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New York Attorney General Proposes Price Gouging Rules

- The New York Attorney General recently issued a Notice of Proposed Rulemaking in furtherance of promulgating rules under New York's price gouging law, which applies to the sale of certain goods or services during an "abnormal disruption of the market."
- Among other things, the proposed rules would set a threshold for price increases that presumptively violate the law, prohibit companies with 30% or greater market share from raising prices and create a framework to determine whether companies that engage in dynamic pricing are price gouging.
- The rules are subject to a 60-day comment period once the notice is published in the *New York State Register*.

Background

The New York price gouging law, G.B.L. 396-R, generally prohibits the charging of an "unconscionably excessive price" for "goods or services vital and necessary for the health, safety and welfare of consumers or the general public" during "any abnormal disruption of the market." The law applies to "all parties within the chain of distribution."

The statute defines "abnormal disruption of the market" as "any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor."

However, the statute provides only general guidance on what would constitute an "unconscionably excessive price." A violation can be based on a finding of an "unconscionably extreme" price increase and/or "an exercise of unfair leverage or unconscionable means." The law allows the Attorney General to establish proof of a prima facie violation with evidence that there is a "gross disparity between the price of the goods or services" immediately before and during the abnormal market disruption, or that the "amount charged grossly exceeded the price" of the same or similar goods in the area. A prima facie case may be rebutted if the defendant can show that the price increase preserves its profit margin for the goods or services in question or is the result of additional costs imposed on it. A violation is subject to a civil penalty of the greater of three times the gross receipts for the goods and services or $25,000.

Cases interpreting the statute are scant. Examples include *People* v. *Chazy Hardware, Inc.*, 675 N.Y.S.2d 770 (N.Y. Sup. Ct. 1998), where the court found that a markup of 59% on electric generators following an ice storm was "unconscionably extreme"; *People* v. *Wever Petroleum, Inc.*, 827 N.Y.S. 2d 813 (N.Y. Sup. Ct. 2006), where the court found that there was a "gross disparity between a $0.83 per gallon mark-up pre-Hurricane Katrina and a $0.97, $1.08 or $1.43 per gallon mark-up post-Hurricane Katrina"; and *People* v. *My Service Center, Inc.*, 836 N.Y.S. 2d 487 (N.Y. Sup. Ct. 2007), where the court found a violation when, among other things, a New York gasoline retailer "uniformly hiked its retail price 7–10 times above its conceded 'normal' 8–10 cent per gallon profit margin" following Hurricane Katrina.

A 2020 amendment to the statute allows the Attorney General to issue rules "necessary to effectuate and enforce" the statute.

The Proposed Rules

The Attorney General has proposed a total of seven rules which variously identify types of conduct that would violate the statute (when it applies), limit how defendants could rebut presumptions or findings of prima facie violations and establish a framework for evaluating price gouging when an entity uses dynamic pricing.

The first proposed rule provides for a presumption of "a gross disparity in price"—which would establish a prima facie violation—"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." According to the rulemaking notice, 10% "is the most commonly employed measurement around the country." The notice also states that the "rule merely creates a presumption, and an increase less than a 10% price increase may constitute price gouging due to unfair leverage or excessive pricing due to the absolute price increase depending on other facts and market circumstances." A different rule regarding new products states that "[t]he fact that the product or industry did not exist prior to the abnormal market disruption is not a defense under the price gouging statute" and "[p]rofit margins for a new product that are higher in percentage terms than a comparable product may be used as evidence of unconscionably extreme pricing."

A separate proposed rule sets out rebuttable presumptions for unfair leverage, the exercise of which could lead to a violation of the statute. Under the proposed rule, unfair leverage would be "presumed when a seller with at least 30% market share raises prices" or when an entity with greater than 10% market share "in a market for vital and necessary goods and services with five or fewer significant competitors raises prices for such goods or services." The effect of this rule would be to establish a presumption of illegality for any price increases during abnormal market disruptions by entities meeting the thresholds. The rule would allow a defendant to rebut these presumptions in the same ways that a defendant can rebut a prima facie case: by showing that a price increase preserves its profit margin or is the result of costs imposed on it. According to the notice, this rule is meant to protect against the incentive of "high market-share companies" from using their pricing power "to set their increases exactly at whatever level was permissible" and to protect against companies in concentrated markets (where, according to the Attorney General, "coordination or tacit collusion is most likely") from doing the same.

Another proposed rule, titled "Costs not within the control of the defendant," relates to the particular costs a defendant may use in rebuttal. Under the proposed rule, 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" would be cognizable. The proposed rule excludes from the definition of eligible costs "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." The rule also states that prices based on indexes are not necessarily "cost-based" prices.

A proposed rule on "Presumptive Cases of Unfair Leverage" states that "the use of unequal bargaining power, high-pressure sales techniques, confusing or hidden language in an agreement or in price setting" can constitute "unfair leverage or unconscionable means" and could therefore violate the statute. The proposed rule does not further define what conduct would, for example, constitute "the use of unequal bargaining power." Instead, the accompanying regulatory impact statement asserts that the "rule puts firms and customers on notice of some of the conduct that constitutes unfair leverage, by giving examples that come from the judicial history" and cites to an Appellate Division case, *Master Lease Corp.* v. *Manhattan Limousine, Ltd.*, 177 A.D.2d 85, 89 (2d Dep't 1992), which addressed unconscionability of contracts.

The last proposed rule sets out a framework for use in evaluating whether companies that use dynamic pricing have engaged in price gouging. According to the rule notice, "dynamic pricing leads to situations in which there are a wide variety of pre-disruption prices" and the "pre-disruption 'price' may not be easily discernable." The Attorney General has proposed that one method of establishing the "pre-disruption price" would be "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." The proposed rule allows a dynamic-pricing entity to defend itself 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."

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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