

Proposed New York Price Gouging Rules Expand Coverage and Provide Clarity

Minding Your Business on March 23, 2023

New York Attorney General Letitia James announced [new price gouging rules](#) intended to clarify New York's price gouging law, [N.Y. Gen. Bus. Law §396-r](#), earlier this month. The proposed rules seek to address many of the perceived limitations of the statute exposed during the COVID-19 pandemic and subsequent economic turbulence triggered by supply chain bottlenecks and record inflation. Public comments on the proposed rules are due May 1, 2023.

Under New York law it is a violation to sell or market covered goods or services during an abnormal market disruption at an unconscionably excessive price. [N.Y. Gen. Bus. Law §396-r\(2\)](#). Several of the proposed rules aim to clarify or adjust the scope of the law and what evidence is required to establish a violation or affirmative defense.

- **10% Price Increase Limit** – There are two ways to establish *prima facie* proof of price-gouging under New York law: (1) a gross disparity between the price at which a good or service was sold and the historic price at which the good or services were sold prior to the market disruption; or (2) a price grossly exceeding the price at which the same or similar goods or services were sold or offered for sale. The proposed rules would create a presumption that a 10 percent price increase constitutes a gross disparity under the first prong. The proposed rule brings New York State in line with New York City's and a wide number of states' price-gouging thresholds. While an increase of less than 10 percent could still potentially be subject to price-gouging restrictions, the 10 percent benchmark provides guidance to those doing business in New York when considering price increases.
- **Costs Outside of Seller's Control** – When facing a price gouging allegation, defendants can raise an affirmative defense that the price increase was the result of increased costs borne by the seller. The proposed rules include several clarifications regarding what may be included in sellers' "costs". Specifically, under the proposed rules, sellers can include "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” in cost calculations. Further, costs will be calculated over the same period as the market disruption, which means, for example, that sellers would be able to factor in costs related to a supply chain disruption or inflation if they occur at the same time as the market disruption. The proposed rule specifically notes that a seller’s reliance on “an external index for pricing” will not establish that a price increase based on that index is “cost-based”.

- **Dynamic Pricing** – The proposed rules clarify that when calculating a price increase for sellers who rely on dynamic (automated) pricing or pricing algorithms, the pre-market-disruption price will be the median price for the same good or service at the same time one week prior to the abnormal market disruption. A seller may affirmatively defend against a price gouging claim by establishing 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 to the abnormal market disruption.
- **Presumption of Unfair Leverage** – The proposed rules create a presumption of a violation when a seller with at least 30 percent market share raises prices by *any* amount during an abnormal market disruption, though such sellers may avail themselves of the increased-cost affirmative defense. The proposed rules state that such a presumption is necessary to deter price gouging “where leverage and pricing power exist, and coordination or tacit collusion is most likely.”

The proposed rules demonstrate that accurate and detailed price and cost tracking is key to price-gouging compliance. Companies can leverage the proposed rules and manage compliance by collecting and maintaining “directly attributable” cost information in addition to tracking price changes. This data will be critical when responding to a price-gouging inquiry or investigation.

Proskauer’s Price Gouging Team will continue to monitor these and other changes to the price-gouging landscape as federal, state, and local governments look to revise and clarify their price-gouging restrictions in light of the looming expiration of the federal COVID-19 state of emergency on May 11, 2023, as [announced](#) by the White House on January 30, 2023.

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[Related Professionals](#)

- **John R. Ingrassia**

Partner

- **Timothy E. Burroughs**

Associate