.

In addition, the Attorney General posed a number of questions to guide commenters, including about how the statute should be interpreted. Specifically, she sought input on whether it would be appropriate to "set thresholds at which price increases could give rise to a presumption of 'unconscionably extreme' excesses in price" and what those thresholds should be. She queried when price increases could be attributed to "unfair leverage" or "unconscionable means," including whether and how the two types of conduct should be distinguished from one another. She also sought comments on how new products directly attributable to an abnormal market disruption should be treated under the statute (given that no pre-disruption price exists), and how supply and distribution chain factors affect pricing.

Notice of Proposed Rulemaking

Almost a year to the day the ANPRM was released, the Attorney General issued a formal Notice of Proposed Rulemaking. Like the year before, the Attorney General began by walking through the statute and its history. She also described the legislative purpose underlying the law and the comments received in response to the ANPRM.

Most importantly, the Attorney General offered seven rules she proposed to issue, addressing a wide range of issues related to the price gouging law. Those rules are:

> Rule 1: *It shall be a presumptive case of a gross disparity in price if the price increase for any covered good or service was greater than 10% of the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market.*
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> Rule 2: *The phrase "Additional costs not within the control of the defendant" whether used in the statutory language or regulations, includes only actually incurred costs directly attributable to the production, purchase, storage, distribution, taxation, labor, and sale of the specific good or service, and a directly attributable percentage of the overhead costs of the business, including energy, rent, or general operational budgets.*
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> *The phrase "Additional costs not within the control of the defendant," whether used in the statutory language or in regulations, does not include a decline in sales of other goods and services, costs related to past debts or expenses, projected future costs, internal charges levied from one part of a seller to another part of a seller, or costs related to planned or speculative future expenditures, including new investments or research and development, not related to the actual production, purchase, storage, distribution, labor and sale of the specific good or service.*
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> *Costs shall be calculated over the same time period as the time period of the market disruption.*

The existence of a customary or industry practice of employing an external index for pricing shall not establish that a seller's charging of that index price is a cost-based price.

Rule 3: *The fact that the product or industry did not exist prior to the abnormal market disruption is not a defense under the price gouging statute.*

Profit margins for a new product that are higher in percentage terms than a comparable product may be used as evidence of unconscionably extreme pricing.

Rule 4: *"Unfair leverage or unconscionable means," as referred to in 396-r(a)(2), includes but is not limited to the use of unequal bargaining power, high-pressure sales techniques, confusing or hidden language in an agreement or in price setting.*

Rule 5: *When unfair leverage is used to increase prices, there is no de minimis percentage price increase to create a presumption of illegality.*

"Unfair leverage," as referred to in 396-r(3)(a)(ii), will be presumed when a seller with at least 30% market share raises prices. A defendant can rebut such a presumption with the same evidence that a defendant can rebut the prima facie case as laid out in 396- r(3)(c).

"Unfair leverage" as referred to in 396-r(3)(a)(ii), will be presumed when a significant competitor in a market for vital and necessary goods and services with five or fewer significant competitors raises prices for such goods or services. . . . A firm with above a 10% market share will be presumed to be a significant competitor . . . A defendant can rebut such a presumption with the same evidence that a defendant can rebut the prima facie case as laid out in 396-r(3)(c).

Rule 6: *All parties within the chain of distribution, including manufacturers, suppliers, wholesalers, distributors, or retail sellers of goods, are subject to the statute with respect to products sold in the state.*

Rule 7: *The pre-disruption price for sellers who use dynamic pricing can be determined by using the median price for the same good or service at the same time one week prior to the abnormal disruption of the market. A seller who would be liable for price gouging due to this provision may affirmatively defend against a price gouging claim by proving that the aggregate profit divided by the aggregate units sold is the same as the aggregate profit divided by the aggregate units sold a week prior during the same time period.*

Comments on the proposed rules are due 60 days after publication of a Notice of Adoption in the New York State Register.

Takeaways

Throughout the NPRM, the Attorney General emphasized that the proposed rules are designed to "clarify" or "provide guidance" as to how the price gouging statute will be interpreted by her office. But even if the rules restate positions the Attorney General has taken in investigations and enforcement actions, the effect of codifying those positions through a formal rulemaking could have a substantial impact on businesses' ability to defend against allegations of price gouging.

Under longstanding New York administrative law doctrine, "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom[,] the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute." Pey*ton v. N.Y.C. Bd. of Standards & Appeals*, 36 N.Y.3d 271, 280 (2020) (quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980)). "If the agency's interpretation is not irrational or unreasonable, it will be upheld." *Id*. (internal quotation marks omitted). By contrast, New York courts will not afford deference to an agency's interpretation "when the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative

intent." *Id*. (internal quotation marks omitted). The Court of Appeals has been clear, however, that "deference is appropriate where the question is one of specific application of a broad statutory term." *Id*. (quoting *O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006)).

Several of the proposed rules could be regarded as interpreting words or phrases in the price gouging statute. Rule 1 concerns the term "gross disparity," Rule 2 addresses "additional costs not within the control of the defendant" and Rules 4 and 5 cover "unfair leverage and unconscionable means." The Attorney General is likely to argue that her interpretation of those terms is entitled to deference in light of her office's decades of experience investigating violations and enforcing the law. Indeed, the NPRM previews this position by citing the Attorney General's "extensive expertise in administering the price gouging law," as well as the office's "multiple enforcement actions," frequent issuance of guidance documents and cease-and-desist letters and "recei[pt] and process[ing] [of] thousands of price gouging complaints."

Whether a court considering an enforcement petition would afford deference to the Attorney General's interpretation of the statutory terms found in her proposed rules remains to be seen. But New York law suggests that deference to the Attorney General's position is more likely if the proposed rules are enacted. *See Neurological Surgery, P.C. v. N.Y. State Dep't of Health*, 203 A.D.3d 1252, 1254 (3d Dep't 2022) ("An administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise."). If deference is afforded to the new rules, and the Attorney General seeks to enforce the price gouging statute in accordance with the positions outlined in the NPRM, a company defending an enforcement action will face added hurdles in persuading a court that it has not violated the law.