Office of the New York State Attorney General Letitia James

Economic Justice Division

March-May, 2023

Price Gouging

Consolidated Notices of Proposed Rulemaking ("First NPRMs")

Public Comments

From: Mike Luketic
To: stopillegalprofiteering
Subject: Car prices
Date: Friday, March 10, 2023 7:11:09 AM

[EXTERNAL]

Is $10,000 over MSRP considered price gouging?

Sent from my iPhone

From:	Leigh Musgrove
To:	stopillegalprofiteering
Subject:	Letter from my mortgage companuy
Date:	Wednesday, April 5, 2023 9:09:09 PM

[EXTERNAL]

Get Outlook for Android

From:	huck davenport
To:	stopillegalprofiteering
Subject:	Comments for GBL 396-r(2) proposed rules
Date:	Friday, April 7, 2023 1:31:06 PM

[EXTERNAL]

To The Office of the New York State Attorney General
From Huck Davenport
Re Comments for GBL 396-r(2) proposed rules
Date 7 April 2023

General Comments not specific to any rule

Thank you for the much needed changes, the statute as it stands now is unconstitutionally vague and gives businesses little guidance on what they can charge or even when the law becomes activated. We should all agree that the law should give people clear and unmistakable guidance as to what action is legal and what is illegal. The law as written now— eg. “unconscionably excessive,” “gross disparity,” “abnormal disruption, ” “vital and necessary” — fails badly on this account.

Even so, I wish to challenge the rules and the law itself, although the latter is not open for debate here, on the fundamental premise that they do good — they do not. People hate unfairness, and rightly so, and nothing can possibly seem so unfair as for “greedy profiteers” to feed on the misfortune of others. This is a powerful emotional response, and it is understandable why the legislature would want to right this “wrong.” But a more complete analysis would show that there was not only no wrong, but these price gouging attempts to correct the perceived wrong create harm to the community. Exactly what the legislature wishes to prevent.

I can give you two main reasons why price gouging laws, and rules, as that is the subject here, harm the community:

(1) There can be no debate that an abnormal event creates high demand for products in scarce supply. For instance, there is a small fraction of the portable generators available to meet the need after a hurricane causes power failures. The question becomes, how does a business allocate this scarce resource? Or better, how does a business allocate this scarce resource for the good of the community?

Leaving the price the same or even a modest 10% increase will essentially deplete his inventory the moment he opens his doors for business, with the inventory going to who arrived first, with everyone else out-of-luck. I submit to you, this does harm to the community because, in general, there are people who have greater needs than others for that generator, and price is the better mechanism for its allocation.

A mother who needs to keep her baby's formula refrigerated would be much happier to find a generator for sale at a higher price, even much higher, rather than to find no generator at all. For a diabetic with insulin, it may be life or death. In general, this is always true, a commodity that is priced too low will go to those who don't need it or can do without it or use it strictly as a convenience, while those in desperate need are condemned to do without, no matter what the price.
During COVID, to take a trivial example, but one that couldn't have been more clear, out of fear, not need, people — who got there first — filled their basements with toilet paper leaving the shelves empty for months. If the price had been allowed to escalate, people would have said, wow, I don't need 2 years of toilet paper in my basement, I'll wait for the price to go down, and the shelves would not have been empty.

2) Price increases serve another extremely valuable purpose: They signal to businesses not just in NY, but all across the country, to not only move merchandise to where the price is higher — the place of the abnormal market conditions — but to create more of the product. So instead of empty shelves and a community in dire need of "vital and necessary" goods, these goods would flow in from everywhere, albeit, at a higher price. Can anyone reasonably argue that "vital and necessary" goods available at a higher price are worse than no goods at all?

What do economists think?

> In a University of Chicago poll of leading economists on price gouging, the results showed that 77% disagreed or strongly disagreed with price gouging laws and only 7% agreed. Michael Salinger, the FTC's former director of the Bureau of Economics, wrote, "gouging laws stand in the way of the normal workings of the competitive market." Pacific Legal Foundation's Steve Simpson unequivocally stated, "price gouging laws are economical just idiotic," "irrational and arbitrary," and a "violation of the right to due process."

And what is the effect of gouging laws during COVID?

> Gouging laws created so much uncertainty for merchants that, instead of marshaling their resources to alleviate the market disruption, they simply fled the marketplace. Amazon, not knowing how to comply with a national patchwork of conflicting and arbitrary laws, sent cryptic warnings on gouging to its merchants, including those whose prices hadn't changed. Instead of risking suspension, hundreds of merchants simply removed listings. Amazon erased the listings of those that didn't. During the height of the pandemic, Amazon withdrew 530,000 offers of critically needed goods rather than risk arbitrary prosecution.

In this context, with a profound gratefulness for your addressing the gouging law and providing this comment forum, I address your rule changes:

Rule 1

500.1 Presumptive Cases of Gross Disparity 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.

Quantifying what is gouging is a long overdue change, thank you! However, 10% is the wrong number for the reasons described above, but worse, it is inconsistent with the legislature's intent. The legislature wrote that the price should not be "unconscionably excessive," not just high, not just excessive, but "unconscionably" excessive — that is, "shockingly unfair, so bad to be immoral," as per Webster. That is a very high bar. How does the price of a hand sanitizer going from $1.00 to $1.10 immorally shock the conscience? **Because we do have the law, but want to minimize the harm to the community that results when shelves go bare, and to be more consistent with the written language of the statute, as well as other judicial rulings of NYS, I submit a more reasonable price increase of 100% be used in the new rule.**

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. 2. 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.

When there is an abnormal market condition, to prevent harm to the community, we want all the resources of the free market to come to its aid. It is exactly in the height of a disaster that innovation of new products and services is absolutely vital. Rule 3 will chill this innovation of new products and services because they didn't exist prior to the abnormal condition and places the burden of proof on the innovator to demonstrate that their new product is priced correctly against an impossible standard of "comparable" products. **This places the innovator at the mercy of the system, and many will decide to direct their talents elsewhere rather than risk prosecution. In doing so, their absence does harm to the community who is forced to do without the goods and services it so desperately needs. Rule 3 should be rescinded.**

Rule 5

1. When unfair leverage is used to increase prices, there is no de minimis percentage price *increase to create a presumption of illegality. 2. "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). 3. "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. A firm with above a 10% market share will be presumed to be a significant competitor. b. 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).*

For all the same reasons above, it will harm to the community to restrict businesses even if they have large market shares. **The 10% cap of Rule 1 harms the community, the 0% cap of Rule 5 is worse, and because it applies to businesses with a larger market share, it will harm the community even more broadly.** Also, as it singles out particular businesses, it is an unconstitutional Bill of Attainder. **Rule 5 should be rescinded.**

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 4 discusses unfair leverage. And that is a very real concern, in fact, I'd argue that the **Rule 4 should be used to encompass the entire statute. That is, for there to be a gouging violation, there must also have been unfair leverage.** Here, in Rule 6, you implicate business to business transactions that are rarely if ever involved in unfair leverage. Additionally, the supply chains are national, if not international, and it extends the reach of NY's Price Gouging Law outside of its constitutional bounds as defined by the Interstate Commerce Clause. **This rule would chill efforts of the entire supply chain to restore the markets and harm the very community you wish to serve. For these reasons, Rule 6 should be rescinded.**

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.

Dynamic pricing, eg. Uber pricing, is a major innovation that has increased the quality of life and standard of living for New Yorkers. It allows for people to take advantage of lower prices made available from an excess of supply by shifting their actions when they can, and similarly, makes available services that would not ordinarily be available, albeit at a higher price. Those who find themselves needing a ride home at 3am — say a nurse coming off a double shift whose car won't start — would be grateful that she can get one, even if at double the cost. **The idea of applying traditional rules of price gouging to dynamic pricing will do harm to the community by causing shortages of the very services the community has come to enjoy through dynamic pricing. Rule 7 should be rescinded.**

Rule 8

Here I propose a rule that has not been addressed. The statute makes reference to "abnormal market disruptions." This is extremely vague and fails to give an ordinary business the clear notification that a just law requires. No business can know the law is even in effect, and therefore, plan their actions to ensure they are legal. Therefore, I propose the following for your consideration:

An abnormal market disruption is defined to be 24 hours after the District Attorney's Office posts notice on its website that an abnormal market disruption has occurred.

Thank you for you addressing this important matter, your time, and your consideration,
Huck Davenport

From:	Kyle Nelson
To:	stopillegalprofiteering
Subject:	Construction Project To Quote
Date:	Thursday, April 13, 2023 11:07:04 AM

[EXTERNAL]

Hi,

Our business is dedicated to providing comprehensive estimate and takeoff services to all types of contractors, whether they are working on new projects or remodels. We utilize a variety of industry-leading software tools, including Accubid, McCormick, Conest, EBM, Blue-Beam, and Plan-Swift, to ensure that our clients receive accurate and timely estimates. Our team of experienced professionals is committed to delivering exceptional customer service and is always available to answer any questions or provide further assistance. If you have any queries or would like to receive a quick quote, please don't hesitate to contact us.

Regards,

Kyle Nelson

International Estimating, LLC

14th East, 4th St., STE 405, NYC, NY 10012

(718) 618-4485

From:	Miranda Nix
To:	stopillegalprofiteering
Subject:	Don’t take away surge pricing
Date:	Monday, April 24, 2023 5:31:23 PM

[EXTERNAL]

Dear Attorney General Letitia James,

I’m a rideshare driver and surge is a critical component of how I earn and that can’t happen without dynamic pricing. It helps compensate me and other drivers when riders need us the most. Without the additional earnings provided by surge, I wouldn’t go out and drive during those times.

Please do not do anything that will cause me to make less money.

Regards,
Miranda Nix
4289 Chestnut Ridge Rd
Buffalo, NY 14228

From: Laura Qosja
To: stopillegalprofiteering
Subject: Don’t take away surge pricing
Date: Monday, April 24, 2023 5:31:35 PM

[EXTERNAL]

Dear Attorney General Letitia James,

I’m a rideshare driver and surge is a critical component of how I earn and that can’t happen without dynamic pricing. It helps compensate me and other drivers when riders need us the most. Without the additional earnings provided by surge, I wouldn’t go out and drive during those times.

Please do not do anything that will cause me to make less money.

Regards,
Laura Qosja
77 Beaumont Cir
Yonkers, NY 10710

From:	Anoosh Ahmar
To:	stopillegalprofiteering
Subject:	Don't take away surge pricing
Date:	Monday, April 24, 2023 5:31:36 PM

[EXTERNAL]

Dear Attorney General Letitia James,

I'm a rideshare driver and surge is a critical component of how I earn and that can't happen without dynamic pricing. It helps compensate me and other drivers when riders need us the most. Without the additional earnings provided by surge, I wouldn't go out and drive during those times.

Please do not do anything that will cause me to make less money.

Regards,
Anoosh Ahmar
83 Bay 7th St
Brooklyn, NY 11228

From: Sugey brioso
To: stopillegalprofiteering
Subject: Don’t take away surge pricing
Date: Monday, April 24, 2023 5:31:38 PM

[EXTERNAL]

Dear Attorney General Letitia James,

I’m a rideshare driver and surge is a critical component of how I earn and that can’t happen without dynamic pricing. It helps compensate me and other drivers when riders need us the most. Without the additional earnings provided by surge, I wouldn’t go out and drive during those times.

Please do not do anything that will cause me to make less money.

Regards,
Sugey brioso
2324 Walton Ave
The Bronx, NY 10468

From:	James Szumiloski
To:	stopillegalprofiteering
Subject:	Surge price elimination uber
Date:	Monday, April 24, 2023 5:48:30 PM

[EXTERNAL]

Please do not eliminate surge pricing,,,rideshare drivers make next to no money after gas and expenses,,,the small amount we make comes from surge pricing,,,if it is eliminated very few rides will be available as most drivers will be forced to quit,,,,it's already tough to make anything profitable,,,but doing this job for free which is what will happen if surge is eliminated in nys is not acceptable with thr cost of gas and repairs,,,also rideshare is a high risk job,,,it's not like McDonald's where you can mess up on a burger,,,this is a zero error job and as such surge pric8ng is essential not optional,,,thank you! James szumiloski,full time uber driver

From:	Gabriella Limón
To:	stopillegalprofiteering
Subject:	Public Comment of New York State Senator Brad Hoylman-Sigal and Assembly Member Nily Rozic
Date:	Tuesday, April 25, 2023 3:30:13 PM
Attachments:	Comment of Sen. Hoylman-Sigal and Asm. Rozic to OAG re Notice of Proposed Rulemaking.pdf

[EXTERNAL]

Greetings,

Attached is the public comment of New York State Senator Brad Hoylman-Sigal and Assembly Member Nily Rozic in response to the Attorney General's March 2023 Notice of Proposed Rulemaking regarding price gouging.

Thank you.

Sincerely,

Gabriella Limón
Pronouns: *she/her/hers*
Communications & Legislative Aide
NYS Senator Brad Hoylman
(O): (212) 633-8052
(F): (212) 633-8096
322 Eighth Avenue, Suite 1700
New York, NY 10001

STATE SENATOR BRAD HOYLMAN-SIGAL
Senate District 47
322 Eighth Avenue
New York, NY 10001
T. (212) 633-8052

STATE ASSEMBLY MEMBER NILY ROZIC
Assembly District 25
159-16 Union Turnpike
Flushing, NY 11366
T. (718) 820-0241

PUBLIC COMMENT TO THE OFFICE OF NEW YORK ATTORNEY GENERAL LETITIA JAMES IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING PURSUANT TO SECTION 396-r(5) OF THE GENERAL BUSINESS LAW

April 25, 2023

Thank you for the opportunity to submit comments in response to the Advanced Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. § 396-r(5). We write as the New York State Senate and Assembly sponsors of the legislation that created Section 396-r(5) in 2020 (Chapter 90) and on behalf of our constituents in Senate District 47, which stretches from Christopher Street to West 103rd Street in Manhattan, and Assembly District 25, which is located in Eastern Queens and includes Flushing, Queensboro Hill, Hillcrest, Fresh Meadows, Auburndale, Oakland Gardens, Bayside Hills, and Briarwood.

We introduced our legislation in 2020 to extend New York's price gouging statutes to the nefarious profiteering that occurred during the pandemic. Many New Yorkers can remember searching for medical or personal protective equipment (PPE) in the early days of the pandemic and finding face masks, hand sanitizer, or disinfectants at double or triple their usual price—if they found those items at all. Reporting later confirmed that individuals and businesses bought extreme quantities of essential goods in order to sell them at enormous profit, squeezing supply during a public health emergency.

But some of the most egregious pandemic profiteering occurred in the sale of life-saving medical devices and PPE to governments and hospitals supplying frontline health workers. At the height of the pandemic, some corporations sold essential equipment at over 1,000 percent the usual cost. This was especially true in New York, where some hospitals were charged $7 for 50-cent hospital gowns, and $25 for protective shields worth $1.25. New York taxpayers bore the burden of this profiteering, as the state paid up to 15 times normal prices for X-ray machines and other essential supplies in 2020.

Our legislation responded to these extreme price disparities by expanding New York's existing price gouging statute to cover the sale of medical devices and other essential goods to institutional buyers like local governments and hospitals. It forbade businesses from inappropriately increasing profit margins during abnormal market disruptions like pandemics and natural disasters and authorized the Attorney General to promulgate rules effectuating these provisions.

Unfortunately, shameful profiteering appears to have continued well past the pandemic's peak. New Yorkers saw the price of baby formula spike 300 percent during last fall's nationwide shortage, and dozens of corporate executives have openly admitted to using inflation as a pretext to raise prices and bloat profit margins. This behavior extracts hard-earned money from working New Yorkers and contributes to inflation by artificially driving up prices and endangering economic stability.

We applaud the Attorney General for applying the full force of New York's price gouging law against such bad actors. The proposed rules would forbid industry-dominant firms from subtly raising their profit margins, provide New York businesses with a clear standard of acceptable price increases, and set crucial guidelines for firms that rely on dynamic pricing. This is the strong, decisive action our legislation was designed to enable and will provide much-needed relief to New Yorkers already facing record-high inflation.

Thank you for the opportunity to submit comments, and for your continued work on this issue.

From: Andrew Greenblatt
To: stopillegalprofiteering
Subject: Deadline for Comments
Date: Wednesday, April 26, 2023 10:50:12 AM

[EXTERNAL]

To Whom It May Concern:

I have heard that the comment period for these rules has been extended to May 22. Can you confirm that for me?

Thank you,
Andrew Greenblatt

--
Andrew Greenblatt, Executive Director
IDG Benefits Fund
(646) 847-9606

From: stopillegalprofiteering
To: Andrew Greenblatt; stopillegalprofiteering
Subject: RE: Deadline for Comments
Date: Wednesday, April 26, 2023 11:00:35 AM

Dear Andrew,

The proposed rules were published on March 22 in the State Register, and the deadline for comments is 60 days after that.

https://dos.ny.gov/system/files/documents/2023/03/032223.pdf

Zephyr Teachout
Senior Counsel for Economic Justice

From: Andrew Greenblatt <andrew@idgbenefits.org>
Sent: Wednesday, April 26, 2023 10:49 AM
To: stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>
Subject: Deadline for Comments

[EXTERNAL]

To Whom It May Concern:

I have heard that the comment period for these rules has been extended to May 22. Can you confirm that for me?

Thank you,
Andrew Greenblatt

--
Andrew Greenblatt, Executive Director
IDG Benefits Fund
(646) 847-9606

From:	Andrew Greenblatt
To:	stopillegalprofiteering
Subject:	Re: Deadline for Comments
Date:	Wednesday, April 26, 2023 11:45:29 AM

Thank you. I was confused by the March 3 News Release, but this makes perfect sense.

On Wed, Apr 26, 2023 at 11:00 AM stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov> wrote:

> Dear Andrew,
>
> The proposed rules were published on March 22 in the State Register, and the deadline for comments is 60 days after that.
>
> https://dos.ny.gov/system/files/documents/2023/03/032223.pdf
>
> Zephyr Teachout
>
> Senior Counsel for Economic Justice
>
> ---
>
> **From:** Andrew Greenblatt <andrew@idgbenefits.org>
> **Sent:** Wednesday, April 26, 2023 10:49 AM
> **To:** stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>
> **Subject:** Deadline for Comments
>
> **[EXTERNAL]**
>
> To Whom It May Concern:
>
> I have heard that the comment period for these rules has been extended to May 22. Can you confirm that for me?
>
> Thank you,

> Andrew Greenblatt
>
> --
>
> Andrew Greenblatt, Executive Director
>
> IDG Benefits Fund
>
> (646) 847-9606
>
>

--
Andrew Greenblatt, Executive Director
IDG Benefits Fund
(646) 847-9606

From: Jason Klipa
To: stopillegalprofiteering
Subject: 60 comment period.
Date: Wednesday, April 26, 2023 12:09:08 PM

[EXTERNAL]

Hi.

Can you let me know when the comment period ends for the price gouging proposed rules?

Thank you.

Jason N. Klipa
Director Public Affairs & Government Relations
New York & Pennsylvania

jason.klipa@walmart.com

Walmart
Hershey Square # 206
1152 Mae Street
Hummelstown, PA 17036

From:	Jason Klipa
To:	stopillegalprofiteering
Subject:	Re: EXT: Re: 60 comment period.
Date:	Friday, April 28, 2023 3:04:01 PM

Got it

Thanks

Jason

On Apr 28, 2023, at 2:57 PM, stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov> wrote:

EXTERNAL: Report suspicious emails to **Email Abuse.**

Dear Jason,

The rules were proposed in the March 22nd State Register, and the comment period ends May 22nd. Thanks for reaching out,

Zephyr Teachout
Senior Counsel for Economic Justice

From: Jason Klipa <Jason.Klipa@walmart.com>
Sent: Wednesday, April 26, 2023 4:08 PM
To: stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>
Subject: 60 comment period.

[EXTERNAL]

Hi.

Can you let me know when the comment period ends for the price gouging proposed rules?

Thank you.

Jason N. Klipa
Director Public Affairs & Government Relations
New York & Pennsylvania

jason.klipa@walmart.com

Walmart
Hershey Square # 206
1152 Mae Street
Hummelstown, PA 17036

From: Andrew Greenblatt
To: stopillegalprofiteering
Subject: Request for a Call
Date: Friday, April 28, 2023 12:10:57 PM

[EXTERNAL]

Zephyr,

Thank you for clarifying that the final date for submission of comments is 60 days after March 22.

I am writing to request a 30-minute Zoom call to discuss the proposed regulations concerning profiteering during market disruptions.

I work with an affiliate of the Machinists Union, the Independent Drivers Guild, which represents Uber and Lyft drivers. In reading the proposed regulations and supporting documents, there is a potential contradiction that we'd like to explore.

On the one hand, the rules clearly state that increased labor costs during an emergency can be passed along. For example, if a firm needs to pay overtime or hazard pay, that is OK.

On the other hand, the sections on rideshare seem to imply that any price increase isn't allowed.

It is clear that any price increase that ends up as profit for the firms, Uber or Lyft, is barred during these periods. But what if the price increase all goes to the workers to cover increased labor costs, and none results in increased profits for the firms?

Please let me know if you are available next week for a call. For example, I am available Wednesday, Thursday, or Friday after 11:00 AM. Just send a time (or two) that works for you, and I'll confirm one with a calendar invite for 30 minutes with a Zoom link.

Thanks in advance for your help,

Sincerely,
Andrew Greenblatt

--
Andrew Greenblatt, Executive Director
IDG Benefits Fund
(646) 847-9606

From: Jian wang
To: stopillegalprofiteering
Subject: Don’t take away surge pricing
Date: Saturday, April 29, 2023 9:50:10 AM

[EXTERNAL]

Dear Attorney General Letitia James,

I’m a rideshare driver and surge is a critical component of how I earn and that can’t happen without dynamic pricing. It helps compensate me and other drivers when riders need us the most. Without the additional earnings provided by surge, I wouldn’t go out and drive during those times.

Please do not do anything that will cause me to make less money.

Regards,
Jian wang
1242 71st St
Brooklyn, NY 11228

From: Andrew Greenblatt
To: stopillegalprofiteering
Cc: Scott Cantone; Aziz Bah
Subject: Re: Wednesday 11:00 AM Meeting
Date: Monday, May 1, 2023 1:30:08 PM

That's helpful. Thank you.

On Mon, May 1, 2023 at 1:07 PM stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov> wrote:

> Yes, thanks for letting me know. They are welcome to join. Again, we will be in listening mode, and will take notes to submit along with public comment. We will not be in a position to answer questions so much as to listen.
>
> ---
>
> **From:** Andrew Greenblatt <andrew@idgbenefits.org>
> **Sent:** Monday, May 1, 2023 5:04 PM
> **To:** stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>; Scott Cantone <scott@bendercantone.com>; Aziz Bah <aziz@drivingguild.org>
> **Subject:** Wednesday 11:00 AM Meeting
>
> **[EXTERNAL]**
>
> Zephyr,
>
> I am writing to ask if we can add two of my colleagues to the call on Wednesday. Given that we will be discussing proposed regulations, I would like to request that we include our registered lobbyist, Scott Cantone. I am not registered individually and don't want to run afoul of the lobbying laws.
>
> Also, it would be useful to include our organizing director, Aziz Bah. He drove for over a decade and is the one most connected to the drivers today.
>
> Scott's email is scott@bendercantone.com
>
> Aziz's email is aziz@drivingguild.org
>
> Both are cc'd on this email.
>
> Thanks for your help,
> Andrew Greenblatt
>
> --
> Andrew Greenblatt, Executive Director
> IDG Benefits Fund
> (646) 847-9606
>
> **IMPORTANT NOTICE:** This e-mail, including any attachments, may be confidential,

> privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.

--
Andrew Greenblatt, Executive Director
IDG Benefits Fund
(646) 847-9606

From: Zubin Soleimany
To: stopillegalprofiteering
Subject: NYTWA Comments on Price Gouging Rules
Date: Monday, May 1, 2023 10:59:02 PM
Attachments: NYTWA Comments on Illegal Profiteering Rules.pdf

---

[EXTERNAL]

Good evening,

Attached please find the NYTWA's comments on the proposed rules concerning price gouging.

Respectfully submitted,

Zubin Soleimany
New York Taxi Workers Alliance
31-10 37th Avenue, Suite 300
Long Island City, NY 11101
www.nytwa.org

NEW YORK TAXI WORKERS ALLIANCE

AFL-CIO; Intl. Transport Workers' Federation

31-10 37TH AVE.
SUITE 300
LONG ISLAND CITY, NY 11101
TELEPHONE: (718) 706-9892

The Hon. Letitia James
New York State Attorney General
28 Liberty St. 10005
New York, NY

May 1, 2023

Dear Attorney General James:

The New York Taxi Workers Alliance (NYTWA) submits these comments in response to the Attorney General's March 2, 2023 notice of proposed rulemaking regarding price gouging.

While the NYTWA represents low-wage workers in the taxi and for-hire vehicle (FHV) industries who are, like all consumers, affected by price gouging, we submit these comments more specifically in response to suggestions that the proposed rules would limit the earnings of High-Volume For-Hire Vehicle (HVFHV) Drivers for services such as Uber and Lyft. In short, there is no reason to believe that the proposed rules would adversely affect HVFHV drivers.

Background

Dynamic pricing or "surge pricing," as Uber calls it, is a process by which Uber raises its prices for ride services in response to heightened consumer demand, ostensibly to incentivize more drivers to work in high-demand areas. Initially, Uber's general compensation formula paid drivers a flat 80% of each fare. Therefore, if, through surge pricing, Uber increased a normally $20 fare by 100%, to $40, a driver would have still earned 80% of the fare. Accordingly, although such pricing would boost both Uber and the driver's revenue, and Uber's take rate on such trips would not increase.

In 2017, Uber abandoned its percentage payment structure, and began paying drivers minimum rates per mile and minute, without regard to customer fare payments. Uber explained in an email to drivers that it was "[s]eparating rider payments from driver fares."[1] Accordingly, with drivers no longer receiving a set percentage of each fare, Uber could now double a passenger's fare price through dynamic pricing, while only increasing a driver's pay by, for example, 25% for the same trip, or not increase it at all. Dynamic pricing could now be in play on any fare, with or without

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[1] *Making Earnings Easier to Understand*. Email from email@et.uber.com to New York City drivers (May 19, 2017, 7:13 AM).

drivers being aware of it. However, when surge pricing is in effect, drivers would now receive a set dollar bonus, rather than a proportional share of the increased fare.[2]

A recent study by the UCLA Labor Center, developed for the NYTWA, which analyzed New York City Taxi & Limousine Commission (TLC) data regarding HVFHV trips found that, in recent years, increases in Uber's consumer fare pricing outpaced increases in driver pay, indicating that in general, drivers had not shared proportionately in Uber's increased pricing.[3]

The Proposed Rules and Driver Earnings

Last week, Uber sent a message to drivers in New York telling them that "[t]he NY Attorney General wants to eliminate surge pricing" and soliciting drivers to write to "AG James opposing this effort."[4]

The message told drivers that the proposed rules would "effectively end surge pricing for New York drivers by eliminating rideshare companies like Uber's ability to surge rider pricing." *Id*. The main message Uber aims to impart to drivers is that the proposed price gouging rules will directly harm their earnings.

Uber's message to drivers is disingenuous for three reasons:

1. The message implies a blanket ban on dynamic pricing at all times. This is, of course, not what the proposed rule would do, as it only places limits on dynamic pricing during abnormal market disruptions and, even during those times, the rule still allows for dynamic pricing to operate generally as it would have prior to the abnormal market disruption.
2. Uber has independently divorced driver pay from customer pricing since 2017; the suggestion that driver pay rises and falls with customer pricing is not borne out by Uber's shifts in policy since 2017, and TLC data. Of course, to the extent Uber wishes to share increased fare revenue drivers, it may continue to do so.
3. Importantly, the proposed rule explicitly creates an affirmative defense to a charge of price gouging through dynamic pricing where a company's aggregate profit per unit does not increase. This means that there should not be a situation where the AG's proposed rule would prohibit dynamic pricing so long as any price increase beyond the normal pre-disruption scope of dynamic pricing is passed on to drivers.[5] Put another way, the proposed

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[2] *See* Uber Blog, *Your questions about the new surge, answered*. (Sept. 12, 2019), archived at https://web.archive.org/web/20191010062101/https://www.uber.com/blog/your-questions-about-the-new-surge-answered/ (Archived on Oct. 10, 2019; date accessed May 1, 2023).

[3] *See* Aya Konishi, Vivek Ramakrishnan, Saba Waheed, Lucero Herrera. *Analysis of High Volume For-Hire Vehicle Data for New York City* (Feb. 2023), at 7 (noting that, in recent years, while median driver pay had increased by 31%, the median passenger fare had increased by 50%), available at https://www.labor.ucla.edu/wp-content/uploads/2023/02/Taxi-Commission-policy-brief-2.9.23.pdf (Date accessed: May 1, 2023).

[4] *Important: New NY rules would eliminate driver surge*. E-mail from noreply@uber.com to New York Uber drivers (Apr. 23, 2023, 5:31 PM).

[5] For example, if Uber typically charged $50 from East Midtown to Park Slope, at 1 pm on February 1st, and then surged and charged $100 for the same trip at 5 pm on February 1st, it could still surge and charge $100 for the same trip at the same time the next week, February 8, even if,

rule explicitly allows for the type of behavior which Uber has told drivers it threatens: the company's ability to pass on increased fare revenue to drivers.

There is no reason to believe that the proposed rules would harm drivers' earnings potential. To the contrary, the rules would allow FHV services that use dynamic pricing to further increase prices, even during abnormal market disruptions, if such increases were attributable to labor costs and passed on to drivers. Moreover, as low-wage workers and consumers themselves, drivers stand to benefit from the proposed rules' protections from price gouging on basic household expenses.

Respectfully submitted,

Zubin Soleimany
Senior Counsel
New York Taxi Workers Alliance

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for example, there were a blizzard. If Uber raised prices even higher on February 8 at 5 pm to incentivize drivers to work in the snow, the proposed rules would permit this, so long as the further increase was attributable to driver pay.

From:	Uchechukwu Eburu
To:	stopillegalprofiteering
Subject:	Don't take away surge pricing
Date:	Tuesday, May 9, 2023 10:14:40 AM

[EXTERNAL]

Dear Attorney General Letitia James,

I'm a rideshare driver and surge is a critical component of how I earn and that can't happen without dynamic pricing. It helps compensate me and other drivers when riders need us the most. Without the additional earnings provided by surge, I wouldn't go out and drive during those times.

Please do not do anything that will cause me to make less money.

Regards,
Uchechukwu Eburu
10526 Avenue N
Brooklyn, NY 11236

From:	Kent Sopris
To:	stopillegalprofiteering
Cc:	Teachout, Zephyr; Webley, Alec; Ramirez Warren, Giovanni
Subject:	NYACS Price Gouging Comments
Date:	Monday, May 15, 2023 11:58:29 AM
Attachments:	Price Gouging Comments May 2023 FINAL .pdf

[EXTERNAL]

Comments are attached.

Thank you for the opportunity to submit them.

Kent Sopris

--

Kent Sopris
President
New York Association of Convenience Stores
130 Washington Ave., 3rd Floor
Albany NY 12210
518-588-4115 Cell
518-432-1400 Office

New York Association of Convenience Stores
130 Washington Avenue, Suite 300, Albany NY 12210
TELEPHONE: (800) 33-NYACS or (518) 432-1400 FAX: (518) 432-7400

May 15, 2023

The Honorable Letitia James
Office of the Attorney General
State Capitol
Albany NY 12224-0341

Dear Attorney General James:

The New York Association of Convenience Stores (NYACS) wishes to submit the following comments in response to the proposed price gouging rules that have been released by your office. NYACS represents the interests of nearly 8,000 convenience stores and over 127,000 employees across the state. 70 percent of our members also sell motor fuel. NYACS members take responsible retailing very seriously, including ensuring consumers are not gouged ever – regardless of economic or other forces.

As we stated in our comments dated April 22, 2022, retail motor fuel prices are affected by dozens of factors that are constantly shifting. Factors that influence gas prices include crude oil prices, local sales taxes, credit card swipe fees, delivery and labor costs, weather, and military disputes. Despite the sensitivity of the market to these cost dynamics, no other commodity market is as transparent or competitive as retail motor fuel. Tax-included prices are constantly displayed on highly visible signage and are updated in real-time. The combination of transparent pricing and consumers' price sensitivity exerts a constant downward pressure on retail fuel prices, benefiting consumers. It also forces retailers to operate efficiently in order to preserve market share. Convenience store operators are also buyers of fuel as much as they are sellers, so they are sensitive to how consumers are impacted by price trends. The difference is that convenience stores buy fuel thousands of gallons at a time.

NYACS has reviewed the proposed rules and appreciates the time your office took to review previous comments and your attempt to satisfy concerns. However, NYACS continues to believe the rules are too vague and require more guardrails and defined terms. As drafted, the explanations of abnormal disruptions are too broad and in fact do not take into account geography or the wildly dynamic motor fuel market.

Section 396-r of General Business Law 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."[1] Further, per the proposed rules, "An abnormal market disruption is characterized by an abnormal increase in demand or a decrease in supply (or both) of a vital or necessary good or service…If, for example, the local electricity grid goes down, the sellers will raise the price of generators (in the absence of a price gouging rule) because of increased demand for the existing supply. If a heavy snowstorm shuts down the highways for days, the cost of orange juice to sellers will shoot up because of constricted supply."[2]

The question still remains, where does the "change in the market" need to occur and what is the definition of "market?" A snowstorm or electricity outage in one part of the state could impact another very easily. Weather or man-made events in the Gulf Coast or the Middle East could impact prices long before an official market disruption is declared or even felt by the general economy. Retailers could purchase fuel in one part of the state that is impacted by a disruption but sell it in another part of the state. The rules, as drafted, do not take these scenarios into account.

Additionally, the rules still do not address the lack of an official declaration by the Governor or other official. Section 396-r's definition of "abnormal disruption of the market" still appears to remain in effect and still states a disruption is caused by certain events OR a declaration by the Governor. There continues to be no official declaration mechanism or timeframe review required by these draft rules. In fact, the Governor did not declare a state of emergency last year after one of the most disruptive market events – the Russian invasion of Ukraine – occurred. This military dispute continues as gas price fluctuated and have since stabilized – all because the market was allowed to work without interference or artificial price controls.

Because there is no strict requirement that a declaration be made, the price gouging law – and proposed rules - is vague and puts law-abiding businesses at risk. In addition to requiring a declaration, there should be a requirement that the state review these declarations regularly as some emergencies last days while others could last years. This lack of clarity on the requirement for a declaration and what that declaration looks like is the top cause of concern for NYACS and should be addressed before finalizing any rules.

The lack of clarity and understanding of the motor fuel market underscore NYACS' major concerns with Rule 500.1 (Presumptive Gross Disparity), Rule 500.5 (Unfair Leverage), and Rule 500.7 (Dynamic Pricing). A 10 percent increase in retail motor fuel prices can occur multiple times in a day and be impacted by events that occur more than a week before any disruption is officially declared or acknowledged. Hurricanes in

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[1] GBL 396-r

[2] (https://ag.ny.gov/sites/default/files/2023-03/price_gouging_rulemaking_final_for_sapa.pdf)

the Southeastern United States where refineries are located or problems with pipelines cause no actual damage in New York but are very impactful on prices. Some NYACS members reported an increase of 50 cents to one-dollar per-day last year when Russia invaded Ukraine. Also, who determines what a 30 percent market share is and again where is the market located?

Because crude oil and gasoline are all traded commodities, any price moves become immediate and are affected by supply and demand issues as well as speculation by commodity traders. The retailers are at the end of the line and forced to change prices quickly as their costs escalate on a daily basis. For these reasons a 10 percent price increase trigger for a review along with the one-week lookback language and is not an appropriate way to look at the motor fuel retail space. Additionally, until terms are fully defined these rules will prove to be incomplete.

The proposed rules seem to allow retailers to prove any increases in price during a declared emergency are valid costs. While this is a move in the right direction, it raises concerns about the process and administrative burden required to prove these costs. We ask you to review the problems associated with last year's gas tax holiday and the rebate process implemented by the Department of Tax and Finance. The state required the use of inadequate and incorrect forms and after my members complied, many were told they needed to provide more information via fax. NYACS fears these proposed rules will create a paperwork nightmare for our members.

NYACS appreciates the efforts of your office to curb illegal retail practices and pricing, however, the lack of clarity in these proposed rules will only hurt law-abiding businesses and residents of the state. NYACS looks forward to continuing to work with you on this and offers itself as a resource for your staff.

Sincerely,

Kent Sopris
President
NYACS

From:	Teachout, Zephyr
To:	Kent Sopris; stopillegalprofiteering
Cc:	Webley, Alec; Ramirez Warren, Giovanni
Subject:	RE: NYACS Price Gouging Comments
Date:	Monday, May 15, 2023 12:11:54 PM

Thank you Kent for the submission.

Best,

Zephyr Teachout

From: Kent Sopris <kent@nyacs.org>
Sent: Monday, May 15, 2023 11:58 AM
To: stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>
Cc: Teachout, Zephyr <Zephyr.Teachout@ag.ny.gov>; Webley, Alec <Alec.Webley@ag.ny.gov>; Ramirez Warren, Giovanni <Giovanni.RamirezWarren@ag.ny.gov>
Subject: NYACS Price Gouging Comments

[EXTERNAL]

Comments are attached.

Thank you for the opportunity to submit them.

Kent Sopris

--

Kent Sopris
President
New York Association of Convenience Stores
130 Washington Ave., 3rd Floor
Albany NY 12210
518-588-4115 Cell
518-432-1400 Office

From:	Teachout, Zephyr
To:	Kent Sopris; stopillegalprofiteering
Cc:	Webley, Alec; Ramirez Warren, Giovanni
Subject:	RE: NYACS Price Gouging Comments
Date:	Monday, May 15, 2023 12:11:54 PM

Thank you Kent for the submission.

Best,

Zephyr Teachout

From: Kent Sopris <kent@nyacs.org>
Sent: Monday, May 15, 2023 11:58 AM
To: stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>
Cc: Teachout, Zephyr <Zephyr.Teachout@ag.ny.gov>; Webley, Alec <Alec.Webley@ag.ny.gov>; Ramirez Warren, Giovanni <Giovanni.RamirezWarren@ag.ny.gov>
Subject: NYACS Price Gouging Comments

[EXTERNAL]

Comments are attached.

Thank you for the opportunity to submit them.

Kent Sopris

--

Kent Sopris
President
New York Association of Convenience Stores
130 Washington Ave., 3rd Floor
Albany NY 12210
518-588-4115 Cell
518-432-1400 Office

From:	Michael Durant
To:	stopillegalprofiteering
Subject:	Proposed Rulemaking Pursuant to New York General Business Law Section 396-r(5) (Price Gouging)
Date:	Monday, May 15, 2023 2:54:58 PM
Attachments:	image007.png image008.png image009.png 2023 FIA Price Gouging Regulation Comments.pdf

[EXTERNAL]

Dear Sir or Madam –

Please see the attached submission in response to the proposed rulemaking focused on price gouging. This represents the position of the Food Industry Alliance of NYS, and is submitted on behalf of our members. We thank you for your consideration.

Mike Durant
President & CEO
Food Industry Alliance of NY
111 Washington Avenue
Albany, NY 12210
(518) 434-1920

Follow us:

Advocates of the
Food Industry
Since 1900
FIA
FOOD INDUSTRY ALLIANCE OF NEW YORK, INC.
111 Washington Avenue - Suite 200, Albany, NY 12210 (518) 434-1900

May 15, 2023

BY EMAIL – (stopillegalprofiteering@ag.ny.gov)

Honorable Letitia James
Attorney General of the State of New York
Office of the Attorney General
State Capitol
Albany, New York 12224

RE – Proposed Rulemaking Pursuant to New York General Business Law Section 396-r(5) (Price Gouging)

Dear Sir or Madam:

The Food Industry Alliance of New York State Inc. (FIA), the premier trade association representing the full spectrum of the grocery industry in our state, is appreciative of the opportunity to offer comments in response to the March 2023 proposed rules regarding price gouging. In review of the proposed rulemaking, the retail food industry has numerous concerns and alternatives which we respectfully request consideration. Overall, the proposed rulemaking lacks clarity and remains vague at numerous points, which likely will have an adverse impact on the retail food industry.

With respect to **Proposed Rule 1 (500.1 Presumptive Cases of Gross Disparity)**, which creates an automatic presumption of gross disparity for price increases over ten percent, FIA first offers that while the creation of an automatic presumption will lead to significant additional enforcement actions, it wholly fails to recognize the variety of intended and unintended circumstances which could warrant such price increases.

FIA offers the following considerations –

1. That the proposed ten percent rule includes an appropriate temporal limitation that is reflective of the temporary risk of profiteering that arises from an abnormal market disruption.

   The lack of any temporal limitation on the ten percent rule leaves retail sellers susceptible to an automatic presumption of price gouging that may be unwarranted during prolonged periods of pricing restrictions, the COVID public health emergency being an example. Yet another example relates to delivery cost. There are numerous instances in which retailers may not know actual delivery cost in real time and yet must adjust prices continuously in a highly competitive market in relation to both costs and/or anticipated costs.

Additionally, there may be instances when a retailer needs to estimate its delivered product cost and set a price accordingly at the time, even though it has not yet been invoiced for the delivery. In such instances, the retailer may need to rely on index prices to estimate what its actual delivered cost will be.

2. FIA recommends that any final rule provides clarity related to "abnormal market disruption" to ensure businesses can take the proper compliance measures.

   The proposed rule lacks clarity with regards to measuring a price "immediately prior to the onset of the abnormal disruption of the market" that is not triggered by a state of emergency declaration. While the proposed rules make clear that an "abnormal market disruption" is "any change in the market, whether actual or imminently threatened, resulting from *two sets of enumerated events*: (1) 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 (2) when the Governor declares a disruption-related state of emergency."

   However, unlike a state of emergency declaration, abnormal market disruptions that arise under the first enumerated event are not typically accompanied with a formal method of notification to inform businesses that the pricing restrictions under GBL 396-r have been activated. As a result, businesses are without guidance on how to accurately measure price prior to the onset of an abnormal disruption created under that prong.

Focusing on **Proposed Rule 2 (500.2 Costs Not Within Control of the Defendant),** the language takes a narrow interpretation of "additional costs not within the control of the defendant" which will essentially have a specific and significant impact on retail grocery stores by nullifying this as an affirmative defense.

The rationale set forth makes clear that "costs include only those which are for the goods and services whose price increased, not for the business as a whole. The product-specific losses accrued during a market disruption must be costs specific to the product whose price was increased; losses on sales of a business' other products may not be included in the cost-justification calculation." The proposed rule is not a feasible measure of "additional costs" for businesses such as retail grocers that sell thousands of different products. As a result, the "additional cost" defense under the proposed rule is not a practical or accurate way to measure additional costs incurred by retail grocers that are completely out of their control.

For example, if a price gouging enforcement action is brought against a supermarket related to the sale of a single product (*e.g.*, baby formula, toilet paper, milk, etc.), it is not feasible for the retail supermarket to apportion, quantify, and directly attribute the additional costs set forth in the rule to a specific product such as baby formula.

Aside from additional purchase costs, retail supermarkets will be unable to directly attribute additional costs for storage, distribution, labor, and overhead costs such as energy, rent or operational budgets to one single product among thousands. The rule as drafted is completely unworkable for retailer grocers and should be revised to account for the varying business types for all parties within the supply chain.

Proposed Rule 5 (500.5 Unfair Leverage), seeks to create a presumption of unfair leverage based on thresholds related to annual revenue, market share, and market concentration. In reviewing the language, it is apparent that the entire rule moves beyond the issue of price gouging and into existing antitrust regulations.

Further, these proposed provisions would unfairly target retailers in some markets, holding some retailers to different standards and unduly burdening them to overcome presumptive violations.

Also, the assessment that this will not increase costs on the industry or on the enforcing agency is incorrect. If affected retailers have *any* increase in price it will be a presumed violation and therefore both the agency and the retailer will be required to spend resources on an investigation (where there may be no evidence of actual price gouging, but nevertheless the presumption must be disproven) whereas unaffected retailers with similar price increases would not be subject to presumptive violations and thus have no investigation or defense costs.

Additionally, FIA is concerned that there is ambiguity with the term "relevant market". Due to the uncertainty about how markets are defined, many retailers may not know their precise market share or how the Attorney General's Office would define the "relevant market." This might force these retailers to conservatively assume the stricter threshold applies to their pricing. This uncertainty further underscores this proposed rule's deviation from the "unconscionably excessive" statutory standard

FIA strongly recommends that clarity be provided with respect to "relevant market" and the proposed rule language is examined further as it relates to current antitrust regulations.

Lastly, focusing on **Proposed Rule 7 (500.7 Dynamic Pricing),** there are numerous concerns with the construct of the proposed rule and the lack of clarity throughout. While the language states that "the statutory text prohibits the use of dynamic pricing during abnormal market disruptions" it should be noted that, in fact, the statute does not. Specifically, the statute provides that that prices should be compared to those "immediately prior to the onset of the abnormal disruption of the market" *(N.Y. Gen. Bus. L. § 396-r(3)(b)(i).*

Further, pricing "one week prior" is also an arbitrary point of comparison that does not permit consideration of historical pricing and is ambiguous. It also fails to acknowledge that various commodity pricing can increase throughout any given day and be impacted by events happening not just in New York, but across the United States and in some instance, the globe.

Overall, the retail food industry supports sensible, workable solutions to public policy issues, such as this. That said, most of the rules as proposed contain a lack of clarity and equally concerning, a consideration of the national and global nature of the supply chain. The vagueness contained throughout the proposed rules will have a significant impact on the industry and will have a direct negative impact on consumers.

We respectfully urge the Department to consider this submission on behalf of the retail food industry in New York prior to publishing any final regulations. FIA remains a willing stakeholder to continue the discussion on price gouging and provide any guidance necessary to improve the rules and promote fair and workable standards on price guidance in New York.

Respectfully submitted,

Michael Durant
President/CEO
Food Industry Alliance of NYS, Inc.

From: Andrew Greenblatt
To: stopillegalprofiteering
Subject: Written Testimony Re: Price Gouging
Date: Friday, May 19, 2023 1:44:42 PM
Attachments: Written Testimony of IDG RE Price Gouging May 19 2023.pdf

[EXTERNAL]

Attached, please find written testimony from the Independent Drivers Guild concerning proposed price gouging rules.

--

Andrew Greenblatt, Executive Director
IDG Benefits Fund
(646) 847-9606

Written Testimony of Andrew Greenblatt
Policy Director
Independent Drivers Guild (IDG)
Related to Proposed Rules Concerning
Section 396-r of the GBL (Price Gouging)
Office of the New York State Attorney General
May 19, 2023

My name is Andrew Greenblatt, and I am the Policy Director of the Independent Drivers Guild (IDG). Thank you for this opportunity to submit this testimony concerning the proposed Price Gouging rules.

The IDG is a nonprofit affiliate of the International Association of Machinists and Aerospace Workers (IAMAW), and our organization represents over 100,000 for-hire vehicle drivers in New York State.

I am submitting this written testimony regarding the proposed rules for rideshare companies in New York State. This testimony follows a discussion with the Office of the Attorney General staff via video conference on May 3, 2023.

While we appreciate the state's effort to regulate dynamic pricing during market disruptions and prevent price gouging, we have concerns that the proposed changes may inadvertently harm both workers and passengers unless the rules are clarified further. The proposed rules allow rideshare firms to increase costs for rides during market disruptions, as long as the additional fees are spent on justified increased costs, including labor costs. Our fear of a misunderstanding of the proposed rules concerns the section forbidding firms from passing along increases "within their control." Given the control firms in general, and rideshare in particular, have over labor costs, we are worried that rideshare firms might avoid paying their workers more during market disruptions, starving workers of much-needed pay and leaving passengers unserved during urgent and/or dangerous situations.

The proposed rules allow firms to raise prices to cover increased labor costs. Specifically, the proposed rule section 500.7 addresses dynamic pricing and states that a firm that would be liable for price gouging due to this provision may 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. Additionally, proposed rules in section 500.2 state that costs not within the control of the defendant, including "labor," may be passed along to consumers as increased prices.

Taken together, these changes mean that rideshare companies will be allowed to raise prices during market disruptions - and pay labor whatever increased rates are needed - as long as it doesn't lead to increased profits for the rideshare firms.

Confusion may arise from proposals in section 500.2 that would prohibit passing along costs unless they are "not within the control of the defendant." Since rideshare firms set the increased labor rate during price surges, this could be read to forbid firms from passing the increased rates for labor along to passengers during a market disruption.

We believe this is the wrong reading of the rules and recommend that the rules be enacted with clarification to prevent this misreading. The examples of costs that are within the firm's control, and, therefore, forbidden, are cases in which higher costs today are just attempts to capture increased profits later when the disruption is over. For example, front-loading debt repayment today will lead to higher profits tomorrow. Passing increased fees on to laborers will not increase profits for the firms today or in the future.

Furthermore, increased labor costs are typically “within the control” of all firms to some extent. Firms choose to offer hazard pay or raise pay rates during market disruptions in order to entice workers to fill otherwise vacant positions during urgent and/or dangerous situations. For example, hospitals raised pay for nurses during the recent pandemic to fill open positions needed to meet the increased need and dangers. Similarly, rideshare firms often need to raise drivers' rates to fill unmet transportation needs during a market disruption.

Therefore, we urge the New York State Attorney General's office to clarify the rules regarding rideshare companies and their ability to raise prices during market disruptions as long as the additional income is passed along to drivers. It is important to ensure that workers and passengers are not inadvertently harmed by these rules and that rideshare companies can continue to provide vital services during times of disruption.

Industry Information

During our discussion on May 3, 2023, OAG staff requested that we submit information concerning how surge pricing operates in our industry from a driver perspective. We do not have statistical data on the subject, but as a driver-led organization that has been working with thousands of drivers over the years, we can share the following:

1. Drivers respond to surge pricing - Surge pricing can occur whenever the demand for drivers outstrips the supply in the area. In order to attract more drivers to cover an area, rideshare firms raise the per-minute and per-mile pay for trips that are in high demand and otherwise wouldn’t be met. This may bring drivers from an overserved geographic region to an underserved area, or it may encourage drivers to start driving or extend their shifts. This pay is analogous to other forms of incentive pay firms choose to use to attract labor when the demand isn’t being met, such as hiring bonuses or hazard pay. Like those forms of increased costs of labor, surge pay should be considered an increased cost of labor that is necessary to meet the needs, most importantly during an emergency or other market disruption. For example, during the height of the pandemic, drivers were enticed to risk their health and lives to transport healthcare workers by offering the drivers increased pay.

2. Drivers rely on this pay - New York State rideshare drivers are disproportionately immigrants working for low wages. In New York City, where approximately 85% of rideshare rides occur in New York State, 91% of the drivers were born in another country. The city now (thanks to a complaint filed by the IDG) requires rideshare firms to

pay a minimum compensation rate that covers expenses and brings take-home pay up to the minimum wage. Surge pricing pays above this floor, and savvy drivers know when surges will likely occur. These drivers plan their workday around when they are more likely to get work, especially surge pricing.

Given the importance of surge pricing both to drivers and the passengers who rely on them to work, we urge the Attorney General to make sure that any new rules clearly allow firms to continue offering surge pricing during market disruptions and during business as usual.

If you have any questions, please feel free to contact Andrew Greenblatt at andrew@idgbenefits.org or 646-847-9606.

From:	Chelsea Lemon
To:	stopillegalprofiteering
Cc:	Paul Zuber; Ken Pokalsky
Subject:	The Business Council of NYS - Comments re OAG proposed price gouging rules
Date:	Friday, May 19, 2023 3:17:28 PM
Attachments:	image001.png Final_BCNYS Comments_OAG Proposed Price Gouging Rules_05.19.2023.pdf

[EXTERNAL]

Dear Ms. Teachout:

Attached please find comments submitted on behalf of The Business Council of New York State, Inc., regarding OAG's proposed price gouging rules.

I appreciate the opportunity to comment and welcome the opportunity to speak further. Thank you.

Regards,

Chelsea Lemon | Director of Government Affairs
The Business Council of New York State, Inc.
111 Washington Avenue, Suite 400 | Albany, NY 12210
Tel. 518.694.4462 | Fax. 518.465.4389
Chelsea.Lemon@bcnys.org | www.bcnys.org

The Business Council

The voice of business and employers in New York State.
Advancing economic growth, creating good jobs and strong communities across New York State.

Chelsea Lemon
Director of Government Affairs

May 19, 2023

SUBMITTED ELECTRONICALLY TO stopillegalprofiteering@ag.ny.gov

Ms. Zephyr Teachout
Special Advisor and Senior Counsel for Economic Justice
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

Re: Comment on Price Gouging Proposed Rulemaking (I.D. Nos. LAW-12-23-00006-P, LAW-12-23-00007-P, LAW-12-23-00008-P, LAW-12-23-00009-P, LAW-12-23-00010-P, LAW-12-23-00011-P, LAW-12-23-00012-P)

Dear Ms. Teachout:

These comments are submitted on behalf of The Business Council of New York State, Inc., New York's largest statewide business association, with 3,200 members in a wide range of business sectors, including many that could be directly impacted by these proposed regulations related to the state's price-gouging statute, General Business Law § 396-r. These rules were proposed by the Office of the Attorney General (OAG) and published in the New York State Register on March 22, 2023.

If adopted as proposed, these rules would present numerous operational and compliance challenges and create significant uncertainty for large, medium, and small businesses in New York. These comments focus on several specific concerns we have with this proposal and offer alternatives that would result in a more certain, more workable regulatory regime.

- **The proposed rules fail to require a specific declaration of an emergency for an "abnormal disruption of the market" or otherwise provide clarity on the timing, affected goods, or geographic scope of such disruptions.**

  A declaration of emergency by the governor should be required for enforcement. The price-gouging statute (GBL § 396-r), by its terms, comes into effect during periods of "abnormal disruptions of the market." However, the statute leaves significant ambiguity as to when a period of abnormal disruption of the market begins and ends. To provide adequate notice to businesses and consumers alike, the statute should be interpreted to require a state of emergency declaration by the governor before its requirements come into force. The importance of that notice is, moreover, significantly heightened in light of the increased requirements on businesses that the OAG is seeking to impose in this rulemaking.

Instead of taking the opportunity to provide greater clarity on this issue through this rulemaking, the proposed rules compound the ambiguity of the statute by taking the position that a state of emergency declaration is *not* required for enforcement of the statute. Nor do the proposed rules provide any other bright-line rule for businesses to use to determine when the statute's requirements come into effect. The proposed rules thus simultaneously attempt to dramatically increase the statute's pricing restrictions, while also creating more ambiguity and providing inadequate notice to businesses as to when these requirements are in force (proposed § 500.1). Without further clarification as to how an abnormal market disruption is determined, businesses will be operating blindly and could unknowingly violate the law, thus being unfairly exposed to potential enforcement and significant civil penalty.

It does not need to be this way. Price-gouging statutes in most states, including Connecticut[1] and Pennsylvania,[2] specify how the market disruption must be declared and when it ceases, requiring formal emergency declarations by the governor. The OAG should ensure that New York law does not provide less guidance to New York businesses than these states provide to theirs.

The proposed rules fail to provide clarity as to which goods and services are affected by an abnormal market disruption. Not every market disruption will impact all critical goods or services covered by New York's price-gouging law. Therefore, it should also be necessary that there be a formal declaration of the goods or services affected by the abnormal market disruption. Other states identify the impacted goods or services, whether required by their laws or in practice.[3]

This is particularly important for goods and services (especially commodities such as petroleum) that are bought and sold in national or world-wide markets, where some level of abnormal market disruptions occur on an almost-daily basis. For example, the war in Ukraine could be considered an abnormal market event that impacted global energy and grain markets; yet, more than a year later, it is unclear whether that constitutes an abnormal market disruption implicating the provisions of GBL § 396-r and this proposed rule, and, if so, which goods and services are affected, and how businesses should know when the market disruption is no longer in effect. Knowing when an abnormal market disruption starts and ends is critical to complying with the law. If a business cannot be certain that it is in compliance with statutory and regulatory requirements, this can dissuade businesses from responding to market forces in a way that provides both business and consumer benefits.

For these reasons, The Business Council believes that not only should a state of emergency or other form of formal notice be required to commence applicability of the statute but also that such a proclamation of an abnormal market disruption should also identify what goods and services are affected. It is essential that New York's rules provide clear guiderails around an abnormal market disruption so that businesses can comply with the regulations.

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[1] CT Gen Stat §§ 42-230–42-232.

[2] Pa. Price Gouging Act, Act of Oct. 31, 2006, P.L. 1210, No. 133.

[3] Maine requires that an abnormal market disruption declaration list "[t]he particular necessity, necessities or categories of necessities that are affected by the abnormal market disruption." Me. Rev. Stat. tit. 10, § 1105. Tennessee provides that "a declaration of an abnormal economic disruption by the governor may specify that only certain goods or services are covered by the prohibition described in subdivision." Tenn. Code Ann. § 47-18-5103(a)(2). In practice, both Wisconsin and California also outline which goods and services are covered. *See* Wis. Gov. Exec. Order 164 (May 26, 2022); Cal. Exec. Order N-03-21 (Mar. 4, 2021).

The proposed rules fail to provide a mechanism for identifying which portions of the state are affected by an abnormal market disruption. Additionally, the proposed rules do not contemplate that only a particular geographic area might be affected by an abnormal market disruption, such as a disruption caused by a hurricane or snowstorm that only impacts one area of the state. Requiring a gubernatorial declaration or other means of clarification that specifies the affected areas would address this uncertainty.

The proposed rules fail to address the possibility of seasonal pricing fluctuations. Further, the rules do not allow for an exception for increased prices due to seasonal changes, an issue addressed in statute by several states, including South Carolina and Virginia.[4] This omission can compound the problems caused by a geographically overbroad application of the statute. For example, if a hurricane hits the Long Island region during the month of August, but has no effect on the Lake George region, and an abnormal market disruption is declared due to that disruption, it could have grave economic consequences for the heavily seasonal, tourism-dependent economy of the Lake George area if the declaration does not specify the region or goods and services affected, especially if that declaration were to apply to hotel rooms. Each region of New York flourishes at differing times of the year, with many regions reliant on the revenue from their tourist seasons. Because of the large geographic footprint of the state, not every disruption affects the entire state, and that should be accounted for in the proposed rules to guide businesses statewide.

The seasonality issue stands regardless of geographic location. If a hurricane hit Long Island just before Labor Day weekend, businesses will have already built in the increased demand for hotel rooms, rental cars, flights and so on. These price increases are built on market demand and could falsely be attributed to an abnormal market disruption. We recommend the inclusion of safe harbor language like that of Virginia[5] or Kentucky.[6]

The ambiguity left by the proposed rules will have harmful real-world effects. Without a declaration of the scope of an abnormal market disruption, including when the disruption ends, the OAG's proposed rules may unintentionally create a *de facto* price cap on particular goods or services. That would, among other things, diminish the incentives for businesses to invest in and expand production and distribution in New York State, to the detriment of its citizens.

While statutory amendments addressing these concerns would be ideal, we strongly recommend that the OAG's final rules provide a mechanism by which businesses will be made aware of when a disruption begins and ends, what goods and services are affected, which geographic areas are impacted and account for seasonal pricing fluctuations.

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[4] S.C. Code § 39-5-145(H) (2006); Va. Post-Disaster Anti-Price Gouging Act, § 59.1-527(4) (2004).

[5] "In determining whether a price increase is unconscionable, the following shall be considered…4. Whether the increase in the amount charged by the supplier was attributable solely to a regular seasonal or holiday adjustment in the price charged for the good or service" Va. Post-Disaster Anti-Price Gouging Act, § 59.1-527 (2004).

[6] *See* Ky. Rev. Stat. Ann. § 367.374(1)(c)(4).

- **The proposed rules impose a draconian price cap on businesses based on "market share" when many businesses will not know how to define their market or what their share is.**

  The issue of what constitutes a "market" may be the most daunting question that looms over this rulemaking and the enforcement of § 396-r, and this open-ended term could result in significant, adverse impacts on small businesses across the State. The rules directly link unfair leverage—and a draconian price cap of 0%—to a business's market share. This idea of "unfair leverage" is similar to the idea of "dominant position" as proposed in the *Twenty-First Century Anti-Trust Act*.[7] Neither that bill nor these proposed rules provide any criteria or guidance as to how an affected market is to be defined. A market could be defined by a variety of factors including the service/product, geographic boundaries, or industry. Further, the rules do not provide for consistency in how this determination would be made. Calculating market share would require defining (1) the relevant product market, which are the products and/or services that as close substitutes, and (2) the relevant geographic market, which is the area where producers of such products and/or services compete. Determining product and geographic markets often requires complex and data intensive economic analysis to ascertain which products and/or services should be included in the market and the geographic area where the sellers of such products and/or services actually compete.

  The absence of clear criteria for defining markets has the potential to result in hundreds of businesses, including small businesses, deemed to have unfair leverage within a market, and thus subject to the OAG's draconian price cap of 0% (§ 500.5(1)). For example, if a butcher is the only butcher in town, it would arguably have 100 percent of the market share for that town; such that <u>any</u> price increase during an abnormal market disruption that may increase profit margins, however slightly, would be in violation of these proposed regulations.

  Under the proposed rules, a business need only have limited market share for the 0% price cap to apply. The rules define "unfair leverage" to exist when a single business raises prices any amount and either has more than 30 percent of a "market," or has 10 percent market share and limited competition, defined as five *or fewer* competitors with above a 10% market share (§§ 500.5(2)–(3)(b)). As written, the proposed rule would apply to any business with 10% market share operating in a "market" in which one competitor (or, strictly read, even none) also has a 10% market share. Even if 80% of the remainder of the market were split between an unlimited number of competitors, the rule would still apply. Thus, under the proposed regulation, unfair leverage will be presumed for any price increase by a business with 30% market share or 10% market share and a limited number of large competitors, even for a small business operating in a highly competitive and fragmented market.

  Without knowing the scope of a market, and its geographic footprint, whether local, regional, national, or international, and conclusively defining those terms for a business to comply with the final rules, a business would be unable to determine whether it is operating with or without unfair leverage and whether the provisions of § 396-r and these regulations apply. The proposed rules—aimed at "unconscionably excessive" price increases—should not be interpreted to apply 0% or 10% pricing restrictions on everyday businesses without, at a minimum, greater clarity as to which businesses are subject to such a requirement.

[7] N.Y. State S. B. S.6748, May 8, 2023.

Even were the scope of the market known, the proposed 0% price cap in concentrated markets is unfaithful to the statute and exceeds the OAG's rulemaking authority. Under the statute (GBL § 396-r(2)), "unfair leverage" is not an independent standard but one of the factors a court may consider to find a price to be "unconscionably excessive". The draft rule proposes that, in instances where "unfair leverage" is used to increase prices, "there is no *de minimis* percentage price increase to create a presumption of illegality," i.e., a 0% cap on price increases.[8] But "unconscionably excessive" plainly cannot be read to prohibit a 1% price increase, no matter how concentrated the market or how essential the good or service. In fact, the proposed rule is so divorced from the statutory language that it may violate New York's "strong" non-delegation doctrine,[9] as was held to be the case for the NYC Health Department's soda ban.[10]

Taking together these provisions on "unfair leverage," a business with the arbitrarily chosen shares of 30%, or even 10%, of an undefined market will be presumed to be in violation of § 396-r for any cost increase. The resulting uncertainty may cause businesses of all sizes in all markets to freeze prices during abnormal market disruptions. This was plainly not the Legislature's intention and could have significantly detrimental effects on the New York marketplace and its consumers.

- **The 10% price increase threshold is also inconsistent with the statute and improperly unjustified.**

The proposed rules establish a 10% price increase from pre-emergency pricing as the presumptive threshold for a "gross disparity" in pricing (§ 500.1). This is inconsistent with the statutory prohibition of "grossly" or "unconscionably" excessive price increases. Such price fluctuations are not unusual for many products and thus hardly "unconscionable". OAG justifies the chosen threshold without reference to the statute it is meant to be implementing. OAG points to 10% as the standard in many other States, including neighboring New Jersey, and New York City, but ignores that these jurisdictions' laws prohibit merely "excessive" price increases.[11] OAG disregards that states with more analogous laws to New York (e.g., Pennsylvania, Michigan, and Minnesota) have employed a 20% threshold.[12] OAG also wrongly points to the enhanced administrability of adopting the same standard as New Jersey and New York City, but ignores the four other States that border New York—Pennsylvania and its 20% threshold share the longest border with New York, while Vermont and Massachusetts (which also prohibit "gross" or "unconscionable" price increases) are among the plurality of states that specify no presumptive threshold.[13]

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[8] Proposed Rulemakings, 2023 N.Y. Reg. Text 638439 (NS), 45 N.Y. Reg. 22, 13 NYCRR § 500.5(1) (Mar. 22, 2023) (emphasis added).

[9] *See* Borchers & Markell, New York State Administrative Procedure and Practice § 5.3 at 143–45 (2d ed. West's N.Y. Prac. Series 1998); David Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1387 n.32 (2011); Gary Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States,* 8 ADMIN. L.J. AM. U. 567, 581 (1994).

[10] *See N.Y. Statewide Coal. of Hispanic Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681 (2014).

[11] The Rules of the City of New York, § 5-42 (effective June 26, 2020), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-19009; NJ Rev Stat § 56:8-109 (2013).

[12] *See* Price Gouging Act, Act of Oct. 31, 2006, P.L. 1210, No. 133 § 2(4).; M.C.L.A. § 445.903(z); Mich. Exec. Order No. 2020-18 (Mar. 20, 2020); Minn. Emergency Exec. Order 20-10 (March 20, 2020).

[13] 940 Mass. Reg. 3.18; 9 V.S.A. § 2461d; Proposed Rulemakings, 2023 N.Y. Reg. Text 638439 (NS), 45 N.Y. Reg. 22, 13 NYCRR § 500.1 (Mar. 22, 2023) ("Nineteen states apply no numerical presumption, and instead peg price gouging to unconscionably extreme prices or similar formulations.").

Together with the other uncertainties regarding the statute's applicability, we believe that the 10% price threshold is inconsistent with the statute's intentions and too rigid a standard.

- **While the purpose of the rules is to provide clear guidance for businesses, they do not provide any safe harbor for increased costs due to legitimate price increases.**

In its rulemaking package, the OAG states that one of its aims is to provide both businesses and consumers with clearer guidance. However, while the rules state a presumption of what *is* price gouging, there is no presumption or safe harbor as to what is *not* price gouging. Therefore, in practice, the rule imposes a 0% threshold, not the intended 10%. New York City and New Jersey, as well as Arkansas, California, Kentucky, Utah, and West Virginia, all state that price gouging can only occur above the threshold percentage in statute or define both what is and what is not price gouging.[14]

Moreover, while the stated intention of the statute and the draft regulations is to allow for companies to raise prices to cover increased costs incurred during a market disruption, language in Section 500.2 will seriously hinder a company's ability to prove this affirmative defense. For example, the rule does not allow for increased costs that cannot be shown to be "directly attributable" to the good or service in question. For a large business with national or international operations, it will be extremely difficult to break down increased costs across the business attributable to each item or service sold. During a multi-year crisis like the recent pandemic, this could discourage companies from selling newly developed goods (like medications or tests) to New Yorkers. For example, a company may otherwise wish to invest in increased production and efficient methods to provide additional goods, but there is no economic incentive to do so under the rules. To the contrary, there is every incentive to either forego that product line altogether, redirect the products elsewhere, or produce only the minimum possible. This formulation also introduces Takings concerns by arguably creating a scenario where general and legitimate business expenses cannot be recaptured.

The proposed rules may complicate the sale of vital commodities during abnormal market disruptions. These rules apply to all types of products and businesses without contemplating the impact they will have on New York businesses that operate within, or heavily rely upon, existing international markets, and in particular, commodities. Under the proposed rule, companies may not rely on prices set by an external index to justify price increases, notwithstanding that is how commodities prices are typically set (§ 500.2(4)). This conflict disadvantages sellers who would be required to sell at below-value prices to others, whether regionally, nationally, or internationally, and fails to protect existing contractual arrangements.[15] In commodities, it is standard practice for the seller and buyer to negotiate long-term *national* supply contracts. However, this proposed rule would require an individualized contract for such businesses' New York operations. The inability to rely on indexed pricing may also dissuade businesses from providing vital commodities to New York consumers during market disruptions because they can sell the same commodities for market prices elsewhere. This proposed rule is out-of-step with other states, like Rhode Island, North Carolina,

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[14] *See* The Rules of the City of New York, § 5-42(a); N.J. Stat. Ann. § 56:8-108; Ark. Code Ann § 4-88-303; Cal. Penal Code § 396; Ky. Rev. Stat. Ann. § 367.374; Utah Code Ann. § 13-41-102(4)(a); W. Va. Code Ann. § 46A-6J-3.

[15] Kentucky includes safe harbor for existing contracts that are agreed to prior to an intervening market disruption. *See* Ky. Rev. Stat. Ann. § 367.374(1)(c)(5).

Tennessee, and Louisiana,[16] and we strongly suggest that the rule allow for exceptions for normal price fluctuations in regional, national, and international commodity markets, or exempt pricing arrangements that preceded a market-disrupting event.

Again, the OAG rulemaking states as an objective of this rule to "ensure the public, business and enforcers have guideposts of behavior that constitutes price gouging" (§ 500.1). We respectfully submit that without a clarification as to safe harbor and what does *not* constitute price gouging, the rules fail to accomplish this goal.

- **The proposed rules may discourage businesses from introducing vital new products during abnormal market disruptions.**

The draft rules provide that a "new product" that did not exist prior to an abnormal market disruption can still be subject to claims of price gouging, stating that "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." However, the draft rules do not define a "comparable product" or provide factors that would need to be considered to make the determination as to what is and is not a comparable product (see § 500.3). By failing to address this or account for new products that have no comparative product or price point, the rules could potentially prohibit a range of lawful behavior that may be beneficial during an abnormal market disruption and prevent access to consumers. The Business Council is deeply concerned that this rule will impair innovative markets' ability to thrive within New York, not only because of the lack of clarity around new products, but the uncertainty surrounding when an abnormal market disruption begins.

- **The proposed rules risk extending the statute's application far beyond New York.**

There is an inconsistency between the statutory language and the proposed rule that raises concerns about the potential impact of this proposal on interstate commerce. The statute (at GBL §396-r(2)(c)) states that its prohibitions "shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another *when the product sold was located in the state prior to the sale*" (italics added.) In contrast, the proposed rule (§500.6) states that "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*" (italics added.) The change in wording in the proposed rule would seem to apply the provisions of GBL §396-r to transactions wholly outside of New York State (perhaps in a state with no comparable price-gouging law) and made without consideration of New York as a potential ultimate destination for goods in question, e.g., a manufacturer's sale of products to a third-party wholesaler. We believe wholly out-of-state transactions are beyond the scope of the law, and efforts to extend its reach could have the perverse effect of reducing the willingness of out-of-state suppliers to make products available to New York during times of market disruptions. We recommend that the regulation directly reflect the statutory language regarding the rule's applicability to supply chain participants in order to eliminate uncertainties regarding the validity of the rule with regard to out-of-state transactions.

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[16] *See* La. Stat. Ann. § 29:734(B); N.C. Gen. Stat. § 75-38(a); R.I. Gen. Laws § 6-13-21(c); Tenn. Code Ann. § 47-18-5103(b).

In summary, without clear rules, entrepreneurs and businesses of all sizes will have little if any advanced notice of their potential violation of GBL § 396-r, and may be deterred from doing business, or taking advantage of business opportunities, in New York. That outcome would adversely impact New Yorkers through the loss of access to goods and services, including innovative products and services during times of heightened consumer need. Our economic performance and future growth are dependent on businesses operating within clear guidelines and knowing the rules. Yet, when the proposed rules were published, our members were left questioning how they could successfully operate since the rules did not clearly outline the parameters of lawful versus illegal market actions. The Business Council believes that the above concerns should be addressed in OAG's final rulemaking to ensure all businesses, consumers and regulators know and understand the rules and can comply without significant uncertainty.

Again, thank you for your consideration of The Business Council's comments on the proposed price-gouging rules. We welcome the opportunity to further speak with you to ensure that the final rules provide clear and easily compliable guiderails for New York's business community. Please do not hesitate to contact me by email at chelsea.lemon@bcnys.org or by phone at (518) 694-4462 with any questions.

Sincerely,

Chelsea McLemon

Chelsea Lemon
Director of Government Affairs
The Business Council of New York State, Inc.

From:	Memphis, Kelly
To:	stopillegalprofiteering
Subject:	HDA Comment Letter Regarding Proposed Regulation for Price Gouging, Title 13 NYCCR
Date:	Friday, May 19, 2023 5:26:37 PM
Attachments:	image001.png HDA Comments NY Price Gouging Proposed Rules Final.pdf

[EXTERNAL]

To Whom It May Concern:

On behalf of the Healthcare Distribution Alliance, the national trade association representing pharmaceutical wholesale distributors- the vital link between roughly 1,400 pharmaceutical manufacturers and more than 180,000 pharmacies and other healthcare settings nationwide- please find attached our comment letter regarding the proposed price gouging regulations for §GBL 396-r.

As the representatives of the logistical experts within the healthcare supply chain who ensure products are physically on New York pharmacy and sites of care shelves where and when patients need them, we thank you for this opportunity to share our views on how any final rules can ensure that both consumers and the resiliency of the supply chain are protected.

Please do contact me with any questions.

Sincerely,
Kelly

Kelly Memphis
Director, State Government Affairs
Direct: (202) 964-6594
Mobile: (443) 375-6541

HDA
Healthcare Distribution Alliance
Health Delivered

HDA Healthcare Distribution Alliance
HEALTH DELIVERED

May 19, 2023

Honorable Letitia James
Attorney General of New York State
1 Empire State Plaza
The Capitol
Albany NY 12224

Healthcare Distribution Alliance Comments
Re: Proposed Regulation for Price Gouging, Title 13 NYCRR
LAW-12-23-00006-P; LAW-12-23-00007-P LAW-12-23-00012-P

On behalf of our member companies, the Healthcare Distribution Alliance (HDA) would like to thank you for this opportunity to provide comments on proposed regulations implementing New York GBL 396-r. HDA supports the intended goal of the statute and proposed regulations to increase transparency and protections for consumers during times of crisis. However, on behalf of the pharmaceutical distribution industry, we are greatly concerned that some of the proposed rules do not take into account the unique and specific structure of the pharmaceutical supply chain, and as written could cause costly and harmful disruptions to supply and access. We would like to request your consideration of exempting pharmaceutical products from the regulations due to the unique nature of the industry. If there is not a willingness to remove pharmaceutical products from the regulations in full, then we request the consideration of our proposed comments on LAW-12-2300006-P, LAW-12-23-00007-P, and LAW-12-23-00012-P which will help ensure the healthcare supply chain remains strong, resilient, and efficiently serving patients across New York.

HDA is the national trade association representing pharmaceutical wholesale distributors, the vital link between roughly 1,400 pharmaceutical manufacturers and more than 180,000 pharmacies and other healthcare settings nationwide. An estimated 93% of US prescription drugs are handled by our members, who work around the clock to save the US healthcare system billions of dollars annually through efficient management of drug supply chain logistics. Additionally, distributors are unlike any other supply chain participants – their core business does not involve manufacturing, marketing, prescribing or dispensing medicines, nor do they set the Wholesale Acquisition Cost (WAC) or list price of prescription drugs, influence prescribing patterns or determine patient-benefit design. Rather, our members serve as the logistical experts within the supply chain who ensure products are physically on pharmacy shelves where and when patients need them.

HDA respectfully makes the following recommendations, which we believe will avoid any unintentional negative impacts on the supply chain and patient access.

1.) <u>Comments on LAW-12-23-00006-PW (Proposed Addition to Section 500.1 of Title 13 NYCRR- Presumptive Cases of Gross Disparity)</u>

HDA understands and appreciates the Department's position that even small prices increases for certain products can create difficulties to some consumers. However, it is HDA's position that not all products can be regulated in the same way, and for all or most products a 10% threshold is too rigid of a standard to account for regular market fluctuations, and therefore cannot be considered "unconscionably excessive", as the statute states. **HDA requests that New York follow the precedent set by several states and set the threshold no lower than 20%.**

This is especially true when it comes to the pharmaceutical supply chain, a unique market which is responsible for ensuring highly regulated and critically essential medicines are safely and securely delivered to patients and consumers across New York. .A 10% threshold fails to take into account the standard market fluctuations of generic medications- fluctuations which may reflect up to a 10% increase or decrease in pricing, but which ultimately represent a price change of only a few cents or dollars. For example, for a $10 drug, a 10% increase would be $11.00. While distributors do not set the list prices for drugs, as the logistical experts who ensure products make it onto shelves where and when they are needed, the resiliency and efficiency of the supply chain is of top priority to our members. Accordingly, HDA believes that labeling nominal price fluctuations price gouging, or requiring nationally-based companies to make dramatic changes to the pharmaceuticals marketplace and supply chain due to "abnormal market conditions" in New York, would create untenable expenses and burdens on supply chain entities which would far outpace any savings to consumers. It would also create an expensive burden on the State to enforce such a nominal price increase standard on thousands of manufacturers and hundreds of thousands of products.

Again, while HDA acknowledges and understands the Department of Law's position that even nominal prices changes can make a difference to consumers- for example, the price of a can of beans. However, due to the cost and complexities of developing, storing, delivering, tracking, tracing, and otherwise protecting the integrity and availability of pharmaceuticals, the pharmaceutical marketplace is unique from marketplaces for commodities, and should not be regulated in the same way.

To protect consumers and help the State better accomplish its goals, HDA and our members recommend the state establish separate thresholds for brand medications and generic medications. Brand and generic medications each occupy separate markets and follow separate pricing mechanisms, with the generic market generating significant cost savings to consumers. Price fluctuations occur regularly in the generics market due to its competitive nature, a model which has consistently driven down costs for patients. The generic pharmaceutical market also has thin margins, trying to regulate the generic and brand marketplace in the same manner will likely result in unintended consequences. For instance, applying price gouging thresholds that are too low to account for the generic market's regular price fluctuations and thin margins could drive products or manufacturers out of the market in New York, creating conditions for generic drug shortages. Generic drug shortages would restrict or prevent New York patients' access to the savings offered by generics, ultimately driving up their out-of-pocket costs and defeating the purpose of this policy effort.

To support the marketplace while also protecting consumers, HDA recommends that for brand medications, New York follow the precedent of several states and utilize 20% thresholds. For generic medications, HDA recommends the State follow the precedent of at least three states and utilize a 25% threshold, in order to allow the generics market to retain its competitive nature.

Next, while HDA appreciates the inclusion of section *500.2 Costs not within control of the defendant*, we believe it is important to include explicit safe harbor language in this section that clarifies that pass-through costs not within control of an entity will not be considered price gouging.

HDA requests the Department consider the following language amendment:

> *Section 500.1. Presumptive Cases of Gross Disparity. It shall be a presumptive case of a gross disparity in price if the price increase for any covered good or service, except pharmaceutical medications, was greater than 20% 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. It shall not be considered a case of gross disparity in pricing if the price increase is directly attributable to additional costs imposed on the person by the supplier of the goods.*
>
> *For pharmaceutical medications, a brand product with a price increase at or below 20% shall not be considered a gross disparity in price. For generic products, a price increase at or below 25% or $25, whichever is greater, shall not be considered a gross disparity in price.*

Additionally, HDA is concerned that the guidelines regarding when an "abnormal market disruption" begins and ends is not clear. HDA strongly requests the Department provide defined, explicit guidelines that businesses operating in the State can follow, such as requiring a specific declaration of emergency and providing a mechanism for identifying what geographical area of the state is affected. Failing to set guardrails, limits, and specific guidelines will discourage or restrict business from continuing to operating in New York.

2.) Comments on LAW-12-23-00007-P (Proposed Addition to Section 500.5 of Title 13 NYCRR Presumptive Unfair Leverage for Large Enterprises or Enterprises with Large Market Share)

HDA respectfully believes that while defining "unfair leverage" as 30% of the market, or as 5 or fewer competitors with a 10% share, may apply to businesses that directly control their markets, this standard becomes an arbitrary and punitive threshold when applied to ancillary businesses, like wholesaler distributors, who do not directly set the originating list prices of the products they sell, regardless of their "market share." HDA is also concerned about the use of this term "market share" as a legal standard, since this is a loosely defined economic concept which can be defined by a variety of factors and barometers and is not adequately defined in these proposed rules. We also object to the presumption woven throughout this provision that a large company with a large market share is automatically guilty of price gouging for any amount of price increase.

Pharmaceutical wholesale distributors contract with roughly 1,500 manufacturers to safely warehouse and efficiently ship medication and other healthcare products to nearly 380,000 points of care across the nation. The manufacturer, not the wholesaler, sets the Wholesale Acquisition Cost (WAC) or list price for their products. Pharmaceutical wholesale distributors purchase pharmaceutical products based on the WAC price set by the manufacturer. Then, for the distribution services they provide, pharmaceutical wholesale distributors typically charge manufacturers a service fee that is not passed along to the subsequent purchaser. These service fees underwrite the cost of warehousing, ordering, special product handling services and transporting products to the thousands of ship-to points each distributor serves every day. A wholesale distributor has no insight or authority over a manufacturer choosing to increase the list price of certain products.

Additionally, while the pharmaceutical wholesale distribution industry may be consolidated, it supports an industry which is not. For example, HDA represents 34 of the nation's primary pharmaceutical wholesale distribution companies, who are responsible for delivering over 90 percent of the nation's pharmaceutical products. However, these duties are performed on behalf of over 1,500 manufacturers. Without distributors, each manufacturer would be responsible for the secure and efficient delivery and shipment of their products to each point of care, which would dramatically increase costs in our healthcare system, Proposing that "any increase" in price is price-gouging due to market share is unrealistic and harmful to industries, like wholesalers, whose main role is to support the delivery and logistics of ensuring consumer access to products from a much larger market. This becomes even more burdensome for businesses that operate on a national or regional scope. When a distributor makes the original purchase from a manufacturer, they are often made in bulk to achieve cost savings and then sent directly to a regional or national distribution facility, often not within the state of New York. Those products are then shipped to various points of care across the nation. At the time of the original purchase, there is no way for a pharmaceutical distributor to know in advance where or to which state the product will ultimately be delivered. Further, our companies generally work under contract with pharmaceutical manufacturers. These are often long-term contracts ranging from 3-5 years covering multiple product categories. This adds another layer of complexity since these purchases and sales often take place entirely out of state, outside of any rules New York may have activated. Specific to the pharmaceutical wholesale industry, under the current distribution model as outlined above, our members are proud of the fact that our industry saves the US healthcare system billions of dollars annually due to the logistical efficiencies this model provides[1].

Due to all the concerns highlighted above, HDA strongly recommends that New York follow the precedent set by other states and not include this unfair leverage due to market share provision in any final rules. We request the complete removal of LAW-12-23-00007-P. However, should the Department choose to keep the language intact, we request that there be exemption language included for entities that do not set the list price of the products they sell, like pharmaceutical wholesale distributors.

3. Comments on LAW-12-23-00012-P (Proposed Addition to Section 500.2 of Title 13 NYCRR- Costs Not Within the Control of the Defendant for Purposes of the Price Gouging Law

Again, HDA would like to thank the Department for their consideration of costs not within the control of a business. However, we are greatly concerned with the proposed provision that states, "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". Again, HDA does not believe this standard can be accurately applied to the pharmaceutical supply chain.

In the pharmaceutical market, manufacturers report their pricing to publicly accessible compendia. This is the price at which a wholesaler would typically purchase these products. Pharmaceutical wholesalers do not control the pricing of these products, nor do they control the price fluctuations, this is under the control of the manufacturer. However, wholesalers rely on the compendia, an external index for pricing, to determine the price of the products they purchase from the manufacturer.

While we strongly recommend that entities who do not set the price of the product they sell, like pharmaceutical wholesale distributors, be exempted from certain standards within price gouging rules, we would recommend that the utilization of indexes be allowed as an affirmative defense. This would help the Department identify the entity that set the price of the product rather than the ancillary entities that operate more as a pass-through entity. We also again request clarifying language that pass-through costs not within control of an entity would not be considered price gouging.

Furthermore, we are concerned that the proposed language in the rule does not accurately reflect the language in the statute, a failure which could cause serious disruptions to the pharmaceutical supply chain.

The statute (at GBL §396-r.2.c) states that its prohibitions ". . . shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another *when the product sold was located in*

[1] https://www2.deloitte.com/content/dam/Deloitte/us/Documents/life-sciences-health-care/us-hda-role-of-distributors-in-the-us-health-care-industry.pdf

the state prior to the sale" (italics added.) In contrast, the proposed rule (§500.6) states that "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*" (italics added.) The change in wording in the proposed rule would seem to apply the provisions of GBL §396-r to transactions wholly outside of New York State (perhaps in a state with no comparable price gouging law) and made without consideration of New York as a potential ultimate destination for goods in question. This is particularly concerning for the pharmaceutical supply chain because the transactions between wholesalers and manufacturers for products that will end up on New York shelves often take place completely outside the state, since the wholesale pharmaceutical distribution model often operates on a national or regional basis to optimize efficiency and maximize savings to the US Healthcare System. We believe that such wholly out-of-state transactions are beyond the scope of the law, and efforts to extend its reach could have the effect of reducing the availability of critical products in New York.

HDA requests that the regulatory language directly reflect the statutory language regarding the rule's applicability to supply chain participants to eliminate uncertainties regarding the validity of the rule with regard to out-of-state transactions. HDA also requests the following language amendments to any final rule:

1. *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. It shall not be considered a case of gross disparity in pricing if the price increase is directly attributable to additional costs imposed on the person by the supplier of the goods.*

2. 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.

3. Costs shall be calculated over the same time period as the time period of the market disruption.

~~*4. 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.*~~

In summary, HDA believes that the pharmaceutical supply chain, and particularly ancillary entities such as pharmaceutical distributors, cannot be regulated in the same way as the marketplace for any other product. Rather, it is crucial that regulations reflect the unique

complexities of the industry in order to not impede on the critical role of getting essential medical products on shelves where and when patients need them.

Thank you for your consideration of our concerns and language amendment requests as the Department moves forward with rulemaking. Please contact me at any time with questions or for further conversation at kmemphis@hda.org or at 443.375.6541.

Sincerely,

Kelly Memphis

Kelly Memphis
Director, State Government Affairs
Healthcare Distribution Alliance

From: Tyler Kubik
To: stopillegalprofiteering
Cc: Tyler Kubik
Subject: American Fuel & Petrochemical Manufacturers Comments on 45 N.Y. Reg. 21 to 29
Date: Sunday, May 21, 2023 11:06:40 AM
Attachments: AFPM NY Price Gouging Comments 05-21-23.pdf

[EXTERNAL]

Good morning,

Please find attached AFPM's comments on the proposed price gouging regulations, 45 N.Y. Reg. 21 to 29, I.D. Nos. LAW-12-23-00006-P TO -00012-P.

Best,

Tyler Kubik
Counsel
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May 21, 2023

Zephyr Teachout
Office of the Attorney General
The Capitol
Albany, NY 14224-0341

Submitted Via Email: ***stopillegalprofiteering@ag.ny.gov***

Dear Ms. Teachout:

The American Fuel & Petrochemical Manufacturers ("AFPM") submits these comments on the Office of the New York State Attorney General's proposed rules concerning price gouging ("Proposed Rule").[1]

I. AFPM's Interest in the Proposed Rule.

AFPM is a national trade association representing the U.S. refining and petrochemical manufacturing industries. AFPM members support more than three million jobs, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the U.S. AFPM supports free market pricing that allocates goods to their most urgent uses and allows for robust competition. AFPM's and its members' interests are directly affected by the Proposed Rule. Many of its members' products are sold to consumers in New York, such as gasoline, home heating oil, and other important supplies that would be subject to the Proposed Rule.

AFPM recognizes the importance and effectiveness of private charitable efforts to respond to disasters—AFPM's members are frequently first to help those in need in their communities in a variety of ways during emergencies, such as hurricanes, as they frequently live in the same communities in which they work. But it is important that New York allows the full range of private initiative to help to mitigate the impact of Disruptions.

Prices provide the signal and incentive to draw supplies to areas facing disruptions.[2] AFPM is concerned that the Proposed Rule will undermine the very goals the Proposed Rule is trying to achieve by imposing an artificial price ceiling that will result in prolonged shortages by distorting that price signal and undermining that incentive. This undermines the statutory purpose, which indicates a concern with "severe shortages" and protecting consumers.[3] These comments provide extensive explanation of economic law and its real-world application during ordinary market conditions and disruptions, demonstrating the various flaws with the Proposed Rule's assumptions and proposed regulations. AFPM offers several recommendations in these comments, but the most important thing the Attorney General can do to ensure the best outcome for New Yorkers during a disruption, especially for the most vulnerable, is to acknowledge the economic law that increasing prices is necessary to draw supply into areas facing a disruption.[4]

II. The Proposed Rule Will Harm Consumers Because It Will Promote Hoarding, Create Prolonged Shortages, and Decrease Overall Welfare.

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[1] 45 N.Y. Reg. 21 to 29 (March 22, 2023), I.D. Nos. LAW-12-23-00006-P TO -00012-P.

[2] TYLER COWEN & ALEX TABARROK, MODERN PRINCIPLES OF ECONOMICS 115 (3d ed. 2015) ("A price is a signal wrapped up in an incentive.").

[3] N.Y. Gen. Bus. L. § 396-r(1).

[4] A MAN FOR ALL SEASONS: A PLAY BY ROBERT BOLT (1969) ("Some men think the Earth is round, others think it flat; it is a matter capable of question. But if it is flat, will the King's command make it round? And if it is round, will the King's command flatten it?").

The Proposed Rule will undermine the purpose of New York's price gouging law: protecting consumers.

A. Price Controls Harm Consumers.

The economic effects of artificial price ceilings are clear and disastrous. During abnormal market disruptions ("Disruptions"), prices for essential goods often increase as demand increases or there are supply interruptions.

In an unhampered market, as prices rise, two important consequences follow. First, higher prices perform a rationing function by encouraging consumers of goods or services to conserve the resource and only use it for more highly valued ends. Second, higher prices perform a signaling function by conveying information about the relative scarcities of goods and services and an incentive function by encouraging new entrepreneurs and existing suppliers to increase supply. This, in turn, causes prices to fall toward pre-Disruption levels.

An artificial price ceiling, such as a price gouging law, prevents prices from rising as much as they otherwise would have. This, in turn, blocks the signal provided by market prices to increase supply to an area, which would cause prices to fall. Supply will instead head to areas with higher prices, i.e., neighboring areas without price controls, including for fungible commodities such as gasoline or diesel.[5] The result will be a prolonged shortage.

Price ceilings also inhibit the rationing function of market prices. Increased prices discourage consumers from hoarding, i.e., from buying and using more than they actually need. In other words, higher prices encourage *conservation* of essential resources during a Disruption. Price controls actively discourage this conservation, thus aggravating shortages and encouraging inefficient resource allocation.[6] If priced normally, as consumers flood stores to stock up on essential supplies as a Disruption is nearing, goods will simply fall to those who are first in line and run out quickly; each self-interested consumer will hoard goods, buying more than his usual share to prepare for a disaster. Late-comers are left with nothing. However, higher prices quickly increase consumers' opportunity costs and reduce the marginal utility of each additional unit of a good. Consumers will buy less, leaving more goods for latecomers.

For example, during a drought, high water prices discourage water users from using water for lower-valued ends, such as taking a second daily shower, watering the lawn, etc. During a blizzard, high prices for snow plowing could discourage, say, a wealthy family in a home with power and a well-stocked pantry from purchasing snow plowing services for which they have no imminent need, leaving these services

[5] Those who lack the ability to easily access neighboring jurisdictions without an artificial price ceiling, particularly those in rural areas or those in cities relying on public transportation, will thus be left without supply compared to others who can access supply by paying higher prices in those jurisdictions with market prices.

[6] *See* Michael Giberson, *The Problem with Price Gouging Laws*, 34 REG. 48, 53 (Spring 2011) ("One family, evacuated from its home, may reserve two hotel rooms at a capped rate when they would have taken one at higher prices; late arriving evacuees will find fewer rooms available."); Brian Skarbek & David Skarbek, *The Price is Right! Regulation, Reputation, and Recovery*, 6 DARTMOUTH L.J. 235, 245-46 (2008) ("Even if out-of-area and local sellers did not respond, higher prices would still improve allocative efficiency by encouraging consumers to temper their use, such as by staying in a relative's home instead."). Indeed, price ceilings incentivize hoarding because economically savvy consumers who recognize that the consequence of artificially low prices will be prolonged shortages have an interest in buying all they can now, rather than foregoing purchases until later since there will be nothing left.

available to those who may have a more urgent need to get to work, check on relatives, or purchase essentials.

Price ceilings also prevent the incentives needed to draw in additional supplies by ignoring the need to compensate for costs and, especially pertinent here, entrepreneurial and operational risks. During Disruptions, the risks for prospective entrepreneurs and existing sellers are far greater than normal circumstances. Sellers can just as easily become victims of a disaster as the consuming public. For example, an Uber driver faces greater risks to operate during Disruptions, i.e., greater opportunity costs. Higher prices are necessary to incentivize drivers to operate during Disruptions so that they are willing to incur the risks. What incentive has an Uber driver to leave the safety of his home during perilous conditions if he is not compensated for these risks? Similarly, what incentive has a truck driver carrying fuel, food, or other important goods to drive into an area impacted or soon to be hit by a hurricane, blizzard, etc., if they are not compensated for the risk? This need to compensate for risk is a general economic phenomenon that occurs whether or not there is a Disruption. The Proposed Rule forgets that sellers, who often search far and wide for additional supplies during a Disruption,[7] face the risk of over-purchasing at higher cost goods that, once the Disruption is over, could sell for far less and yield losses. Higher prices during a Disruption compensate for this risk, which sellers cannot be blamed for requiring in order to risk imminent ruin during a disaster.

The Proposed Rule claims that because Disruptions and thus demand will eventually subside, higher prices will not provide proper incentives to bring new supply to market.[8] But this is demonstrably false. The Proposed Rule cites an article relying on the COVID crisis to justify this claim,[9] even though nation-wide—indeed, *international*—Disruptions of this scope, scale, and length are exceedingly rare. The Proposed Rule cannot rely on an outlier, *sui generis* crisis to justify its regulation. Moreover, while demand usually subsides after an emergency, the Proposed Rule falsely assumes that capital outlays to expand supply capacity are necessary to increase supply to an area facing Disruption. In fact, all that's needed is an incentive to *divert* supplies to an area with a Disruption—an incentive readily supplied by prices.[10] Moreover, the Proposed Rule ignores state and federal governments' own role in preventing manufacturing and other parts of the supply chain from operating normally during the crisis, which can hardly be blamed on free markets. And price gouging laws, again, *cause* demand for a good to increase higher than it otherwise would be and thus encourage waste and misallocation of resources. Nothing forces businesses to stay open during a Disruption, so many sellers in fact shut down during a Disruption,[11] which ironically reduces the number of sellers in the market—something about which the Proposed Rule purports to be

[7] Rafi Mohammed, *The Problem with Price Gouging Laws*, HARV. BUS. REV. (Jul. 23, 2013) ("A well-known gouging case involves the invisible hand actions of John Shepperson. After the Hurricane Katrina disaster, John bought 19 generators, rented a U-Haul truck, and drove 600 miles from Kentucky to Mississippi. In return for his efforts and risk, he hoped to sell the generators at double his purchase price. Instead, he was arrested for price gouging, spent 4 days in jail, and the generators were confiscated."); Skarbek & Skarbek, *supra* note 6, at 236-37 (recounting the prosecution of John Charles Mikell and John Tate Mikell, who drove 630 miles round trip down the Florida coast selling generators to 22 Hurricane Ivan victims, making a profit of $100 for each generator).

[8] Notice of Proposed Rulemaking, Preamble at 5-6, https://ag.ny.gov/sites/default/files/2023-03/price_gouging_rulemaking_final_for_sapa.pdf (hereinafter "NPRM").

[9] *Id.* at 6 n. 22.

[10] *See* note 9, *infra*.

[11] *See* David W. Montgomery et al., *Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply*, 3 J. Comp. L. & Econ. 357, 359, 364 (2007); Giberson, *supra* note 6, at 51 (noting that some South Carolina businesses did just that following Hurricanes Gustav and Ike).

concerned. High prices, fortunately, create a greater opportunity cost to shutting down, and therefore incentivize businesses to stay open.

During price-ceiling-induced shortages, rationing by the price system is often replaced by more insidious forms of rationing, such as quotas, which cause waiting lines. Time is costly. Waiting lines have a high opportunity cost for poorer families and individuals, who cannot afford to pay people to wait in lines, sometimes for hours, like the wealthy do. And those languishing at the line's end may end up with nothing, despite waiting many hours.[12] Real prices, therefore—sticker price plus the time spent waiting—increase notwithstanding artificial price ceilings.[13] And unlike seller profits, this time cost cannot redound to create social benefits, as profits can when they are invested or distributed, creating a deadweight loss rather than a transfer.[14] Similarly, price controls result in a class system in which obtaining needed goods and services during a Disruption becomes a matter of who one knows, rather than whether one is willing to pay for a good or service, which also disproportionately harms poorer New Yorkers.

Historical examples abound of price ceilings causing shortages.[15] The most prominent American example of price controls was in the 1970s. In 1971, President Nixon ordered a 90-day freeze on all prices and wages in the United States, with similar policies enacted subsequently. The result was disastrous: "[t]hose controls only temporarily slowed the rise in prices while exacerbating shortages, particularly for food and energy."[16] But price ceilings, for thousands of years, have always failed. Roman Emperor Diocletian, in 301 A.D., "fixed 'ceilings' or maximum prices on most, if not all, commodities and freight rates," which unsurprisingly resulted in shortages.[17]

The Proposed Rule asserts that price controls combat inflation:

> Finally, by preventing disruption from triggering a broader economic downturn and exacerbating individual suffering, the price gouging law also serves the goal of economic stability. It serves to counteract inflationary tendencies. When prices increase for non-cost-based reasons, they

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[12] Montgomery et al., *supra* note 11, at 375. Queuing also "awards goods on the basis of one's place in line rather than the intensity of one's desire for the good," which impedes overall allocative efficiency. Skarbek & Skarbek, *supra* note 6, at 244.

[13] Real prices also increase through "changes in discounts, service and quality." Milton Friedman, *Why the Freeze is a Mistake*, NEWSWEEK, Aug. 30, 1971, 22.

[14] Montgomery et al., *supra* note 11, at 366. One study estimated that for every $1.00 in monetary savings, price controls cost consumers $1.16 in added costs. *Id.* at 377 (citing Robert T. Deacon & Jon Sonstelie, *The Welfare Costs of Rationing by Waiting*, 27 ECON. INQUIRY 179 (1989)).

[15] *See, e.g.*, Stephen Breyer & Paul W. MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941, 965-979 (1973) (explaining that Federal Power Commission regulation of natural gas prices predictably caused shortages).

[16] Michael Bryan, Federal Reserve Bank of Atlanta, *The Great Inflation, 1965-1982* (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-inflation. *See also* DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 63 (1998) ("[T]he control system was not working. Ranchers stopped shipping their cattle to the market, farmers drowned their chickens, and consumers emptied the shelves of supermarkets."); Edgar L. Feige & Douglas K. Pearce, *The Wage-Price Control Experiment—Did It Work?* 16 CHALLENGE 40, 40 (July-August 1973) ("Did wage-price controls reduce the rate of inflation and the rate of unemployment below what they would have been in the absence of controls? The empirical results produced by the authors suggest a resounding 'no!'").

[17] H. Michell, *The Edict of Diocletian: A study of Price Fixing in the Roman Empire*, 13 CANADIAN J. OF ECON. & POL. SCI. 1, 5, 9-11 (Feb. 1947).

> contribute to inflation, which in turn encourages companies to impose further increase [sic] prices, which in turn contributes to more inflation.[18]

But inflation is caused by credit expansion, not firm pricing decisions of market power.[19] Inflation is a phenomenon entirely independent from Disruptions. The Proposed Rule fails to provide any explanation why there should be continuous upward pricing pressure, which, of course, never manages to actually occur in real life without continuous credit expansion, such as has occurred in every episode of hyperinflation in world history.[20] The elemental facts of market competition, substitutes, and opportunity cost prevent this upward price spiraling purportedly a consequence of corporate market power.

The Proposed Rule cites large numbers of complaints of price gouging to justify its proposal.[21] But complaints of price gouging are notoriously poor evidence of violations of price gouging laws.[22]

In sum, price controls are the typical anti-solution to a problem solved by markets. Price ceilings create and exacerbate shortages and encourage unnecessary purchases and wasteful use of essential goods and services, causing a far worse human toll than increased prices. Yet, the Proposed Rule never mentions these consequences of price controls, which underscores the extent to which it is misconceived.

B. <u>New York's Price Gouging Law Should be Interpreted to Reflect Economic Realities</u>.

The New York legislature enacted its price gouging law to protect the consuming public. The Proposed Rule, however, is interpreting the price gouging law to primarily *penalize* "profiteers."[23] Notably, the term profiteer is absent from the statute. Rather, the statute focuses on consumer welfare. Had the legislature been concerned solely with penalizing those capturing high profits, its price gouging law would not be limited to emergencies and "goods and services vital and necessary for the health, safety and welfare of consumers or the general public."[24]

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[18] NPRM, *supra* note 8, at 7.

[19] GOTTFRIED HABERLER, INFLATION: ITS CAUSES AND CURE 3 (1960) ("It is, however, safe to say that there has never been a case in monetary history anywhere of a prolonged and violent inflation without a sharp rise in the quantity of money."); MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE WITH POWER AND MARKET 989-991 (2d ed., Scholar's ed. 2009) (1962) (explaining how inflation is caused by money supply expansion); *cf.* Milton Friedman, *The Counter-Revolution in Monetary Theory*, 17, in EXPLORATIONS IN ECONOMIC LIBERALISM (1970) ("[I]nflation is always and everywhere a monetary phenomenon.").

[20] *See, e.g.*, ADAM FERGUSSON, WHEN MONEY DIES: THE NIGHTMARE OF DEFICIT SPENDING, DEVALUATION, AND HYPERINFLATION IN WEIMAR GERMANY (2010) (1975).

[21] NPRM, *supra* note 8, at 3.

[22] In the FTC's study of refinery and retail price manipulation in the aftermath of Hurricanes Katrina and Rita, the FTC found that notwithstanding many complaints of price gouging, "[t]he regions with the largest price increases were those where supply was most greatly effected by the hurricanes," and that "given the supply disruption, prices should have risen on average *more than they actually did*." FED. TRADE COMM'N, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES 67 (2006) (emphasis added). *See also* Harriet Baskas, *One Person Filed 6,500 Noise Complaints for Reagan National Airport*, NBC NEWS (March 14, 2016), https://www.nbcnews.com/business/travel/one-person-filed-6-500-noise-complaints-reagan-national-airport-n538031 (noting that *one single individual* filed 6,500 noise complaints against D.C.'s Reagan National Airport).

[23] *See* 45 N.Y. Reg. at 21 ("The primary objective of the statutory authority is to protect the public from firms profiteering off market disruptions . . . ."); *id.* at 22 (price increases above 10% "create a windfall for the seller").

[24] N.Y. Gen. Bus. L. § 396-r(2).

Without increasing the price ceiling to attempt to account for economic forces and market realities, New York's price gouging law will make consumers far worse off. Many states, shrewdly, lack price gouging laws entirely. Many states with price gouging laws have or have had thresholds higher than 10%. Many states with specific thresholds also have place strict time limits on when such price controls are in effect—for example, California's price gouging statute is normally in effect for only 30 days after a declaration of an emergency.[25] New York, by contrast, places no time limit and the AG has declined to provide any clarity as to how long a Disruption can last.

The ability to prove a price increase was cost-justified in retrospect is insufficient to prevent harm to consumers, as sellers will be deterred from raising prices and thus shortages and waste will follow. It is essential that the Proposed Rule seeks to minimize the extent to which shortages will follow from the price gouging law. This requires interpreting the statute in accordance with economic law.

C. Price Gouging Presumption.

The Proposed Rule would presumptively prohibit any increases in price more than 10% from the pre-Disruption price.[26] The Proposed Rule offers four justifications for the 10% price increase presumption: (1) 10% "is the most commonly employed measurement around the country"; (2) "the 10% rule is easily administrable"; (3) 10% provides numerical guidance for business certainty; and (4) price increases above 10% "ha[ve] a meaningful effect," even for low-priced goods.[27]

But each justification fails. Selecting the most common measurement is an insufficient reason to cause shortages during Disruptions. *Any* bright line rule has an advantage of easy administrability, so its percentage is no better than any other percentage it could choose. AFPM agrees that a specific percentage provides greater certainty, but for the reasons explained above, 10% provides business certainty at the cost of a certainty of shortages that harm New Yorkers. Setting a threshold at 10% without placing a specific time limit on how long the price control in effect will likely impact surety of supply in New York as suppliers will re-route products to other states that do not impose such stringent price controls. Failure to obtain the goods at all has a far more "meaningful effect," including for low-priced goods, for the reasons explained above. The Proposed Rule is likely to disproportionately impact lower income individuals and families not by reducing the cost at which they can obtain goods, but by decreasing the availability of these goods.

D. Unfair Leverage by Large Sellers Presumption.

The Proposed Rule provides that *any* increase in prices by a firm with "unfair leverage" is presumptively unlawful. The Proposed Rule defines "unfair leverage" as occurring when a seller has "at least 30% market share" or is in a market "with five or fewer significant competitors."[28] Because unfair leverage is defined entirely with reference to the seller, wealthy individuals and large corporations could be considered victims of price gouging due to a seller's or, in the case of large corporations, a supplier's "unfair leverage."

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[25] Cal. Penal Code § 396.
[26] 45 N.Y. Reg. at 21.
[27] *Id.* at 21.
[28] *Id.* at 22. "Significant competitor" would be defined at having at least a 10% market share. *Id.*

The Proposed Rule claims that "[t]he 30% market share threshold is a conservative metric of pricing power."[29] But the so-called empirical evidence on presumptions proffered by the Proposed Rule is built on a foundation of quicksand. In the first place, the Proposed Rule's 30% market share figure is plucked from an antiquated era of merger precedent and lacks any basis in sound economics for presuming a likelihood of anticompetitive impacts,[30] let alone for presuming that any price increase comes from unfair leverage. In short, "[m]arket structure and competitive effects are not systematically correlated."[31] Just like in antitrust law, the 30 percent presumption will have "the practical effect of . . . shift[ing] the burden of proof from the plaintiff, where it rightfully resides, to the defendant, as though the law prohibited all" price increases "except those that could be proved acceptable by their proponents."[32] Even if market structure and concentration are relevant to examining the potential for price increases during a Disruption, the Proposed Rule presents a one-sided picture that exaggerates the susceptibility of markets to coordinated effects, as cartels are highly susceptible to internal and external pressures to break the cartel.[33] To the extent some sellers drop out of the market due to the price gouging regulation, as we explain above, the price gouging regulation will in fact *increase* market concentration during the Disruption. And by preventing outside competitors from coming in with new supply, the price gouging regulation acts as a cartel enforcement mechanism.

The presumption that a firm cannot raise its prices unless the market has at least 6 "significant" competitors is even more divorced from economic moorings. There is zero case law supporting any such

[29] *Id.* at 23.

[30] *See generally* Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 GEO. MASON. L. & ECON. REV. 201 (2015) (hereinafter, "PNB Presumption"); *id.* at 207-210 (explaining the myriad problems with the paradigm on which the 30 percent presumption is based). And in a later case, *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974), the Court explained that market share is only part of the story, which provides an incomplete picture without "examin[ing] . . . the particular market—its structure, history and probably future." *Gen. Dynamics*, 415 U.S. at 498 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n. 38 (1962)). DOJ and FTC's Horizontal Merger Guidelines, notably, lack a market share presumption. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.3 (2010). Moreover, the agencies; commentary on the horizontal merger guidelines stated that "market concentration may be unimportant under a unilateral effects theory of competitive harm," i.e., that a firm could unilaterally raise prices. U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 16 (2006).

[31] PNB Presumption, *supra* note 30, at 204; *see* Vita & Osinski, *John Kwoka's* Merger Control, and Remedies*: A Critical Review*, 82 ANTITRUST L.J. 361, 363 (2018) (noting Kwoka's retrospective analysis of mergers departed from both standard meta-analysis and econometric methodologies); Global Antitrust Institute, Comments on DOJ-FTC Request for Information on Merger Enforcement 6 (April 2022) (noting that Kwoka's analysis fails to control for import endogenous factors); *id.* at 7 ("The empirical evidence on concentration and mark-ups in local product and geographic markets does not support concentration-based presumptions." (citing Joshua D. Wright & Jennifer Cascone Fauver, *Antitrust Reform and the Nirvana Fallacy: The Case Against a New Sherman Act*, 2022 COLUMB. BUS. L. REV. 72, 80-92 (2022)); Wright & Fauver 103-04 (criticizing Kwoka's meta-analysis). Indeed, one study found that the increasing concentration of industry was correlated with increased productivity and real output, but was not correlated with price increases. *See* Sharat Ganapati, *Growing Oligopolies, Price, Output, and Productivity*, 13 AM. ECON. J.: MICROECONOMICS 309 (2021).

[32] PNB Presumption, *supra* note 30, at 204.

[33] *See* JULIUS GRODINSKI, THE IOWA POOL: A STUDY IN RAILROAD COMPETITION, 1870-84, 25, 27-28 (1950) (noting that railroad magnates John F. Tracy and James F. Joy could not even keep competition from within *their own* railroads, with one if their railroads cutting rates to try and outcompete another of their railroads); *id.* at 4, 15, 141-44, and *passim* (noting the practices of rate cutting, especially secret rate cutting, to pick up business, including against those who agreed to maintain rates).

distinction in antitrust cases.[34] Moreover, the citation to a John Kwoka article purportedly referencing an "FTC presumption that a firm with above 10% market share constitutes a significant competitor"[35] is grossly misleading. The FTC's definition of significant competitor was only for the purpose of a data review and only applied to cases "[w]hen the primary concern was that the transaction would result in a unilateral exercise of market power," not coordinated effects cases[36]—even then, 10% was a consequence of the data, not a cause.[37] Contrary to the Proposed Rule, Kwoka does not describe this as a presumption.[38] The Proposed Rule thereby seeks to transform a qualitative term from a FTC data review into a statement of enforcement policy which, even if it were true, does not constitute economic evidence. How often will a market have at least 6 companies with at least ten percent market share? It is impossible to know for sure, but to the extent it is rare, the Proposed Rule is effectively imposing a *de facto* 0% price increase threshold. In any event, it is easy to envision circumstances in which a market has at least six companies with at least ten percent market share but is very competitive, as well as markets with fewer than six companies with at least ten percent market share but is far less competitive. Fundamentally, it is a very poor metric for assessing market dominance.

E. Supply Chain.

The Proposed Rule provides that "[a]ll parties within the chain of distribution . . . are subject to the statute with respect to products sold in the State,"[39] based on its statutory authority providing that the prohibition on charging "an unconscionably excessive price . . . . shall apply to all parties within the chain of distribution . . . when the product sold was located in the state prior to the sale."[40]

But applying a price gouging prohibition to sales taking place outside New York exceeds New York's authority and violates the Interstate Commerce Clause. Just as in *Baldwin v. G.A.F. Selig, Inc.*,[41] *Healy v. Beer Institute*,[42] and *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[43] New York is regulating the price charged for a good outside of New York. This plainly violates the Commerce Clause

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[34] The Proposed Rule relies on a single journal article by John Kwoka, which relies on the same information as his 2015 book, critiqued above. *See supra* note 31; John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?* 81 ANTITRUST L.J. 837, 856 (2017) ("A more recent and comprehensive survey of the merger retrospective literature is my 2015 compilation, *Mergers, Merger Control, and Remedies*. . . . [I]t is this source I rely upon here.").

[35] 45 N.Y. Reg. at 23.

[36] FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2011 3 (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf.

[37] In logical terms, most As (significant competitors) might be Bs (firms with 10% or more market share), but that does not mean most Bs are As or that A necessarily follows from B.

[38] Kwoka merely states that "[s]ome insight . . . is contained in a report on merger investigations by the FTC," quotes the report and a footnote to the report, then states "[d]espite some ambiguity in the meaning of this passage, it seems clear that market shares can be related to diversion." Kwoka, *supra* note 34, at 856.

[39] 45 N.Y. Reg. at 25.

[40] N.Y. Gen. Bus. L. § 396-r(2).

[41] 294 U.S. 511 (1935).

[42] 491 U.S. 324 (1989).

[43] 476 U.S. 573 (1986).

by "preventing" out-of-state firms "from undertaking competitive pricing" in other states,[44] violating "the autonomy of the individuals States within their respective spheres."[45]

It also violates the Foreign Commerce Clause in the same way, including by unduly burdening foreign commerce. The U.S. Supreme Court has explained, "[f]oreign commerce is pre-eminently a matter of national concern."[46] Indeed, "[i]n international relations and with respect to foreign intercourse and trade," the Supreme Court has understood that "the people of the United States act through a single government with unified and adequate national power,"[47] leading the Court to conclude that "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater" power compared to the Interstate Commerce power.[48]

New York City and its harbor are significant termini for U.S. trade with foreign nations. By dictating terms of trade with foreign nations—imposing a maximum price—New York undermines the ability of the federal government to speak with one voice in foreign commerce. New York, in other words, will become an island during a Disruption—many goods that would otherwise come through or otherwise be connected with New York will avoid New York in a Disruption. New York's law and regulations, therefore, violate the Foreign Commerce Clause.

F. <u>Presumptive Cases of Unfair Leverage</u>.

The Proposed Rule defines "unfair leverage or unconscionable means" to include "us[ing] unequal bargaining power, high-pressure sales techniques, [or] confusing or hidden language in an agreement or in price setting."[49]

With this definition, the Proposed Rule impermissibly expands the reach of the price gouging law beyond the statutory terms and legislative intent. Such an expansion will surely deter legitimate market transactions. The doctrine of unconscionability has always conflicted with the common law of contracts, which only found fault with contracts "procured by fraud, duress, or undue influence."[50] The Proposed Rule should limit any definition of "unconscionable means" to situations involving common law fraud, duress, or undue influence.

The Proposed Rule fails to explain how "unequal bargaining power" and "unfair leverage" differ. If unequal bargaining power simply means a large seller or a seller in a concentrated market, this added term

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[44] *Healy*, 491 U.S. at 338 (citing *Brown-Forman*). In *Nat'l Pork Producers Council v. Ross*, 598 U.S. __ (2023), while the U.S. Supreme Court reigned in ambitious readings of Dormant Commerce Clause precedent, it did *not* overrule this line of cases. Indeed, unlike in *Pork Producers*, wherein a pork producer would not be violating the California statute so long as they did not make in-state sales of pork here out-of-state producers *would* violate the statute even if a different seller sold the product in the state.

[45] *Id.* at 336. *See also Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion) ("The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

[46] *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448 (1979).

[47] *Bd. of Trustees v. United States*, 289 U.S. 48, 59 (1933).

[48] *Japan Line*, 441 U.S. at 448 & n.12.

[49] 45 N.Y. Reg. at 27.

[50] Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 293 (1975).

is superfluous to unfair leverage. Either way, this phrase will be pernicious as it will inevitably be used as a catch-all for all cases in which enforcers cannot otherwise make out a case of price gouging. This is the opposite of business certainty. This is especially problematic because bargaining power is *never* equal. Nor does it need to be for markets to work well. *Competition* invariably tempers the importance of bargaining power, just as it tempers many of the other purported sources of "market failure," such as information asymmetries. Sellers often offer free returns, warranties, and other ways of mitigating these purported "market failures"—and did so long before these purported market failures were "discovered."[51]

G. Definition of "Costs Not Within the Control of the Defendant"

New York's price gouging law allows an affirmative defense if sellers can show it is merely passing on "additional costs not within the control of the defendant."[52] The Proposed Rule proposes to define "additional costs not within the control of the defendant" to include "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."[53] It would expressly exclude as such 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 . . . noted related to the actual production, purchase, store, distribution, labor and sale of the specific good or service."[54] It would also provide that customary referencing of an index price does not make a price cost-based.[55]

The Proposed Rule's artificial limitation on the facts that can be used to establish an affirmative defense has no basis in the text of the price gouging law. Moreover, for the reasons explained above, this definition is problematic because it fails to account for the risk inherent in business ventures. Without this, the Proposed Rule will stifle the market incentive needed to draw sufficient additional supply to an area affected by a Disruption. Sellers often raise price in anticipation of increased costs during a disruption, but this would be expressly precluded by the proposal. This is part of a more fundamental defect of the Proposed Rule, namely, that the Proposed Rule ignores that economic costs are opportunity costs. It is also ironic that the Proposed Rule claims that high prices will be insufficient to create additional supply because Disruptions are temporary and thus companies will not incur capital expenditures.[56] Yet, the Proposed Rule expressly excludes capital expenditures, labelling them "discretionary," which fulfills the Proposed Rule's own irrelevant prophesy.

The Proposed Rule also encourages inefficiency by incentivizing sellers to purchase their supplies so as to pass on costs to the market rather than procure them internally (transfer pricing), which the Proposed Rule implicitly admits in its discussion of index-based pricing.[57] This is the same flaw in cost-plus government contracting, in which firms have an incentive to increase costs rather than economize. Moreover, sellers often rely on transfer and index pricing to estimate their costs internally. By precluding

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[51] *See* Thomas DiLorenzo, *A Note on the canard of "Asymmetric Information" as a Source of Market Failure*, 14 Q. J. AUST. ECON. 249, 252-53 (2011).
[52] 45 N.Y. Reg. at 27-28.
[53] *Id.*
[54] *Id.* at 28.
[55] *Id.*
[56] NPRM, *supra* note 8, at 5-6.
[57] *See* 45 N.Y. Reg. at 28 ("A firm that buys at an inflated index price can correctly count that purchase as an increased cost.").

sellers from using these costs as part of their affirmative defense, the Proposed Rule is effectively forcing sellers to either change how they account for costs internally or risk not being able to defend themselves from accusations of price gouging.

Nonetheless, the Proposed Rule correctly "clarifies that costs accruing after the abnormal Disruption has begun can be used as a defense under the statute."[58] Without this defense, the shortages caused by this price control would be disastrous. On the other hand, it's unclear why costs incurred prior to the Disruption are excluded, given that costs often rise in anticipation of a Disruption and these costs may be equally "not within the control of" the seller. Moreover, because there is often a lag between when a good is purchased and when it is sold to the final consumer, the Proposed Rule cannot say that these costs are not legitimately part of an affirmative defense. The Proposed Rule's exclusion of these costs would, rather than incentivizing sellers to stock up on a good in anticipation of increased demand from an impending Disruption, encourage waiting until a formal declaration of emergency occurs before purchasing the goods, which will hamper supply.

Ultimately, the statute is not ambiguous and the Attorney General lacks authority to exclude these costs as they are clearly not within a defendant's control.

III. The Proposed Rule Should Not Be Applied Retroactively.

The Proposed Rule would establish price gouging presumptions and set parameters for the affirmative defense for price gouging. The Proposed Rule does not specify whether the proposed regulations apply retroactively, or only prospectively (though they could only legally apply prospectively).

The various presumptions, definitions, and other regulations in the Proposed Rule should not and could not legally be applied to business activity occurring before the issuance of any final rule. Applying these provisions retroactively would undermine the rule of law and create significant due process concerns by depriving market participants of fair notice of unlawful conduct and thus depriving them of their ability to conform their behavior to this new regulatory bright line—one that is *not* in the statute. Imposing a bright line rule retroactively usurps the constitutional role of judges and juries to determine whether unlawful price gouging occurred. Therefore, it is essential that the Proposed Rule clarify that any final rule applies only to conduct occurring after the issuance of the final rule, and that the new presumptions and limitations in the rule will not be used to establish a violation of the statute in any enforcement proceeding based on conduct predating the final rule's issuance.

Conclusion

AFPM supports the free market as the best method of protecting consumers. Unfortunately, the Proposed Rule would wield New York's price gouging law as a bludgeon against AFPM's members and other sellers who should, rather, be heralded for the important role they play in providing essential products to consumers and participating heavily in disaster and emergency relief efforts.

AFPM thanks the Attorney General for the opportunity to comment on the Proposed Rule. Please contact the undersigned if you wish to discuss these issues further.

[58] *See id.* at 28.

Respectfully submitted,

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tkubik@afpm.org

From:	Michele Schoeppe
To:	stopillegalprofiteering
Cc:	Michele Schoeppe; Michael Giaimo
Subject:	Comment of the American Petroleum Institute in response to the Proposed Rulemaking regarding price gouging.
Date:	Sunday, May 21, 2023 11:41:26 AM
Attachments:	image001.png API Price Gouging Comments 5-21-23.pdf

[EXTERNAL]

To the Office of the Attorney General,

Please find attached the comment of the American Petroleum Institute in response to the Proposed Rulemaking regarding price gouging.

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May 21, 2023

Office of Attorney General Letitia James
The Capitol
Albany, NY 12224-0341

(Submitted by email to stopillegalprofiteering@ag.ny.gov)

Re: Comments of the American Petroleum Institute on Proposed Price Gouging Rules.

Dear General James:

The American Petroleum Institute (API) submits these comments on the proposed price gouging rules (Proposed Rules) promulgated by the New York Attorney General's office (NYAG).[1]

API is the national trade association representing all sectors of the U.S. oil and natural gas industry, with nearly 600 members throughout exploration, refining, pipelines, distribution, and retail. API's members support more than 11.3 million jobs and produce, process, and distribute most of our Nation's energy. API works to support a strong, viable American oil and natural gas industry. API therefore has a keen interest in the rigorous, consistent, and predictable application of statutes that directly affect its members' abilities to contribute to the national economy through the production, distribution, and sale of oil and natural gas.

API urges NYAG to rethink the Proposed Rules in their entirety. Section 396-r, the price gouging statute, is impermissibly vague—the kind of vagueness that raises serious constitutional concerns about arbitrary enforcement. *See* Part I. The best use of NYAG's limited rulemaking authority would therefore have been to provide guidance to address NYAG's enforcement discretion. Instead, the proposed rules would *increase* NYAG's authority under the statute, expanding the number of ways NYAG may prove its case while curtailing the defenses available to sellers. Because they exceed the scope of NYAG's permissibly delegated authority, the Proposed Rules are unlawful. They are also misguided, often only adding confusion to an already confusing statute. *See* Part II.

[1] https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf (Mar. 2, 2023) (to be codified at 13 NYCRR Parts 500.1 to 500.7).

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I. Section 396-r Raises Serious Constitutional Concerns.

The statutory provision, Section 396-r, that these Proposed Rules purport to implement is unconstitutionally vague. Laws violate the constitutional prohibition against vagueness where they "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [they] prohibit[]," *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 213 (2d Cir. 2012), or when they "do[] not provide explicit standards for those who apply [them]," *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 191 (2d Cir. 2010) (alteration adopted).

First, in many (if not most) instances, a person of ordinary intelligence would not know in advance whether a particular price increase falls foul of the statutory prohibition. In that respect, the statute's mention of "unconscionably excessive price[s]" is no clearer than the prohibition against "charging an 'unjust or unreasonable' rate" that the Supreme Court has long recognized as unconstitutionally void. *See Johnson v. United States*, 576 U.S. 591, 602 (2015) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)). In *Cohen Grocery*, the Supreme Court held that a statute making it "unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" was unconstitutionally vague because it failed to set "an ascertainable standard of guilt" and was "[in]adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." *Id.* at 89. In particular, the Court noted that the law "forbids no specific or definite act" and by its "terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Id.* Section 396-r fails for the same reason as the statute in *Cohen Grocery*.

The statute's guidance about the meaning of "unconscionably excessive price[s]" is no clearer about what conduct is prohibited and what is permitted. It is circular to say, as the statute does, that an "unconscionably excessive price" is one that is "unconscionably extreme." *See* N.Y. Gen. Bus. Law § 396-r(3)(a)(i). And businesses are left similarly in the dark by the admonition that a price is illegally high if "there was an exercise of unfair leverage or unconscionable means." *Id.* § 396-r(3)(a)(ii).

Second and for the same reason, the [statute] does not supply sufficiently explicit standards "to eliminate the risk of arbitrary enforcement." *VIP of Berlin*, 593 F.3d at 191. To be sure, "interpretations the relevant courts have given to analogous statutes" might shine some light on the meaning of an ambiguous statute, *Commack*, 680 F.3d at 213, but similar New York laws provide no such guidance here.

Consider caselaw concerning section 396-rr, New York's milk-specific price-gouging statute. That statute provides that the government may "start an inquiry into whether an 'unconscionably excessive' retail price exists when [it] finds a retail price that exceeds 200 percent

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of the price paid to milk producers." *Greater N.Y. Metro. Food Council v. McGuire*, 815 F. Supp. 706, 711 (S.D.N.Y. 1993); *see* N.Y. Gen. Bus. Law § 396-r(2). This provision, the Southern District of New York explained, gave some indication as to what degree of price increase would be unlawful under the milk-specific statute: "It seems reasonable to conclude that the legislature intended a retail price in excess of 200 percent of the price paid to producers to be regarded as a price reflecting a 'gross disparity' between the retail price and the price to producers." *Greater N.Y. Metro.*, 815 F. Supp. at 711. But section 396-r contains no such benchmark. So, unless NYAG agrees that an increase of 200% is the minimum necessary to trigger section 396-r (NYAG does not, *see* Proposed Rule 500.1), caselaw about the milk-specific price-gouging statute tells us nothing about the meaning of the *general* price-gouging statute.

Or consider the Donnelly Act, another consumer-protection law that prohibits anticompetitive conduct. That Act and its federal counterpart contain a cryptic prohibition against agreements "in restraint of trade." 15 U.S.C. § 1; N.Y. Gen. Bus. Law § 340(1). But those statutes are saved from vagueness because they contain an "objective standard," *United States v. Kozminski*, 487 U.S. 931, 951 (1988), drawn "from the common law [of] the restraint of trade," *Nash v. United States*, 229 U.S. 373, 377 (1913). To establish liability for a restraint of trade under the Donnelly Act, the plaintiff must define and prove the existence of an "economically significant product market." *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 823 N.Y.S.2d 79, 82 (2d Dep't 2006).

Section 396-r, by contrast, lacks any equivalent standards even though the statute refers throughout to economic concepts such as "the market," and "similar goods and services." Because of this lack of guidance, courts have varied wildly in their approach to determining the relevant product market under section 396-r, in one case finding it to be as broad as the market for "gasoline," *People ex rel. Spitzer v. My Serv. Ctr., Inc.*, No. 06/21157, 2007 WL 102463, at *2 (Sup. Ct. Jan. 17, 2007), and in another to be as narrow (and as implausible) as the market for a single brand of disinfectant, *see People ex rel. James v. Quality King Distributors, Inc.*, 173 N.Y.S.3d 221, 230–31 (1st Dep't 2022) (Lysol as its own product market). This "shifting, vague, and indeterminate [] standard" is unconstitutional. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.); *cf. United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) (explaining that a judicial determination as to "whether prices are reasonable" was too "uncertain a test").

Or consider the precondition for section 396-r to take effect: an "abnormal disruption of the market." N.Y. Gen. Bus. Law § 396-r(2). An "abnormal" kind of disruption apparently occurs whenever there is "*any* change in the market" "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

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market which results in the declaration of a state of emergency by the governor." *Id.* (emphasis added). Again, vagueness abounds. The term "market" remains undefined. The change in the market need only be "imminently threatened." *Id.* And, according to one court, "[a] declaration of a state of emergency by the Governor . . . is *not* a precondition to the onset of an abnormal disruption of a market under the statute," *Quality King Distribs.*, 173 N.Y.S.3d at 231 (emphasis added). Little wonder, then, that *all twenty-five* jurisdictions NYAG cites in its proposed rules have sought to avoid this uncertainty by requiring a government declaration of emergency for their price-gouging rules to be triggered.[2] *Cf.* Proposed Rules at 9–10 (asserting that the uniformity of certain provisions across just *eleven* of those jurisdictions "is evidence of a societal convergence" about the propriety of those provisions). In short, liability under section 396-r hinges on whether a business can accurately predict whether some future event (such as a bad storm) will affect some undefined market and make a contemplated price hike illegal. New York should not—and cannot constitutionally—punish businesses for putting their trust in the wrong meteorologist.

It is true that section 396-r nods in the direction of the common law of unconscionability. But the statute remains unconstitutionally vague because its approach to unconscionability is unmoored from that term's common-law roots. Traditionally, "the doctrine of unconscionability requires some showing of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Carvel Corp. v. Rait*, 117 A.D.2d 485, 490, 503 N.Y.S.2d 406 (2d Dep't 1986). Section 396-r departs from this tradition by permitting NYAG to establish liability without proof of either element. *See* N.Y. Gen. Bus. Law § 396-r(3)(a).[3]

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[2] *E.g.*, Ala. Code § 8-31-3; 2020 Alaska Sess. Laws ch. 10, § 26; Ark. Code § 4-88-303(a)(1); Cal. Penal Code § 396(b); Conn. Gen. Stat. § 42-230; D.C. Code § 28-4102; Del. Declaration of a State of Emergency § 9 (Mar. 12, 2020); Ga. Code §10-1-393.4(a); Haw. Rev. Stat. § 127A-30(a); Kan. Stat. Ann. §50-6,106(b)(2); Ky. Rev. Stat. § 367.374(1)(a); La. Rev. Stat. § 29:732(A); 2020 Md. Laws ch. 13, § 1(a)(2); Me. Rev. Stat. Ann. tit. 10, § 1105(2); Mich. Executive Order No. 2020-18 § 2; Minn. Emergency Executive Order 20-10 § 1; Miss. Code §75-24-25(2); N.J. Rev. Stat. § 56:8-108; N.Y.C. Rules, tit. 6, § 5-42 (June 26, 2020); Okla. Stat. Ann. tit. 15, § 777.4(A); Or. Rev. Stat. §401.965(5); 73 Pa. Stat. § 232.4(a); Utah Code Ann. §13-41-101(1)(b); Wis. Stat. §100.305(2); W. Va. Code §46A-6J-3.

[3] To be sure, the First Department has rejected a vagueness challenge to section 396-r, but the decision is doubly flawed. First, it improperly applied "a relaxed-vagueness standard" of scrutiny. *Quality King Distribs.*, 173 N.Y.S.3d at 237. But a more exacting standard is required because there is significant "opprobrium and stigma" attached to being labelled a price gouger, *see Reno v. ACLU*, 521 U.S. 844, 872 (1997), and because the "statute is capable of reaching expression sheltered by

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II. The Proposed Rules Exceed NYAG's Statutory Authority, Do Not Cure the Statute's Infirmities, and Are Otherwise Misguided.

Given the vagueness problems plaguing section 396-r, the best use of NYAG's rulemaking authority would have been to supply entities regulated by the section with clear, evidence-based guidance interpreting the statutory text and resolving uncertainty. Instead, the proposed rules exceed NYAG's authority by attempting to impose extra-statutory presumptions that would improperly put the thumb on the scale in NYAG's favor. They engage in unconstitutional policymaking by adopting economic theories not adopted (or even hinted at) by the Legislature. They add to the statute's vagueness problem by introducing new, undefined concepts like "market share." They arbitrarily and selectively import—then misapply—antitrust principles. And even if they are lawful, they are often unworkable.

We discuss each Proposed Rule in turn.

A. Proposed Rule 500.1

This proposed rule would create a "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."

Although API supports guidance that would allow businesses to know in advance how to avoid liability, the proposed "presumptive case of a gross disparity" for price increases above 10% is unlawful and unworkable.

First, the proposed 10% presumption exceeds NYAG's regulatory authority. Section 396-r assigns to the "court[s]," not to NYAG, the determination "[w]hether a price is unconscionably excessive." N.Y. Gen. Bus. Law § 396-r(3). And to assist courts in this determination, the statute

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the First Amendment," *VIP of Berlin*, 593 F.3d at 186 (internal quotation marks omitted). *Cf. Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017) (holding that New York surcharge ban regulated speech). Second, under any standard, the court's review was unduly deferential. It is true, as the court observed, that the Legislature need not supply "impossible standards of specificity" or precise "quantitative metric[s] for ascertaining whether a given price is unconscionably excessive or unconscionably extreme." *Quality King Distribs.*, 173 N.Y.S.3d at 237. But that observation is beside the point because, as explained in the body text, the statute fails to supply *any* meaningful guidance as to its application—a deficiency NYAG implicitly acknowledges with its attempts to patch those holes through regulation.

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contains a list of "factors" to be considered by court, *id.* § 396-r(3)(a), including a list of evidence for establishing a prima facie case, *id.* § 396-r(3)(b).

NYAG may "effectuate and enforce" these factors and statutory presumptions, *id.* § 396-r(5), but this delegation of authority is not broad enough to permit NYAG to create new ones. *See Kahal Bnei Emunim v. Town of Fallsburg*, 78 N.Y.2d 194, 204 (1991) ("[A]n administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute."). That is, because "the Legislature has explicitly enumerated the factors to be considered by the" courts, NYAG may not add to them. *In re Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989). Indeed, in the price-gouging statute specific to milk, section 396-rr, agency authority is explicitly tied to a percentage increase in the price of the product, *see* N.Y. Gen. Bus. Law § 396-r(2)—showing that, "had the Legislature intended" to introduce a presumption based on percentage increases, "they knew how to engrave it in statutory form." *In re Tze Chun Liao*, 74 N.Y.2d at 510. NYAG may not "add substantially" to its powers in a manner "not contemplated or authorized by the Legislature." *Id.*

Second, even if the creation of new rules were authorized by statute, that authorization would amount to an unconstitutional delegation of the Legislature's policy-making function under the four-part *Boreali* test. *See Boreali v. Axelrod*, 71 N.Y.2d 1, 11–14 (1987).

The 10% figure is a "value judgment[]" for the legislature to make, *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 698 (2014); *see Trenton Potteries*, 273 U.S. at 398 (explaining that determining whether a certain price is reasonable involves a value-laden policy judgment). NYAG appears to concede as much by attempting to justify its rule as consistent with the *legislative* 10% presumptions of some other States, *see* Proposed Rules at 9–10 & nn.32–41 (citing out-of-state statutes with 10% presumptions). For good reason, then, a previous NYAG administration asked the *legislature* to adopt a *statutory* presumption based on percentages.[4]

Furthermore, "this is not a case in which the basic policy decisions underlying the challenged regulations have been made and articulated by the Legislature." *N.Y. Statewide Coal.*, 23 N.Y.3d at 700 (cleaned up). That is, the Legislature in section 396-r took no position on how much of a price increase would amount to a "gross disparity." "Devising an entirely new rule that significantly changes" the approach to proving a prima facie case "without legislative guidance" is therefore exercise in "the choosing of ends, or policy-making." *Id.* at 700.

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[4] NYAG, *Spitzer Authors Bill To Strengthen Price Gouging Law*, https://ag.ny.gov/press-release/2006/spitzer-authors-bill-strengthen-price-gouging-law (Jan. 10, 2006).

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In addition, "inaction on the part of the State Legislature" to update the statute to include a specific percentage figure (as the milk-price-gouging statute does) constitutes additional evidence that the proposed rule "amount[s] to making new policy, rather than carrying out preexisting legislative policy." *Id.*; *see, e.g.*, 2006 N.Y. A.B. 10722 (failed bill containing a presumption based on a 25% increase).

And although price-gouging is unquestionably a matter of economics, "no special expertise or technical competence in the field of [economics] was involved in the development of the" proposed rule, *see Boreali*, 71 N.Y.2d at 13–14; Proposed Rules at 1 (stating as NYAG's only basis for expertise its "years of experience in enforcing the statute"). Instead, NYAG simply borrowed from the legislative determinations of a handful of other States as to an acceptable figure. *See* Proposed Rules at 9–10. In sum, NYAG's narrow authority to "effectuate and enforce" section 396-r, N.Y. Gen. Bus. Law § 396-r(3), "cannot be construed to encompass the policy-making activity at issue here without running afoul of the constitutional separation of powers doctrine," *Boreali*, 71 N.Y.2d at 14.

Third, any assignment to NYAG of the power to create presumptions in its favor (and against defendants) would raise serious due-process concerns. Under NYAG's reading of section 396-r, the Attorney General is authorized both to promulgate a rule that creates a presumption of liability and to prosecute businesses under that presumption. This effectively "dual position as accuser and decisionmaker" is constitutionally impermissible. *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016).

Fourth, there is no rational basis for setting the presumption at 10%. NYAG asserts that there is "a societal convergence around the illegitimacy of more than 10% price increases," but points to the presumptions in only 10 States and New York City. Proposed Rules at 9–10.[5] As NYAG

[5] Even that figure overstates the prevalence of a rigid 10% rule. Unlike the proposed rule, some States permit price increases beyond 10% that are not attributable to cost increases. *E.g.*, Ky. Rev. Stat. §367.374(1)(c)(4) (permitting increases that are "consistent with fluctuations in applicable commodity, regional, national, or international markets, or seasonal fluctuations"). Unlike the proposed rule, some States apply their 10% rule only to retail and not to other levels of the distribution chain. *E.g.*, Utah Code Ann. §13-41-201(1)(b) (prohibiting excessive prices for "good[s] or service[s] at retail"); Okla. Stat. Ann. tit. 15, § 777.4 ("This section shall not apply to growers, producers, or processors of raw or processed food products, except for retail sales of such products to a consumer."). And, contrary to NYAG's representation, Kentucky does *not* use 10% "as the measure of what constitutes presumptive price gouging." Proposed Rules at 9. Instead, Kentucky law provides that a price *never* "violate[s] this subsection if it is . . . [t]en percent or less above the price prior to the [emergency] declaration." Ky. Rev. Stat. § 367.374(c).

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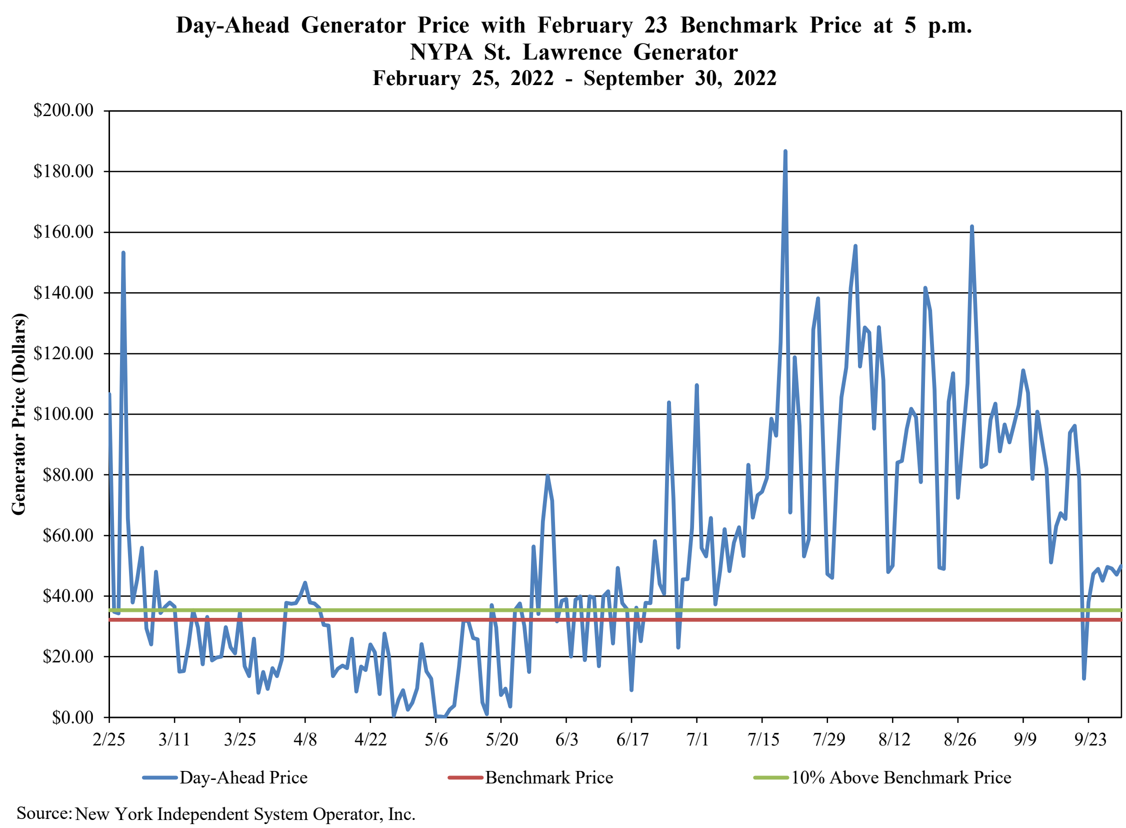
recognizes, even more States—nineteen, to be precise—do not consider presumptions to be appropriate, leaving the issue for the courts. *Id.* at 10. And the others set their presumptions well above the 10% threshold. *Id*. Moreover, those 10 States have price-gouging statutes that apply during short-term disruptions declared by the government, not for periods that could last years, such as "war." *See* N.Y. Gen. Bus. Law § 396-r(2). There is no "societal convergence" around the idea that prices cannot increase more than 10% over a period of many months, let alone many years.

There is no "societal consensus" that the price of a commodity should not change by more than 10% given changes in supply and demand. Look, for example, to New York's own pricing of electricity from hydroelectric plants owned by the New York Power Authority, which is wholly owned by the state and whose trustees are appointed by the governor with the advice and consent of the senate. These are the day-ahead prices charged for power at 5 p.m. by the Authority's St. Lawrence Generator, its second largest hydro plant:



Whether a price increase above 10% violates the statute remains "a question of law" for the court, with no presumption of unlawfulness. *Id.* § 367.374(d).

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The prices New York itself charged for electricity changed by a factor of more than 500% over a span of seven months, and often within a span of days. If there is a "a societal convergence around the illegitimacy of more than 10% price increases," the State of New York appears to have been unaware of it until NYAG released the Proposed Rules.

NYAG also asserts that "the 10% rule is easily administrable," *id.*, but that assertion presupposes, incorrectly, that businesses will have no difficulty figuring out the starting point of "the abnormal disruption of the market," Proposed Rule 500.1. As already explained, because the starting point is extremely difficult to pin-point *ex ante*, businesses will have no way of identifying the moment "immediately prior to the onset" of that disruption. *See id.* It is similarly unclear how to determine when a disruption *ends*. This uncertainty will only deter businesses from providing vital goods and services when they are needed most, while encouraging arbitrary and selective enforcement by NYAG. If NYAG truly considers it "important" to provide "guidance" to "tens of thousands of small retailers," *see* Proposed Rules at 10–11, it should start by giving those retailers meaningful guidance about identifying the start of a "period of abnormal disruption of the market," N.Y. Gen. Bus. Law § 396-r(1); *cf.* n.2, *supra* (listing the many jurisdictions where a price-gouging law is triggered only by an emergency declaration).

In any event, the easy administrability of *some* fixed figure does not justify the imposition of the *10%* figure. And NYAG's argument that the figure is warranted because a 10% price increase "has a *meaningful* effect" on consumers, Proposed Rules at 11 (emphasis added), falls far short of establishing that the increase marks a "*gross* disparity" from an earlier price or "grossly exceed[s]" the price of comparable products, *see* N.Y. Gen. Bus. Law § 396-r(3)(b)(i)–(ii) (emphases added); *cf. Negligence*, Black's Law Dictionary (11th ed. 2019) (explaining that "gross negligence" means "*very great* negligence" (emphasis added)).

It is no surprise, then, that cases in which sellers were found to have violated section 396-r through "unconscionably extreme" prices involved price increases well above 10%. Consider, for example, *Quality King Distributors*. There, the price increases held to be "unconscionably excessive" ranged from 33% to 85%. *See* 173 N.Y.S.3d at 81. In *People ex rel. Spitzer v. My Service Center, Inc.*, the unlawful price increases were between 31% and 48%. *See* No. 06/21157, 836 N.Y.S.2d 487, at *2 (Sup. Ct. Jan. 17, 2007). In *People ex rel. Vacco v. Beach Boys Equipment Co.*, the court affirmed a decision holding unlawful "a price increase of *100%*." 709 N.Y.S.2d 729, 731 (4th Dep't 2000) (emphasis added). And in still other cases, prices found unconscionable were *three or four times* the actual market value. *State of New York v. Strong Oil Co.*, 105 Misc.2d 803, 824 (Sup. Ct. 1980) (collecting cases). By contrast, price increases of 10% or less have been found

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unlawful only when they were "'obtained through unconscionable means.'" *Beach Boys*, 709 N.Y.S.2d at 731 (quoting *People ex rel. Abrams v. Two Wheel Corp.*, 530 N.Y.S.2d 46, 50 (1988)).[6]

B. Proposed Rule 500.2

This proposed rule purports to limit the meaning of the statutory phrase, "additional costs not within the control of the defendant."

Proposed Rule 500.2 suffers from many of the same problems as Proposed Rule 500.1. The proposed rule purports to limit the availability of—and the evidence that may be used to support—the statutory "additional costs" defense in section 396-r(3)(c)(2). But NYAG lacks the power to make a defense more difficult to satisfy. *See Freitas v. Geddes Sav. & Loan Ass'n*, 63 N.Y.2d 254, 264 (1984) (it is impermissible to impose a "more stringent test . . . than would be authorized by the statute under which the regulations were promulgated"). NYAG gets no further by limiting the clear statutory defense under the guise of "guidance," Proposed Rules at 14; *see Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004) (no deference to an administrative agency is due "where the question is one of pure statutory reading and analysis" (internal quotation marks omitted)). NYAG has no power to prohibit a seller's reliance on "index pricing" when such pricing is customary in an industry, *see* Proposed Rule 500.2(4), because those prices will necessarily reflect "the price at which the same or similar goods . . . [are] obtainable in the trade area"—and are therefore lawful, *see* N.Y. Gen. Bus. Law § 396-r(3)(b)(ii). And NYAG's arrogation of the power to determine the availability of defenses for cases it prosecutes again impermissibly encroaches on the Legislature's policy-making function and implicates the federal and state Due Process Clauses.

API also notes that "replacement costs" were omitted from the proposed definition of "[a]dditional costs not within the control of the defendant." In that respect, Pennsylvania and Kentucky laws provide a template that NYAG should follow. *See* Ky. Rev. Stat. § 367.374; 73 Pa. Stat. § 232.4(c) ("The provisions of this section shall not apply if the increase in price is due to a disparity that is substantially attributable to additional costs that arose within the chain of distribution in connection with the sale of consumer goods or services, including replacement costs.").

Moreover, "costs directly attributable to . . . the specific good," *see* Proposed Rule 500.2(1), will in many markets be impossible to calculate. In a market involving refined products,

[6] Because these decisions involved short-term price increases, they had no occasion to discuss the effect seasonal variations in pricing might have on the analysis. But any standard for unconscionability must be linked to the length of the disruption (which, under Section 396-r, could be years), and consider seasonality and other changes in pricing that are unrelated to unconscionability.

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for example, the product is commingled in tanks, making it impossible to determine the acquisition cost "directly attributable" to a particular gallon sold out of the tank.

C. Proposed Rule 500.3

This proposed rule would provide that it is not a defense that the product or industry did not exist before the market disruption, and would find evidence of unconscionably extreme pricing from "[p]rofit margins for a new product that are higher in percentage terms than a comparable product."

Both subsections of Proposed Rule 500.3 suffer from the same defect: they purport to alter the language of the statute. Subsection (1) would limit defenses made available in section 396-r, while subsection (2) would expand the statutorily enumerated list of available methods for NYAG to prove its case by allowing it to present proof of "high[er]" "[*p*]*rofit margins*," Proposed Rule 500.3(2) (emphasis added), instead of "unconscionably extreme" "*prices*," N.Y. Gen. Bus. Law § 396-r(3)(a)(i) (emphasis added). As already explained, NYAG has not been delegated the power to make these alterations to the statute, and, if it had been, any such delegation would be unconstitutional.

Subsection (2) also worsens the vagueness problem that plagues the statute. The Proposed Rule provides no guidance for determining whether the "[p]rofit margins for a new product" is "comparable" to those of "a comparable product." Consider the first COVID vaccine. *See* Proposed Rules at 18 (asserting that there were "complaints about price gouging on . . . vaccinations" during the pandemic). What product would be considered "comparable"? The vaccine for another disease? Some less effective treatment for COVID? And how would the profit margin be compared? When calculating the profit margin, will NYAG consider the significant investment that the manufacturer will need to recoup? Or will NYAG focus only on marginal cost? The Proposed Rule raises more questions than it answers.

D. Proposed Rule 500.4

This proposed rule would state that the statutory term "unfair leverage or unconscionable means" "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."

Proposed Rule 500.4 only adds confusion to an already-confusing statute. NYAG asserts that the proposed rule lists "some of the conduct that constitutes unfair leverage." Proposed Rules at 21. But as NYAG admits, the examples given are "also understood in New York law to constitute procedural unconscionability." *Id.*; *compare* Proposed Rule 500.4 (listing as examples "unequal bargaining power, high-pressure sales techniques, confusing or hidden language in an agreement or in price setting"), *with Master Lease Corp. v. Manhattan Limousine, Ltd.*, 177 A.D.2d

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85, 89 (2d Dep't 1992) (listing as examples of procedural unconscionability "high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract"). If "unfair leverage" is simply a kind of unconscionability, it is unclear how the concept differs from "unconscionable means," another of the statutory prohibitions. *See* N.Y. Gen. Bus. Law § 396-r(a)(2). And given that, as mentioned above, the statute does not track the common law of unconscionability, it remains unclear to what extent that concept informs the interpretation of the statute.[7]

E. Proposed Rule 500.5

This proposed rule would (1) state that, "[w]hen unfair leverage is used to increase prices, there is no de minimis percentage price increase to create a presumption of illegality"; (2) presume "unfair leverage" "when a seller with at least 30% market share raises prices"; and (3) would presume "unfair leverage" when an entity "with above a 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."

Of the proposed rules, Proposed Rule 500.5 is the most clearly unlawful. *First*, the proposed rule introduces new presumptions not included in—and not permitted by—the statute. *See Kahal Bnei Emunim*, 78 N.Y.2d at 204; *In re Tze Chun Liao*, 74 N.Y.2d at 510.

Second, the market-share thresholds violate the separation of powers. The thresholds appear to be drawn not from section 396-r, but from scattershot economic literature. *See* Proposed Rules at 24–25. For example, NYAG asserts that a 30% market share (or 10% share in "concentrated market[s]") is indicative of "pricing power," *id.* at 24, but that assertion has no basis in the statute, and NYAG lacks the economic expertise to make the necessary evaluation. The proposed rule, then, is not a mere regulatory decision, "but rather a policy decision and value judgment about where to draw a line." *Stevens v. N.Y. State Div. of Crim. Just. Servs.*, 169 N.Y.S.3d 1, 14 (1st Dep't 2022). Put differently, with no "legislative guidelines at all for determining" appropriate market share, NYAG is "acting solely on its own ideas of sound public policy and [is] therefore operating outside its proper sphere of authority." *Boreali*, 71 N.Y.2d 1 (1987).

Third, the proposed rule exacerbates the statute's vagueness problem. The proposed rule introduces the non-statutory concepts of "market share," and "significant competitors" as a gloss on the statutory prohibition against "[u]nfair leverage." Proposed Rule 500.5(2)–(3). But the rules

[7] There also appear to be scrivener's errors in the Proposed Rule. The title, "Presumptive Cases of Unfair Leverage," was presumably meant for Proposed Rule 500.5. That proposed rule, unlike Proposed Rule 500.4, deals with presumptions concerning unfair leverage. Separately, there is an "or" missing before the phrase "confusing or hidden language."

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do not explain how to calculate the relevant market or market share, or what the term "significant competitor" means. It is possible that NYAG meant to draw from the concept of relevant markets in antitrust law, *see* Proposed Rules at 23–25 & nn.66–72 (citing and discussing antitrust concepts and authorities), but those concepts are never explicitly incorporated in the section 396-r or in the proposed rules. And the arbitrary incorporation of antitrust law into the meaning of "unfair leverage" is especially unusual given that NYAG's position in Proposed Rule 500.4 is that the term invokes the common law of unconscionability, not the common law of restraint of trade (from which antitrust law is derived). *See* Proposed Rules at 21.

Fourth, to the extent that the 30% and 10% market share thresholds *are* drawn from antitrust law, the thresholds reflect a mistaken understanding of that law. NYAG asserts that the thresholds are "conservative[] metric[s] of pricing power." *Id.* at 24. But the Supreme Court has held that "a market share" of 30% "alone [i]s insufficient as a basis to infer market power"—that is, the power "to force a purchaser to do something that he would not do in a competitive market" such as pay inflated prices. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 27 (1984). New York cases are in accord. *E.g.*, *New York ex rel. Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993) ("In this Court's examination . . . 39% share is below that which has been deemed sufficient to confer market power in any previous decision."). Indeed, regardless of the level of concentration of the market, "[c]ourts have consistently held that firms with market shares of less than 30% are presumptively *incapable* of exercising market power." *Union Carbide Corp. v. Montell N.V.*, 27 F. Supp. 2d 414, 417 (S.D.N.Y. 1998) (emphasis added). Yet, under the proposed rule, a firm that had a 10% share and competed with 90 firms each with a share of 1% would have market power (because, without a 10% share, none of those 90 firms satisfy the Proposed Rule's definition of "significant competitor"), rather than a competitor in an intensely competitive market. No competent economist would support such a definition of market power. Far from embodying conservative metrics, then, the proposed thresholds turn antitrust law on its head.

NYAG's justifications for the thresholds do not withstand scrutiny. In support of the 30% threshold, NYAG cites a decision of the Supreme Court that discusses the threshold for presuming that the effect of a merger "may be substantially to lessen competition" in violation of section 7 of the Clayton Act. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 355 (1963). But that provision that "does not require proof that [the] merger . . . will cause higher prices," *Hosp. Corp. of Am. V. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986), rendering section 7 caselaw wholly irrelevant when it comes to interpreting and applying section 396-r, a price-focused provision.

And, in an attempt to justify the 10% threshold, NYAG relies on a single academic article and mischaracterizes its contents. As NYAG would have it, the article "note[s] that there is an FTC presumption that a firm with above a 10% market share constitutes a significant competitor."

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Proposed Rules at 25. Not so. The article states only that, "in a report on merger investigations by the FTC," the FTC found that "significant competitors" "'usually have market shares in excess of 10%, but market shares alone are *not determinative of significance*.'" John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?*, 81 Antitrust L.J. 837, 850 (2017) (quoting Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2011*, 3 n.17 (2013) (emphasis added)). And the author adds that there is "some ambiguity in the meaning of this passage." *Id.* Indeed, in its authoritative Horizontal Merger Guidelines, FTC makes no mention of the supposed 10% presumption. *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* 18–19 (2010) (using the Herfindahl-Hirschman Index, not a 10% presumption, to determine market concentration).

F. Proposed Rule 500.6

This proposed rule would provide that "[a]ll 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."

Proposed Rule 500.6 is a misguided attempt to rewrite section 396-r(2) even though the meaning of that subsection is currently the subject of litigation. The subsection provides that the prohibition against price gouging applies only "when the product sold was located in the state prior to the sale." N.Y. Gen. Bus. Law. § 396-r(2). In other words, the prohibition does *not* apply to transactions where the product was imported into New York as part of the sale. NYAG's purported revision of section 396-r to extend to *all* instances where the product was "sold in the state," including imports, *see* Proposed Rule 500.6, conflicts with the statute and is entitled to no deference. *See Belmonte*, 2 N.Y.3d at 566. And although it is true that one lower court has adopted NYAG's interpretation, the respondent in that case has appealed and the court has stayed its order pending the outcome of the appeal. *People v. Tyson Foods*, Index # 156457/2022, NYSCEF Doc. # 60 (Sup. Ct., Feb. 6, 2022). It is therefore premature to treat NYAG's interpretation as judicially sanctioned. *See* Proposed Rules at 28. And, to the extent NYAG's interpretation would extend section 396-r to transactions that take place entirely out-of-state (even if the product is later imported into New York), the law would violate the Commerce Clause's prohibition against extraterritoriality. *See Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) (holding that Maryland's price-gouging statute, which "regulate[d] the prices charged for [certain goods] in out-of-state transactions," violated the Commerce Clause).

Even if otherwise lawful, it would be unwise to extend the statute to transactions that take place entirely outside of New York. Otherwise, a prudent out-of-state vendor looking to reduce its risk might take steps to prevent its product from being resold in New York—the last thing New Yorkers want in a time of crisis.

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G. Proposed Rule 500.7

This proposed rule would determine "pre-disruption price for sellers who use dynamic pricing . . . 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." And it would allow "[a] seller who would be liable for price gouging due to this provision [to] 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."

The proposed rule's legal infirmities are by now familiar. Like other proposed rules, Proposed Rule 500.7 unlawfully "creates out of whole cloth" a new rule of liability (and a new defense) for sellers who use dynamic pricing. *Vapor Tech. Ass'n v. Cuomo*, 118 N.Y.S.3d 397, 402 (Sup. Ct. 2020). It once again exacerbates the vagueness problem by introducing new, non-statutory terms—"dynamic pricing" and "median price"—that are not defined and could bear any number of meanings. And it introduces an arbitrary one-week lookback period that fails to account for seasonality and assumes, incorrectly, that prices move equally quickly for all products in all markets.

At the very least, the more detailed description of "dynamic pricing" in the Regulatory Impact Statement, *see* Proposed Rules at 29–30, should have made its way into the text of the proposed rule. But even that description has its shortcomings. According to NYAG, "[d]ynamic pricing exists when a seller increases prices in response to a supply contraction or a demand expansion." *Id.* But that description applies to essentially *all* sellers given that essentially all sellers (and certainly those in traditional commodity markets) take supply and demand into account when setting prices.

*   *   *

For the reasons stated above, we respectfully request that NYAG reconsider its proposed rules so that they provide greater clarity about the operation of section 396-r without attempting to insert unlawful and unworkable presumptions that would only harm businesses and deter innovation.

Respectfully submitted,

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Northeast Region Director
American Petroleum Institute

From:	Bangladeshi American Community Development & Youth Services Corp.
To:	stopillegalprofiteering
Subject:	Comments on Proposed Rules on Price Gouging
Date:	Monday, May 22, 2023 10:39:26 AM
Attachments:	BACDYS NYAG Letter_Signed.pdf

[EXTERNAL]

To Whom it May Concern,

Please find the attached comments on the proposed rules on price gouging.

Thank you,

Bangladeshi American Community Development & Youth Services

May 22, 2023

New York Attorney General Letitia James
28 Liberty St.
New York, NY 10005

To whom it may concern:

Please consider this letter a submitted comment in response to your proposed rules around price gouging.

I represent Bangladeshi American Community Development and Youth Services (BACDYS). Based out of the surrounding neighborhoods of East Brooklyn, BACDYS' mission is to provide low-income families with the skills, the confidence, and the knowledge that will help them improve their living conditions.

As a consumer, I appreciate and understand your desire to reign in corporate profiteering. During the COVID-19 pandemic, I watched in horror as at-home test kits, masks and other items required to safely participate in society were priced out of greed and left out-of-reach for many. It is clear we need a watchdog fighting for us and keeping price gouging under control.

I fear however, that the current rules are too broad and risk hurting innocent bystanders. For example, the proposed rule on dynamic pricing would greatly impact rideshare drivers and have undesirable consequences for riders, as well.

Surge pricing is a tool Uber and Lyft employ to encourage drivers to accept trips during times of high demand and low supply. For example, after a concert or major sporting event, when thousands of people are all calling for cars at the same time, surge pricing provides an incentive for more drivers to get in their cars and help get these people home. Another example is at the onset of bad weather. While most of us would prefer to stay inside, those out-and-about looking for a way to get around often rely on rideshare services, and drivers expect to make a little extra money for their efforts. If the current rules stand, it can be taken as certain that drivers will make less money and riders - those the rule aims to help - will be left stranded at times when they previously could count on reliable service.

I ask you to consider the profile of the average rideshare driver. These extra bucks afforded via surge pricing are a critical form of earnings. Please reconsider any action that will negatively impact a drivers' ability to earn.

Thank you,

Misba Abdin, Founder and Board Member

8310 Rockaway Blvd, Ozone Park NY 11416 | 718-235-1700 | info@bacdys.org | www.bacdys.org

From: Alfredo, Laura
To: stopillegalprofiteering
Subject: GNYHA Price Gouging Comment Letter
Date: Monday, May 22, 2023 11:10:17 AM
Attachments: OAG Price Gouging Final.pdf

[EXTERNAL]

Attached please find GNYHA's comment letter on the price gouging proposed rule.

Thank you for the opportunity to provide our members' views on this.

Laura M. Alfredo
Executive Vice President,
Legal, Regulatory and Professional Affairs and
General Counsel

phone: 212.258.5391
e-mail: lalfredo@gnyha.org

GREATER NEW YORK HOSPITAL ASSOCIATION
GNYHA is a dynamic, constantly evolving center for health care advocacy and expertise, but our core mission—helping hospitals deliver the finest patient care in the most cost-effective way—never changes.

web: **www.gnyha.org**
twitter: **www.twitter.com/gnyha**

GREATER NEW YORK HOSPITAL ASSOCIATION

PRESIDENT, KENNETH E. RASKE • 555 WEST 57TH STREET, NEW YORK, NY 10019 • T (212) 246-7100 • F (212) 262-6350 • WWW.GNYHA.ORG

May
Twenty-Two
2 0 2 3

Via email to **stopillegalprofiteering@ag.ny.gov**
Ms. Zephyr Teachout
Special Advisor and Senior Counsel for Economic Justice
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

Re: Comment on Price Gouging Proposed Rule (I.D. Nos. LAW-12-23-00006-P, LAW-12-23-00007-P, LAW-12-23-00008-P, LAW-12-23-00009-P, LAW-12-23-00010-P, LAW-12-23-00011-P, LAW-12-23-00012-P)

Dear Ms. Teachout:

On behalf of the 170 New York State hospital and health system members of the Greater New York Hospital Association (GNYHA), we appreciate the opportunity to comment on the Office of Attorney General's (OAG) proposed regulations on price gouging. This rulemaking comes under the authority of General Business Law 396-r, which was amended in 2020 following receipt of what OAG has described as thousands of price gouging complaints related to the COVID-19 pandemic.

New York's hospitals were the front line of defense against COVID-19 and experienced firsthand the efforts of various actors to take advantage of the crisis, including by charging exorbitant prices for essential supplies, equipment, and services. In the early days of the pandemic, with the world's supply chain severely disrupted and the health care system under massive stress from an influx of patients with a novel disease, our hospitals did what they had to do to source supplies and services. They are still experiencing the financial effects of the actions they were forced to take in the early days of the emergency.[1]

Our members therefore understand the need for protections against opportunistic and illegal pricing schemes undertaken during market disruptions. We support the intent behind these regulations to protect consumers by protecting the entire line of distribution during a market disruption.

[1] A Joint Hospital Association Survey conducted by GNYHA, HANYS, and other associations published in December 2022 found that "Severe fiscal and workforce challenges are forcing hospitals to cut patient services and halt modernization projects that advance patient care." See, *Critical Condition: New Yorkers are losing access to care as a fiscal crisis hammers hospitals statewide*.

The main purpose of this comment letter is to highlight the impacts of exorbitant contract labor costs on New York's hospitals and health systems and to urge OAG to finalize the rulemaking in a way that optimizes its effectiveness for future needs.
At the outset, we suggest that OAG make crystal clear that the law and regulations apply to labor costs. One of the most distressing issues facing hospitals throughout the COVID-19 emergency was the exorbitant cost of contract labor, amounting to a 134% increase in contract staffing costs between 2019-2022.[2] The perfect storm of high patient volume and loss of health care workers from the workforce for a variety of reasons led to an intense need for health care staff. However, the astronomical charges that our hospitals incurred struck many as being out of proportion to the market conditions.

Like several states, New York recently enacted legislation[3] to require health care staffing agencies to register in the State, meet certain minimum standards, and make certain disclosures to the State, including charges and fees. This transparency may help uncover questionable behavior, but in the event of a future health care-related market disruption the regulations should make it clear that the law applies to temporary agency labor costs. This will give hospitals and other health care organizations the ability to seek redress for troubling behavior. The proposed rule should be finalized to expressly state that "services" includes temporary agency/contract labor costs.

Making the regulations as clear, unambiguous, and reasonable as possible will also support this goal. It is beyond our ken to comment on the technical aspects of the provisions, but we urge OAG to consider comments from the business community that advocate for the rule to be finalized with a requirement for a clear indication of the affected goods and services and geographic scope of market disruptions. Ambiguity in the regulations will negatively impact parties on both sides of a price gouging complaint.

We also urge OAG to review the terms of the statute to ensure the concept of unfair leverage is being faithfully and fairly utilized in the rulemaking. There is little benefit for disadvantaged stakeholders to raise concerns if those engaging in questionable behavior can evade responsibility by raising technical legal defenses.

GNYHA believes that OAG should address the above concerns in the final rulemaking to ensure all interested parties know and understand the rules and can comply and seek enforcement with confidence. Thank you for the opportunity to comment.

Sincerely,

Kenneth E. Raske

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[2] *Id., p. 4.*
[3] See, Public Health Law Art. 29-K

President

From: Nafisa Sadia
To: stopillegalprofiteering
Cc: Adam Witkowski
Subject: response letter to proposed price gouging rules
Date: Monday, May 22, 2023 1:17:33 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
mcn ride share advocacy.pdf

[EXTERNAL]

Hi

Please find attached our response letter for proposed rules around price gouging.

We would immensely appreciate it if the proposed rules were reconsidered, and our advocacy taken into consideration.

Best regards

MCN
Muslim Community Network

Nafisa S Al Hafiz
Finance, Operations & HR Manager
Phone : 347-519-2755
Email : nafisa@mcnny.org
Address: 450 Lexington Ave, NY, New York, 10017.
https://mcnny.org

DONATE

New York Attorney General Letitia James
28 Liberty St.
New York, NY 10005

To whom it may concern:
Please consider this letter as a submitted comment in response to your proposed rules around price gouging.

I represent Muslim Community Network, an organization dedicated to using civic education and leadership development to shape the public narrative about what it means to be Muslim in the United States of America.

As a consumer, I appreciate and understand your desire to reign in corporate profiteering. During the COVID-19 pandemic, I watched in horror as at-home test kits, masks and other items required to safely participate in society were priced out of greed and left out-of-reach for many. It is clear we need a watchdog fighting for us and keeping price gouging under control.

I fear, however, that the current rules are too broad and risk hurting innocent bystanders. For example, the proposed rule on dynamic pricing would greatly impact rideshare drivers and have undesirable consequences for riders, as well.

Surge pricing is a tool Uber and Lyft employ to encourage drivers to accept trips during times of high demand and low supply. For example, after a concert or major sporting event, when thousands of people are all calling for cars at the same time, surge pricing provides an incentive for more drivers to get in their cars and help get these people home. Another example is at the onset of bad weather. While most of us would prefer to stay inside, those out-and-about looking for a way to get around often rely on rideshare services, and drivers expect to make a little extra money for their efforts. If the current rules stand, it can be taken as certain that drivers will make less money and riders - those the rule aims to help - will be left stranded at times when they previously could count on reliable service.

I ask you to consider the profile of the average rideshare driver. These extra bucks afforded via surge pricing are a critical form of earnings. Please reconsider any action that will negatively impact a drivers' ability to earn.

Thank you,

Nafisa Sadia
Operations, Finance and HR Manager
nafisa@mcnny.org

From:	Aquilina, Joseph
To:	stopillegalprofiteering
Subject:	Consumer Brands Comment on Price Gouging
Date:	Monday, May 22, 2023 1:58:29 PM
Attachments:	CBA Comment re NY Price Gouging Proposed Rules Submission May 2023.pdf

[EXTERNAL]

Good Morning,

Attached please find Consumer Brands Association's comment regarding the Office of the Attorney General's Proposed Rules on Price Gouging, specifically the proposed additions to General Business Law, section 396-r(5). We are joined on the comment by the Food Industry Alliance of New York State, the New York Association of Convenience Stores, and the Retail Council of New York State. Thank you for the opportunity to comment and please advise if there are any questions or additional materials we can provide to aid the OAG in this effort.

Respectfully submitted,
Joseph Aquilina

Joseph Aquilina
Senior Director & Associate General Counsel
Consumer Brands Association
571-378-6722 (office)
202-262-9096 (mobile)

May 22, 2023

Sent via electronic mail: to stopillegalprofiteering@ag.ny.gov.

Hon. Letitia James
Attorney General of the State of New York
Office of the Attorney General
State Capitol
Albany, New York 12224

Re: Proposed Rulemaking Pursuant to N.Y. Gen. Bus. L. § 396-r(5) (Price Gouging)

A. Background on Consumer Brands, FIA, NYACS and RCNYS

The Consumer Brands Association ("Consumer Brands") champions the industry whose products Americans depend on every day, representing more than 1,700 iconic brands. As a provider of a variety of essential goods to consumers and accounting for one-fifth of all freight shipping in the United States, the household, personal care, food and beverage products manufactured by the consumer-packaged goods ("CPG") industry is a vital stakeholder and expert on the supply chain ecosystem, with members that work to remove barriers in providing American consumers the affordable products they rely on every day. The CPG industry powers every day for the U.S. economy. The industry is responsible for 1 in 10 American jobs, contributing $361.3 billion to the nation's GDP.[1] In New York alone, the CPG industry supports a total of 984,000 jobs and labor income of $64.8 billion, and it adds $113.3 billion in contribution to the state's GDP.[2]

The Food Industry Alliance of New York State, Inc. ("FIA") is the premier trade association representing the full spectrum of the retail food industry in New York.

The New York Association of Convenience Stores ("NYACS") is a trade association representing the interests of over 8,000 c-stores and 127,000 employees and dedicated to unifying, serving, and advocating for the convenience store industry of New York State.

The Retail Council of New York State ("RCNYS") is the leading statewide trade organization, representing thousands of stores that range in size from sole proprietor businesses to national and international brands. Headquartered in Albany, the Retail Council is the exclusive voice for the retail industry in New York. The retail industry is the largest private-sector employer in the country, supporting 52 million jobs overall — roughly one-quarter of the U.S. workforce — with 32 million jobs

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[1] Consumer Brands Association, *The Economic Contributions of the U.S. Consumer Packaged Goods Industry*, https://consumerbrandsassociation.org/wp-content/uploads/2019/11/ConsumerBrands_EconImpact.pdf.
[2] Consumer Brands Association, *State Spotlight: New York*, https://consumerbrandsassociation.org/wp-content/uploads/pdfs/state-pdfs/new-york.pdf.

involving direct retail employment.[3] Retail also contributes $1.6 trillion to the nation's GDP. In New York, 23% of jobs are supported by the retail industry, with nearly 163,000 retail establishments directly employing 1.8 million people. New York's retail industry contributes $104.6 billion to the state's GDP.[4]

Consumer Brands, FIA, NYACS and RCNYS appreciate the opportunity to submit a comment in response to the March 3, 2023 proposed rules regarding price-gouging,[5] and thanks the Attorney General for considering Consumer Brands' April 15, 2022 comment Advance Notice of Proposed Rulemaking. In the prior comment, Consumer Brands highlighted role of the CPG industry and some of the unprecedented challenges faced by the CPG industry during pandemic.[6] In this comment, we raise concern about several elements of proposed rule, including business and logistical challenges of implementation of the rule, and unintended and harmful consequences that could negatively impact New Yorkers and impede the State's ability to compete for and retain businesses in the State.[7]

B. The Attorney General should take care to articulate each aspect of the proposed rules with specificity to mitigate the risks of existential and excessively punitive damages.

Specifically, Consumer Brands, FIA, NYACS and RCNYS are concerned that the rule as currently drafted raises significant due process concerns. As drafted, the proposed rule's definitions are vague and overbroad. We further voice concerns over the extreme penalties involved with potential enforcement of these proposed rules, namely (i) the greater of up to $25,000 per violation or three times the "gross receipts for the relevant goods or services" and (ii) restitution sanctions. *See* G.B.L. § 396-r(4). This treble-damages provision is especially problematic when combined with a low threshold of presumptive price-gouging and the proposed rule's definitions of costs.

1. An Overbroad Application of a Presumption of Price-Gouging Could Unintentionally Impact the Availability of Essential Goods to New Yorkers.

CPG companies must be able to properly meet challenges in supply and consumer demand. The rule applies "abnormal disruptions in the market" broadly when response times are short, demand

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3 National Retail Federation, https://nrf.com/retails-impact.

4 PwC/NRF report, *The Economic Impact of the U.S. Retail Industry*, May 2020, https://cdn.nrf.com/sites/default/files/2020-06/RS-118304%20NRF%20Retail%20Impact%20Report%20.pdf

5 Notice of Proposed Rulemaking, https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf.

6 Consumer Brands Association, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 15, 2022), https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf. The comment submitted by Consumer Brands is available on pages 29 to 36 of the PDF document on the Attorney General's website.

7 For example, retailers rely on dynamic pricing models to optimize inventory and minimize food waste. However, the proposed rules effectively suspend dynamic pricing for the duration of an emergency, irrespective of how long it lasts and whether the disruption would actually cause dynamic pricing models to charge "unconscionably excessive" prices. Further, pricing "one week prior" is an arbitrary point of comparison that does not permit consideration of historical pricing and, therefore, constrains the normal operation of pricing mechanisms.

is high, and supply chains are strained.[8] But this broad application combined with a presumption of price gouging when price increases meet a mere 10% threshold could impact markets in unintended ways.

As written, the proposed rules present several unintended and potentially harmful consequences to New Yorkers. For example, if prices increase by more than 10%, the rule could incentivize manufacturers and distributors to shift goods to other markets where there is no presumption of price-gouging. Alternatively, the proposed rules could encourage firms to charge higher prices in non-emergency times to avoid triggering the State's low presumptive price-gouging threshold. Moreover, given the rule's application to new products, firms could be discouraged from introducing new innovative products to the New York market during an emergency, especially if there is risk that supply chain disruptions might increase prices. As one business put it: the proposed rules could "squelch innovation" for those companies looking to fulfill needs presented during an emergency. The rule raises the possibility that businesses would be less likely to invest in New York operations.[9] These unintended consequences could lead to higher prices (exacerbating current inflation concerns) and impact the availability of essential goods to New Yorkers, both in emergency and non-emergency times.

Further, the application of the presumption is unclear.[10] For example, definitions of "profit margin" and selections of appropriate reference products are not spelled out in the current rule. Section 500.4 would apply a presumption of price gouging to products introduced during market disruptions when the "the baseline profit margin is higher than the profit margin of a similar product." For innovative products introduced specifically in response to market disruptions, companies could be left guessing to comparators and how New York state authorities might define profit margins.

2. The Definition of "Gross Disparity" Under Section 500.1 Risks Eliding Unlawful "Price Gouging" with Ordinary Responses to Economic Factors.

The proposed rules define price-gouging as a "gross disparity" between "a selling price and a pre-disruption price." Consumer Brands, FIA, NYACS and RCNYS are supportive of standards that are not illusory and do not arbitrarily trigger a presumption of "price gouging." Any standard must be grounded in specific economic analysis and economic realities to avoid creating a framework in which a company with the highest prices will automatically be a target for investigation or prosecution, without more.

As one example of the type of practical realities that may contribute to a price increase, getting materials to rural areas during emergencies could be particularly difficult. Further, because of uncertainty about how markets are defined, many sellers, including online and brick-and-mortar

[8] *See* N.Y. Gen. Bus. Law § 396-r(2) (defining "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.").

[9] For example, the proposed rules ignore the practicality of applying them to nationwide CPG manufacturing businesses, given that pricing to large retailers and other customers is national and not determined on regional basis.

[10] For example, it is uncertain from the proposed rule whether promotional support would be included in the definition of "price."

retailers operating in rural areas, may not know their precise market share or how the Attorney General would define the "relevant market." As a result, the proposed rules should account for how rural consumers may be particularly affected.[11]

3. The Definition of "Unfair Leverage" Under Section 500.5 Overlooks the Difficult Process of Defining the "Relevant Market."

Section 500.5 of the proposed rules create a presumption of unfair leverage based on thresholds related to market share, market concentration, and annual revenue.[12] Consumer Brands, FIA, NYACS and RCNYS encourage the Attorney General to consider the practical consequences of this proposed rule. Certain businesses will be presumed to exercise "unfair leverage" and be unlawfully "price gouging" simply because they have been compelled to raise prices during challenging times. This does not appear to comport with the Attorney General's stated intent that "none of the proposed rules limit any firm from maintaining the per-unit profit margin it had prior to the market disruption, *even where that means increasing prices*." Proposed Rules at 7 (emphasis added). Further, this presumption overlooks the difficulty of applying a test that requires defining the relevant market.[13] As illustrated by the use of the standard in antitrust cases, defining the relevant "market" for purposes of market share and market concentration is fact-intensive,[14] often litigious, and highly resource-intensive. We urge the Attorney General to reconsider the administrability of a rule that requires market definition.

C. The Proposed Narrowed Definition of "Costs" Under Section 500.2 Ignores Business Realities.

The proposed rules claim that "none of the proposed rules limit any firm from maintaining the per-unit profit margin it had prior to the market disruption, even where that means increasing prices to account for higher costs." Proposed Rules at 7. Unfortunately, as written, this is not the case.

Under General Business Law § 396-r(3)(c), price increases due to "costs not within the control of the defendant" provide an affirmative defense to a prima facie case of price gouging brought under the statute. Section 500.2 re-defines these "costs" in a way that ignores business realities, supply chain dynamics, and existing customer pricing mechanisms and contracts. Section 500.2 would require companies to re-think how they perform their internal accounting, mandating that they disregard their internal accounting systems and substitute newly created standards of "costs."

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[11] A rural area flexibility analysis was not performed on the proposed rules. Doing so may provide further detail as to how rural consumers may be particularly affected, especially given that these areas often have undeveloped services delivery systems and lack of economies of scale. *See* S.A.P.A. § 202-BB(1).

[12] The Attorney General is considering $5 billion in annual revenue as a potential definition of a "large firm" subject to "undue leverage" presumptions. This definition of "annual revenue" is not clear as to annual revenue at the local, state-wide, national, or global level.

[13] The examples used by NYACS in its Comment demonstrate this point well. As discussed there, in an increasingly globalized world, a snowstorm, electricity outage, or military invasion in one part the world can (and often does) affect prices to consumers in New York State. *See* NYACS Comment at 2. Moreover, there is a lack of clarity as to when an "abnormal disruption of the market" actually occurs, putting law-abiding businesses at risk as some emergencies may be short-term (measured in days) or longer term (measured in years). *Id.*

[14] For example, a dynamic with only a few companies operating within a category might be interpreted to prohibit price increases as to avoid triggering "price gouging" presumptions.

Further, the proposed definition of "costs not within the control of defendant" fails to account for key costs during emergencies. The experience of the COVID emergency in the last three years has demonstrated the unforeseen costs of complying with new local and state regulations such as social distancing in factories, implementing COVID protocols, and other additional expenses, including labor shortages.

The proposed rules also create numerous practical problems with how a company should actually understand what the state means by these "costs." Consumer Brands, FIA, NYACS and RCNYS encourage the Attorney General to reconsider its approach to the following:

- *The proposed rules should incorporate fundamental and sensible accounting practices.* The proposed rule notes that "[c]ost is not a technical term, and firms may use different internal accounting systems." *See* Proposed Rules at 15; *see also id.* ("This rule addresses common accounting practices that may be sensible for purposes unrelated to this rule but should not be used to define costs for purposes of an affirmative defense to New York's price gouging statute."). The proposed rules acknowledge that companies should use sensible accounting practices for other purposes, but direct that companies must produce an entirely different set of "costs" for purposes of defending an action brought under these rules.

- *Transfer pricing necessarily reflects costs, including increased costs passed onto manufacturers.* The proposed rules acknowledge that companies may be using generally accepted accounting practices ("GAAP") to treat transfer prices as costs for internal accounting purposes, but mandate that such costs be disregarded for purposes of determining "costs" as part of the affirmative defense. *Id.*

- *Apportionment of "costs" only to the challenged product ignores commercial realities of running a business*. Emergency scenarios would exacerbate the difficulties inherent in calculating shared internal costs applicable to multiple products. Any proposed definition must account for unforeseen market disruptions.

- *Time period restrictions for calculating "costs" ignore the realities of commercial sourcing and manufacturing*. Any proposed rules must account for the actual cost of manufacture, including pre-disruption market dynamics–such as component shortages or delays due to labor shortages. Moreover, the "costs" may not reflect the fixed and variable prices of product inputs, which are often based on existing contracts.

- *The proposed rules pose challenges for goods that are priced based on index prices.* The proposed rules ignore that index prices often do reflect the supply and demand of a certain good, which incorporates costs that businesses may face.

Finally, the proposed rules' "cost" definition imposes new administrative burdens. We encourage the Attorney General to further evaluate how the rules would impose new obligations on companies in defining their "costs" for purposes of compliance.[15]

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[15] A regulatory flexibility analysis was not performed on the proposed rules. Doing so may provide further clarity, especially for small businesses. *See* State Administrative Procedures Act ("S.A.P.A.") § 202-B.

D. The Definition of "Chain of Distribution" Under Section 500.6 Raises Constitutional Concerns.

Section 500.6 subjects all parties within the "chain of distribution, including manufacturers, suppliers, wholesalers, distributors, or retail sellers of goods," to potential sanctions under these proposed rules regarding goods sold in the state. This is especially concerning when the manufacturer producing the consumer goods has limited, if any, control over the eventual price to the consumer. We encourage the Attorney General to consider that the extraterritorial application of the proposed rules may present significant constitutional issues, [16] including Dormant Commerce Clause and due process concerns.[17]

E. Conclusion.

While Consumer Brands, FIA, NYACS and RCNYS is fully supportive of consumer protection and support clear guidance on price-guidance, we are concerned that the proposed rule's overbreadth and vagueness of definitions will have unintended impacts on the market and create unintended consequences that could impact New Yorkers. We urge the New York Attorney General to reconsider these definitions and their impact.

On behalf of Consumer Brands, FIA, NYACS and RCNYS, we thank you for your ongoing efforts to protect New York consumers and ensure they can obtain the products they depend on every day. We stand ready to confer with the AG's office to provide further context to the comments provided above, particularly about the practical consequences the proposed rules would have on our member companies' business operations and ability to provide products to New Yorkers of consistent volume and quality during emergency conditions.[18]

Respectfully submitted,

Joseph T. Aquilina

Joseph T. Aquilina
Sr. Director, Associate General Counsel
jaquilina@consumerbrandsassociation.org

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[16] The Attorney General cites to the "chain of distribution" definition determined by the lower court in *People v Tyson Foods*, Index No. 156457/2022, NYSCEF Doc. No. 45 (Sup Ct, NY County, Dec 7, 2022). This cited case is currently on appeal, and the appellate court has been asked to rule on the application of the underlying statute.

[17] *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582, (1986) (striking down a New York law under the Dormant Commerce Clause when it unconstitutionally regulated out-of-state transactions); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring minimum contacts with the forum for personal jurisdiction).

[18] The Comments submitted by NYACS and RCNYS largely dovetail with those submitted by Consumer Brands above. Together, these associations represent thousands of individual businesses in New York State and across the country, and the shared concern is demonstrative of (i) an appreciation that illegal and unfair retail pricing should be curbed but (ii) the lack of clarity around the proposed rules may have the effect of eliding ordinary price increases in response to market conditions with unlawful "price gouging," thereby subjecting law-abiding companies to immense penalties.

From:	Nick Rosa
To:	stopillegalprofiteering
Cc:	Jason Burch; Nick Davoli
Subject:	Comments of Uber Technologies, Inc.
Date:	Monday, May 22, 2023 3:36:59 PM
Attachments:	2023.05.22 Uber Comment_NYS Price Gouging Rule.pdf

[EXTERNAL]

Hello,

Please find the attached correspondence in connection with the March 22, 2023, proposed rulemaking on behalf of Uber Technologies, Inc. Please feel free to contact me should you have any questions.

Thank you for your consideration.

Regards,
Nick

--
Nick Rosa
Program Manager - Legal
US Mobility Regulatory (East)
Uber

BEFORE THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

In response to: **Notice of Proposed Rulemaking Pursuant to N.Y. Gen. Bus. L. § 396-r(5) (Price Gouging)**	**Submitted:** May 22, 2023

COMMENTS OF

UBER TECHNOLOGIES, INC.[1]

Jason Burch
3 World Trade Center
175 Greenwich St., Fl. 47
New York, NY 10007
jburch@uber.com

Attorney for Uber Technologies, Inc.

Uber submits this correspondence in response to the Office of the New York State Attorney General's ("OAG" or the "Attorney General") request for public comment. These comments concern the Attorney General's proposed rules aimed at reducing the risks of price gouging in times of emergency and "abnormal market disruptions" ("proposed rules"). Uber appreciates the opportunity to submit this correspondence and respectfully requests continued engagement with OAG on these very important matters.

Introduction

New York residents depend on the reliability of the Uber platform. When traditional transportation options incur disruptions, New York drivers use the Uber platform to fill the void. Those drivers play a critical role in providing mobility to those New Yorkers that are most affected by abnormal disruptions–rural and low-income communities, and those New Yorkers underserved by existing transportation infrastructure.

Since 2014, when emergencies have struck communities across New York, Uber has deployed a framework that has kept prices low, ensured that drivers are appropriately compensated, and maintained reliability during emergency demand. Uber supports the OAG's effort to enhance the current price gouging protections enjoyed by the people of New York. The proposed rules,

1 "Uber" or "the Company" herein refers to Uber Technologies, Inc. and its affiliates including but not limited to Uber USA, LLC, and Rasier-NY, LLC. Uber USA, LLC is a licensed High-Volume For-Hire Service as defined in New York City Administrative Code § 19-502. Rasier-NY, LLC is a licensed Transportation Network Company as defined in Vehicle and Traffic Law § 1691

however, would upend the very reliability that New Yorkers have come to expect and deserve from the Uber platform.

As set forth more fully below, Uber believes: (1) dynamic pricing regulation should come from the legislature; (2) OAG should further engage with New York's TNC and for-hire vehicle industries (the "ride hailing industry" or the "Industry"), specifically, before carrying out proposed rules; (3) in the absence of legislative action, and following further Industry engagement, propose a rule specific to dynamic pricing by Industry companies; and (4) restrict the Industry's use of dynamic pricing only during states of emergency declared by the Governor's Office.

Background of Pricing on the Uber App

Uber offers upfront pricing to each rider who uses the Uber platform to request a trip. This means that a rider will see, via the Uber App, the price that will be charged before that rider requests the trip. Upfront prices are based on a variety of data points, including the estimated time and distance from origin to destination, localized real-time supply and demand patterns, and other marketplace factors. The upfront price will also include expected tolls, taxes, surcharges, and fees.

Dynamic pricing is a feature that involves adjusting the pricing of goods or services in real-time, based on supply and demand in a specific location/market. In the context of services offered by companies like Uber, dynamic pricing allows for the efficient allocation of resources. By adjusting prices in real-time, it helps to ensure that supply and demand are matched at all times. For example, if there is a surge in trip requests (demand) during rush hour, dynamic pricing can encourage additional drivers to go online, which increases supply and permits prices to naturally decrease. Conversely, dynamic pricing can be used to incent drivers to stay online in times of relatively low rider demand, ensuring that there is sufficient supply available when rider demand increases. When prices are higher due to increased demand, the Uber App will display a message within the App notifying riders that prices are higher than usual.

Uber manages dynamic pricing through detecting real-time shifts in rider demand and driver availability across geographic areas. Uber uses surge pricing to incentivize drivers with higher potential earnings during high demand and disincentivizes riders by charging a premium in times of low driver supply. In the same way riders are notified of higher prices, drivers receive notifications of increased demand, allowing drivers to identify nearby areas with higher demand.

Dynamic Pricing Regulation in the US

Complex marketplaces must be subject to clear and effective regulation, to ensure they operate fairly and efficiently. In this regard, legislative action is preferable to agency rulemaking. Legislative action allows for a comprehensive and transparent approach to regulation, ensuring that all stakeholders are given a voice and that the rules are clear and enforceable. Legislative bodies have consistently acknowledged the importance of setting specific dynamic pricing criteria for Transportation Network Companies to use in times of declared emergencies. Connecticut, Massachusetts, Pennsylvania, Washington, D.C, Washington state, Rhode Island, Nevada, and Nebraska all maintain rules to address dynamic pricing within Industry marketplaces.[2]

In the state of Connecticut, a model identified by OAG within the proposed rules, imposes a limit of a 2.5x multiplier on dynamic pricing–during times of emergency as declared by the Governor.[3] Uber does not disagree that reasonable regulation in times of specifically declared emergencies can protect consumers from profiteering. The nuance and importance of dynamic pricing, however, should be addressed by the legislature, as in many other states, or specific, narrowly-tailored regulation such as OAG's prior agreement with the Company. In the agreement, Uber agreed that it would not raise prices higher than the fourth-highest price charged in the same city and surrounding area in the sixty days preceding the abnormal market disruption. The agreement expired in 2017, but continues to guide Uber's operations today.

Should OAG desire to act in the absence of dynamic pricing-specific legislation, Uber submits, for the reasons discussed below, that a rule specific to the ride hailing industry should be proposed. Such a rule should avoid both the confusion and marketplace disruptions that are likely to result from OAG's current proposals.

Industry-Specific Rule and 2014 Agreement

In its mandate to commence rulemaking, the New York legislature expressed valid concerns about the potential for price gouging and unfair practices. Yet the technical matters, specific to Uber's marketplace and that of other Industry participants, can and should be addressed through targeted regulations that ensure transparency and fairness in pricing. Uber commends OAG in its recognition that ride hailing marketplaces serve a particularly vital societal function that, especially in times of emergency, promotes public policy. The Industry's use of dynamic pricing promotes efficient allocation of resources, ensures quality service, and creates market efficiencies. It is important that regulations continue to allow for dynamic pricing within the ride hailing industry, so that consumers may continue to benefit from these advantages.

Since 2014, when emergencies have struck communities across New York State, Uber has deployed a framework that has kept prices low, ensured that drivers are compensated, and maintained reliability during abnormally disruptive rider demand. As noted in the Attorney General's proposed rules, Uber and the OAG previously agreed to a formula in support of this framework. While that agreement has expired, Uber continued to follow the requirements, recognizing that the framework struck the appropriate balance between price fairness, transparency and marketplace health for both drivers and riders.

Uber believes that the prior agreement remains fit for purpose. The market realities of New York's Transportation Network Company services, and services provided by For-Hire Vehicles, establish prices based on real time market conditions. Therefore, Uber has long supported and employed price transparency to its many customers. The use of pre-trip estimates and binding

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2 *See* CT Gen. Stat. 13b-118(b)(4)(C); MA Gen L ch 159a1/2 § 2(e); 66 PA Cons Stat § 2607(e); DC Code § 50-301.31(b)(13); Wash. Rev. Code § 46.72B.050(2); RI Gen L § 39-14.2-3(b); NV Admin Code 706A.290(2); and NE Code § 75-327(2)(iv)

3 CT Gen. Stat. 13b-118(b)(4)(C)

upfront prices provides consumers with the necessary information before opting to request a trip. Moreover, Uber maintains a public website explaining the inputs of its pricing model, including the use of dynamic price multipliers. These policies were in place at the time of Uber's 2014 agreement with OAG, and they remain in place today.

Proposal: Alternative Dynamic Pricing Rule for Industry

Uber appreciates the Attorney General's openness to alternative rule proposals. Given the Company's experience and prior engagement with OAG on this matter, Uber urges OAG to propose a rule that continues with the framework established by the 2014 agreement: permitting reasonable dynamic pricing with a maximum of 3.0x base fare multiplier, during Governor-declared States of Emergency; the maximum, or "cap," would be restricted to the geographic region affected by the emergency (i.e., identified by the county within New York State); and the restriction would expire when the emergency is no longer influencing the marketplace. Such a rule would improve upon proposed Rule 7, providing the necessary consumer protections desired by OAG while permitting the Industry to continue realizing the marketplace health benefits provided by dynamic pricing. Further, by limiting the applicability to times of gubernatorial declared emergencies, companies using dynamic pricing would not need to make guesses about the "abnormal" nature of a specific market event.

Uber's alternative rule proposal provides clearer guidance to Industry. Rather than lead to "too much condoned profiteering," as suggested in the discussion to OAG's proposed Rule 7, Uber's alternative rule proposal maintains a practical, flexible standard that finds its origins in OAG's prior policy. It maintains a standard that works to the benefit of driver earnings transparency. And it maintains a standard that benefits consumers, by supporting a reliable service when that service is needed most.

Dynamic pricing works because it's closely tied to the level of the marketplace imbalance. The consumer benefit is well understood. In *The Effects of Uber's Surge Pricing: A Case Study*, economists Jonathan Hall and Chris Nosko and data scientist Cory Kendrick, examined dynamic pricing's positive impact following a large concert from 2015, in contrast to a high demand period from the prior year's New Years Eve–where dynamic pricing failed to trigger.[4] After the concert, drivers responded to Uber's dynamic pricing incentive and made their way to the concert venue, increasing overall reliability; where the dynamic pricing feature failed, riders' trip requests went unfulfilled, and drivers lost out on the increased earnings opportunities presented by the increase in demand.

The Attorney General's proposed Rule 7 does away with its prior policy and with it, the benefits to riders and drivers. The proposed rule lacks predictability, with no guidance as to normal versus abnormal demand increases, even though the public benefits from distinguishing public gatherings from officially declared states of emergency. It does not establish prompt, official, and widespread notification that the broad anti-price gouging law is being activated. It establishes

[4] *The Effects of Uber's Surge Pricing: A Case Study*, Jonathan Hall, Cory Kendrick, and Chris Nosko, https://leeds-faculty.colorado.edu/leachj/BCOR1015/Readings%20not%20linked%20to%20Library%20Page/Effects_of_uber%27s_surge_pricing%20CASE.pdf

only presumptions and after the fact defenses. Indeed, the proposed rule appears aimed at bringing dynamic pricing, and the concomitant driver earnings, to a grinding halt. Uber respectfully submits that the OAG can take a more carefully considered approach, as it has in its prior policy outlined in the 2014 agreement with Uber.

Discussion: Office of the Attorney General Proposed Rules

Uber reiterates its request for further engagement with OAG, regarding dynamic pricing rules specific to the ride hailing industry. Nonetheless, the Company wishes to highlight a few concerns with certain of the remaining proposed rules. Uber respectfully urges OAG to consider these comments carefully as it continues with administrative proceedings.

Rule 1: Presumption of gross disparity

The Attorney General's proposal for the presumptive case of gross disparity does not squarely apply to Uber's business. Were Uber to be subject to such a rule, the Company, and others using dynamic pricing discussed in proposed Rule 7, would not have the proper guideposts of behavior to conduct business. The "usual course of business immediately prior to the onset of the abnormal disruption of the market" is not easily found when dynamic pricing is part of the ordinary course of business and responsive to marketplace factors at issue even without a state of emergency. Moreover, the proposed rules do not provide any clear guidance for when, exactly, an abnormal disruption has occurred. The proposed rule's two examples–power grid malfunction and heavy snowstorm–demonstrate the importance of referencing Governor-declared states of emergency. Otherwise, companies using dynamic pricing will be left guessing as to which price will set the rule's 10% standard. As a result, drivers using New York's ride hailing platforms will not receive a clear signal about where their services are needed and whether it will benefit them to respond to increasing demand for rides.

The reasons provided for creating the proposed rule's presumption demonstrate that rule's awkward fit with Uber's business. Reason number one cites a similarity to other states in the US. Yet no other state applies such a presumption to dynamic pricing. Indeed, as discussed above, other state legislatures tend to apply special rules to Industry dynamic pricing–similar to standards observed in OAG's prior agreement governing Uber's operations during states of emergency. The "societal convergence," then, is what animates Uber's alternative rule proposals. Contrary to reason number two, the proposed Rule 1 is not easily administrable for Industry companies using dynamic pricing. Such Industry pricing policies are in furtherance of marketplace health. In the ordinary course, Uber's operations are on the lookout for disruptions, communicating to drivers where the services are most in-demand. The drivers expect to receive price signals and they themselves address the disruptions. The proposed rule, however, introduces both uncertainty and limitations on drivers' ability to receive that key information.

The third reason for the presumption explicitly contemplates retail operations. Numerical guidance *may* in fact benefit small retailers, one of the rule's stated benefits. But this third reason *certainly* demonstrates that the rule does not squarely apply to platform operations using dynamic pricing. Finally, the fourth reason for the proposed rule highlights "vital and necessary goods" offered at retail. Uber operations' use of dynamic pricing works to provide, rather than withhold, a service that is often vital during states of emergency. Thus, Uber's alternative rule proposal does not promote unconscionable conduct. Rather, it aims to strike the same fundamental balance of supply and demand interests that gave rise to the Company's 2014 agreement with OAG–to promote a reliable service during states of emergency.

Rule 2: Costs not within the control of the Company

In New York State, and across the US, riders using the Uber platform are shown the cost of their ride in advance. Before booking a trip, riders are shown the price they'll pay at the end of the ride. Riders then have the confidence to request more trips, generating more demand for drivers. Many data points go into calculating an upfront price, including the estimated trip time and distance from origin to destination, as well as demand patterns for that route at that time. It also includes any applicable tolls, taxes, surcharges, and fees (with the exception of wait time fees). Uber comments here to note that dynamic price increases are directly attributable to the production, purchase, storage, distribution, taxation, labor, and sale of the services available on the Uber platform. The dynamic pricing feature for drivers using the Uber platform is a relief valve for the ride hailing marketplace. Without it, when demand for rides exceeds the number of available drivers, riders will wait longer or might not be able to get a ride at all. Drivers will also have less incentive to accept requests in busy areas. An imbalance between supply and demand is not within Uber's control – when demand exceeds supply prices, increases to prices attract more drivers to restore balance to the marketplace.

The Attorney General's discussion of proposed Rule 2 demonstrates the difficulty of its application to services available on the Uber platform. Uber's use of dynamic pricing is specific to demand for the services and is hyper-local to the marketplace health. The use of external indices or particular accounting practices is not a consideration. By definition, dynamic price increases are responsive to the state of emergency or abnormal market disruption. Uber commends OAG's efforts to provide clear guidance for industry on a key affirmative defense in the statue. The proposed rule, however, does not fit within the operations of TNC and for-hire vehicle services. Thus, Uber respectfully requests that, as discussed in proposed Rule 7, OAG consider an alternative rule intended for dynamic pricing on the Uber platform.

Rule 3: Pricing of products introduced after the market disruption

Uber applauds OAG's efforts to address pervasive economic disruptions related to the COVID-19 pandemic and consumer demand. The challenges have had a significant effect on many industries. Proposed Rule 3 appears aimed at the sale of goods introduced in response to major disruptions, providing more clarity where it is needed. Uber submits, however, that the proposed rule is limited in its application to services available on the Uber platform. The proposed rule therefore provides support for the continued use of standards found in Uber's alternative rule proposal. Those standards are borne out of the Company's 2014 agreement with OAG, and found broad application during the COVID-19 State of Emergency.

Additionally, Uber has reservations about the proposed rule's use of higher-percentage profit margins as evidence of unconscionability. Such an approach will chill the efforts of those who create new products in response to the disruption. Moreover, the proposed rule provides no guidance on what constitutes a "comparable product" when a markedly improved good or service is brought to market. In response to the COVID-19 pandemic, many drivers and other workers using the Uber platform provided services that they had not provided before. Many of those workers provided services *better* than the provision of the same services before. That work is to be applauded and recognized as an improvement. A reference to prior iterations likely would not be appropriate. Any new legal standards found in, and investigations related to, these proposed rules should clearly differentiate between price gouging and price increases related to innovation, creativity, and general improvements in human capacity. Uber is supportive of evidentiary standards that are grounded in specific economic analysis. But section two of proposed Rule 3 introduces the risk of standards that profoundly limit advancement.

Rules 4-5: The use of unfair leverage

The Uber platform strives to create seamless experiences all over the world. The Company strives for a balanced and reliable marketplace, taking up the responsibility to align the different and sometimes conflicting needs of riders and drivers. The work is challenging, technical, always in progress, and often humbling. Few companies have even tried it.

Uber wants to ensure that the Attorney General's office takes these fundamental matters into consideration when establishing unfair leverage based on market concentration. Uber submits that its operations do not contain the practices noted in proposed Rule 4, or in the authorities cited, giving rise to "unfair leverage or unconscionable means." Nonetheless, the presumptions established in proposed Rule 5 are concerning. While Uber submits that dynamic price increases are cost-based, the broad presumptions in the proposed rules, relating to market share and concentration, serve to upend an open marketplace that is responsible for over 500,000 daily trips in New York City.

The novelty and technical complexity of the ride hailing industry lend themselves to market concentration. In New York City, Uber is one of only two High Volume For-Hire Service companies – a category created only after Uber had been established in the city. Other such companies have left the market due to inherent operational challenges. Yet the Uber platform uses dynamic pricing to ensure a reliable and open marketplace for mobility and work. Contrary to the assertions stated in the proposed rule discussion, dynamic pricing during abnormal market disruptions is not the result of available merchandise stock or preferential treatment from suppliers. Rather it provides a signal to workers about earnings potential, thereby seeking to ameliorate market disruptions.

The workers who use the Uber platform have the ability to choose where and when they want to work. In an open marketplace, driver earnings are largely a function of rider demand. Earnings potential is highest when and where it is busy – and sometimes during a State of Emergency. Uber's technology helps workers make choices about where and when to find demand, using Uber's Driver app. When drivers are on the road and between trips, they get real-time updates about demand and dynamic pricing.

Uber respectfully requests that, as acknowledged in the discussion to proposed Rule 7, OAG consider an alternative rule intended for dynamic pricing on the Uber platform. Otherwise, the standards announced in proposed Rule 5 would unfairly and inappropriately apply to services on the Uber platform–services that use dynamic pricing to *create* the supply where it is most needed, especially during States of Emergency.

Conclusion

In summary, Uber is committed to adhering to the pricing restraints under GBL Section 396-r(5), whenever it is activated by an abnormal market disruption. However, in order to strike the appropriate balance among New Yorkers who use the Uber platform for earnings and for services, and in order to promote general commercial compliance across New York State, the rules need to be amended to allow for rules specific to dynamic pricing in the ride hailing industry, and to allow for both stability and innovation in response to abnormal market disruptions.

Thank you for the opportunity to comment.

Respectfully,

R. Jason Burch
Legal Director, US Regulatory

From: Julian Kline
To: stopillegalprofiteering
Subject: Tech:NYC Comments on Price Gouging Rulemaking
Date: Monday, May 22, 2023 4:59:05 PM
Attachments: TechNYC AG Dynamic Pricing Rules.pdf

[EXTERNAL]

Hi,

Please find attached Tech:NYC's comments on the proposed rulemaking for price gouging.
Thank you for your consideration, and feel free to reach out if you have any questions.
Best,

Julian

--
Julian Kline
Head of Policy, Tech:NYC
Kline@technyc.org
(917) 435-4359

www.technyc.org

tech:nyc

Ride Hail Dynamic Pricing Rules

5.22.23

COMMENTS ON NYS ATTORNEY GENERAL'S PROPOSED RULEMAKING FOR THE APPLICATION OF PRICE GOUGING LAW TO DYNAMIC PRICING

Tech:NYC is a nonprofit member-based organization representing over 800 technology companies in New York. Our membership includes hundreds of innovative startups as well as some of the largest tech companies in the world. We are committed to supporting New York's tech based economy and ensuring that all New Yorkers can benefit from innovation. Ride hail platforms are an important part of NYC's tech ecosystem and fill the gaps in our public transit system's service areas, playing a crucial role in helping New Yorkers commute throughout the five boroughs. Beyond providing the basic service of connecting riders with drivers, these platforms are continuously innovating and ensuring that ride-hail options are efficient and accessible. In addition to their primary functions, these platforms also have significant local presences with offices employing a wide range of roles.

Dynamic pricing is a fundamental component of how ride hail platforms operate, by helping drivers on the road meet the demand of riders looking for rides. While the logistics and details of dynamic pricing may differ per platform, it operates on the basic principle that set pricing structures do not actively provide the supply of drivers necessary to meet constantly changing levels or locations of rider demand. Dynamic pricing adjusts trip fares to help balance the ratio of passengers requesting rides to available drivers, and reduce passenger wait times for vehicles. As prices are increased, more drivers will become available or travel to areas that have increased rider demand, which then balances the rider to driver ratio and fares will decrease. There are a number of factors that contribute to dynamic pricing models including the availability of drivers, rider demand, traffic conditions, trip distances, time of day, whether there are any large concerts or other events taking place, if there are any holidays, or other factors which may impact the availability of drivers. Weekend evenings and after work rush hours are also frequent times where dynamic pricing goes into effect. Due to these various factors, dynamic pricing models are complex and cannot be reliably compared from a specific time one week to the next, and we encourage the Attorney General to reconsider this baseline comparison model.

While the Attorney General seeks to further clarify consumer disclosures and rules on reporting price gouging, the proposed rulemaking would interpret the regular fluctuations in cost for ride hail services due to a wide range of factors as price gouging. Tech:NYC believes that the proposed model does not reflect an accurate analysis of how dynamic pricing for ride hail platforms is conducted. Tech:NYC recommends that the Attorney General's office continues to evaluate the factors that contribute to dynamic pricing structures and amend the proposed rulemaking to offer more accurate comparisons and baselines of ride hail prices.

The Attorney General has proposed defining abnormal market disruption as a 10 percent increase in cost, which is a threshold that falls within regular ride hail price fluctuations. Ride hail platforms are regulated differently than yellow cabs, and have been given flexibility by law to set prices outside of a rigid and unchanging fee schedule. This proposed rule would allow the Attorney General's office to establish a benchmark for price gouging comparisons by using the median price for the same good or service at the same time, one week before the emergency or market disruption. As described above, dynamic pricing models used by ride hail platforms are extremely complex and prices can vary frequently, proving that supply, demand, and the many other factors of dynamic pricing regularly vary on the same day and time each week. All of the factors described above make it extremely difficult to look at rides one week apart and assume parity.

Tech:NYC strongly recommends that the Attorney General's office develop a more precise method for determining what may be a suitable base rate when making price gouging comparisons. If left unchanged, the proposed rules would limit the ability of companies to use dynamic pricing, which may reduce the ability of companies to compete and adequately serve riders and drivers in New York. The rules as proposed would set new barriers to innovation and the continued development of ride hail platform technologies, and would prevent new ride hail platforms from entering the market or being founded in New York.

Separately, the proposed rules on Presumptive Unfair Leverage for Large Enterprises presumes that companies with 30 percent or more market share exercise "unfair leverage" and violate the law when making any increases on prices. As explained above, this would by default conflict with the operating standards of dynamic pricing, which is essential for ensuring New Yorkers have access to ride hail vehicles. While there may be a limited number of ride hail platforms currently available for use in New York City, the rules would outlaw the market as it stands today and continue to prevent new competitors from entering it. Tech:NYC also recommends that the Attorney General revise this rule to accurately reflect how dynamic pricing is implemented and promotes an effective ride hail system in NYC. At the very least, the proposed rules should allow a platform to respond to any charges of unfair leverage by proving that any price increases occurred through the ordinary operation of dynamic pricing and not because of unfair leverage.

From: Hova, Jarret
To: Julian Kline; stopillegalprofiteering
Subject: Re: Tech:NYC Comments on Price Gouging Rulemaking
Date: Monday, May 22, 2023 6:30:15 PM

Thank you, Julian.

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From: Julian Kline <kline@technyc.org>
Sent: Monday, May 22, 2023 4:56:09 PM
To: stopillegalprofiteering <stopillegalprofiteering@ag.ny.gov>
Subject: Tech:NYC Comments on Price Gouging Rulemaking

[EXTERNAL]

Hi,

Please find attached Tech:NYC's comments on the proposed rulemaking for price gouging.
Thank you for your consideration, and feel free to reach out if you have any questions.
Best,

Julian

--
Julian Kline
Head of Policy, Tech:NYC
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From:	Nancy Wood
To:	stopillegalprofiteering
Subject:	Comments from HANYS regarding the Notice of Proposed Rulemaking
Date:	Monday, May 22, 2023 5:15:07 PM
Attachments:	image001.png HANYS Response to AG s Notice of Proposed Rule Making final.pdf

[EXTERNAL]

Good afternoon,

Attached are comments from the Healthcare Association of New York State regarding the Notice of Proposed Rulemaking (I.D. No. LAW-12-23-00006-P). Please let us know if you have any questions or need anything further.

Nancy Wood
Special Assistant to the President and Executive Office
Healthcare Association of New York State (HANYS)
518.431.7733 | nwood@hanys.org
Visit our COVID-19 resources page.
Connect with us
TWITTER: hanyscomm | FACEBOOK: HealthcareAssociation

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May 22, 2023

Zephyr Teachout
Special Advisor and Senior Counsel for Economic Justice
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

Submitted electronically

Re: Comment on Notice of Proposed Rulemaking (I.D. No. LAW-12-23-00006-P)

Dear Ms. Teachout:

The Healthcare Association of New York State, on behalf of our statewide member nonprofit and public hospitals, nursing homes, home health agencies and other healthcare providers, appreciates the opportunity to comment on the Office of the New York State Attorney General's Notice of Proposed Rulemaking pursuant to NYS General Business Law §396-r, published March 22, 2023.

Preserving access to safe, high-quality patient care is the mission of New York's nonprofit and public hospitals and health systems. HANYS supports the intent of the proposed regulations, which would provide a mechanism to ensure our members are able to provide a full range of patient services and access to care during abnormal disruptions in the market, including public health emergencies.

One area of particular concern for our hospitals and health systems relates to the substantial increases in costs for contract nurses and other staff during market disruptions. The ranks of frontline healthcare providers were decimated during the COVID-19 pandemic, exacerbating existing workforce shortages.

To address this extraordinary public health emergency and meet the overwhelming demand for care, our members were forced to rely on contracts with temporary healthcare staffing agencies for nurses and other medical professionals. These staffing agencies provided hospitals and health systems with temporary staff to perform "essential medical services," as defined in GBL §396-r(2)(b). These services were and continue to be "vital and necessary for the health, safety, and welfare" of both consumers and the public.

Hospitals and health systems seek every opportunity to hire full-time staff who can provide high-quality care in their communities. That opportunity was not readily available during the COVID-19 pandemic due to many factors, including but not limited to the exodus of staff from the healthcare workforce. Relying on and paying staffing agencies was often our providers' only option to meet their communities' healthcare needs during the public health emergency and continues to be necessary today.

HANYS understands that some increase in labor costs is to be expected when the demand for healthcare staff exceeds available supply. But from 2019 to 2022, *the majority of which was during a declared state of emergency*, our members' overall labor costs increased by 17%, driven by a 134% increase in hospitals' contract staffing costs (an average annual increase of 33%).[1] This was due, in large part, to the unfair leverage that healthcare staffing agencies exercised in charging double, if not triple, the expenses that were previously paid for this temporary assistance.

Unfortunately, these unprecedented staffing agency price spikes imperiled our members' financial viability. Hospitals were forced to make impossible decisions about access to and availability of critical patient care services in the midst of a public health emergency. The ripple effects of these pricing increases and the resulting decisions are still being felt today by our members.

Staffing agencies should always price their services in a fair and reasonable manner that does not threaten New Yorkers' ability to access affordable, high-quality care. It is especially critical that this occur during a public health emergency. The proposed regulations provide a mechanism to ensure they will do so in such a circumstance.

Thank you for this opportunity to comment on the Notice of Proposed Rulemaking. If you have questions, please contact Sandi Toll, general counsel, HANYS, at stoll@hanys.org or 518.431.7838.

Sincerely,

Marie B. Grause

Marie B. Grause, RN, JD
President

[1] HANYS (December 2022) *Critical Condition: New Yorkers are losing access to care as a fiscal crisis hammers hospitals statewide.* https://www.hanys.org/communications/publications/critical_condition/

From:	Brian Keeton
To:	stopillegalprofiteering
Subject:	Comments of Lyft, Inc. on Proposed Price Gouging Rules
Date:	Monday, May 22, 2023 9:29:36 PM
Attachments:	Comments of Lyft, Inc. on Proposed Price Gouging Rules.pdf

[EXTERNAL]

Good evening,

Attached please find Lyft, Inc.'s comments on proposed price gouging rules.

Thank you,

Brian Keeton
Senior Litigation Paralegal
415.370.1283

185 Berry Street
Suite 5000
San Francisco, CA 94107

VIA E-MAIL

May 22, 2023

The Honorable Letitia James
Office of the New York State Attorney General
The Capitol
Albany NY 12224-0341
Phone: 1-800-771-7755
E-mail: stopillegalprofiteering@ag.ny.gov

Re: Comments of Lyft, Inc. on Proposed Price Gouging Rules

Dear Attorney General James:

Lyft, Inc. ("Lyft") submits these comments on the proposed price gouging rules ("Proposed Rules") promulgated by the New York Attorney General's office ("NYAG").[1]

The Lyft app provides a digital marketplace where individuals who want rides to certain destinations ("riders") can be matched with drivers going to or through those destinations ("drivers"). This matchmaking function is one of the primary services that Lyft provides to users — both riders and drivers alike. The Lyft app is available statewide, 24/7, and Lyft-matched rides are available as dictated by drivers, who are independent contractors that choose whether to sign into the app and accept rides.

The Lyft platform utilizes products, incentives, and technology features designed to help facilitate rider and driver connections, maximize efficiency, and meet the demand for rides in a given area. Lyft's pricing is dynamic, meaning that it regularly changes based on market dynamics, and it takes into consideration multiple factors that vary by location, time of day, ride type, the volume and location of ride requests and the volume and location of available drivers, as well as traffic and other travel conditions at the particular time that a ride is requested. During certain periods of time when rider demand exceeds the number of drivers available to meet the needs of riders in a given area, Lyft utilizes Prime Time pricing and driver incentives in an effort to balance the Lyft marketplace and encourage more drivers to accept requested rides.[2]

As a regular business practice, in response to certain extreme events and emergencies, Lyft takes steps — including but not limited to manually adjusting or turning off Prime Time pricing — in order to both comply with relevant laws and do what is right for riders and drivers on our platform.

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[1] https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf (Mar. 2, 2023) (to be codified at 13 NYCRR Parts 500.1 to 500.7).

[2] Further information regarding pricing can be found in Lyft's Terms of Service and on the Lyft Help Center (see https://www.lyft.com/terms and https://help.lyft.com/hc/en-us/all/articles/115013080308-How-to-estimate-a-Lyft-ride-s-cost).

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* * *

Lyft's comments focus on Proposed Rule 500.5 and Proposed Rule 500.7.[3] We first address Proposed Rule 500.7, suggesting amendments to further NYAG's efforts to clarify the operation of Section 396-r in markets with dynamically priced goods or services. We then turn to Proposed Rule 500.5 and suggest that the rule, as written, is too inflexible to account for shifting market conditions, particularly in those markets with dynamic pricing.

I. Rule 500.7

The New York price-gouging statute provides that, during any abnormal market disruption, it is unlawful to "sell or offer to sell [certain] goods or services or both for an amount which represents an unconscionably excessive price." N.Y. Gen. Bus. Law § 396-r(2). Although the statute does not define "an unconscionably excessive price," Section 396-r does supply some guidance. As relevant here, it permits NYAG to establish a prima facie case of price gouging through evidence that there is a "gross disparity" between the price of the relevant goods or services before the disruption and during the disruption:

> [P]rima facie proof that a violation of this section has occurred shall include evidence that:
>
> (i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by 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 . . . ."

Id. § 396-r(3)(b).

Proposed Rule 500.7 is geared to applying this presumption in the context of dynamic pricing. The Proposed Rules explain that "[d]ynamic pricing leads to situations in which there are a wide variety of pre-disruption prices," and that, "in the absence of rulemaking, it may be unclear what baseline price can be used to determine whether a price increase is unconscionably excessive." Proposed Rules at 30. So, NYAG proposes a rule that would determine the "pre-disruption price for sellers who use dynamic pricing" "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." Proposed Rule 500.7. It also proposes an affirmative defense to a price-gouging claim for dynamically priced goods and services—"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." *Id.*

Lyft supports NYAG's efforts to clarify the application of Section 396-r to dynamically priced goods. And Lyft appreciates NYAG "welcom[ing] comments on this rule, or proposals for

[3] By limiting its comments to these proposed Rules, Lyft does not intend to waive its rights in any future proceeding or rulemaking to challenge the other proposed rules, the final rules once enacted, or the underlying statute.

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alternatives" and "[i]n particular . . . comments on whether the median price from a week earlier should be replaced with the average or median of the prior three or four weeks, or some other set of data." Proposed Rules at 32.

As a preliminary matter, Lyft notes that the "Attorney General considered a more ride-hailing specific rule," but ultimately proposed a rule addressing all industries because "although ride hailing is the most prominent service using dynamic pricing, there are several firms that now use dynamic pricing such as childcare service platforms, delivery service platforms, and online retailers, and some suggestion that these numbers will grow." Proposed Rules at 32. As explained below, Proposed Rule 500.7 leaves important questions unanswered with respect to the rideshare industry, and certain rideshare-specific questions may be best addressed with a rideshare specific rule. Lyft would support a conversation about such a rule. But to the extent that NYAG moves forward with a broadly applicable rule on dynamic pricing, Lyft offers two comments on Proposed Rule 500.7. *First*, Lyft encourages NYAG to add language to Proposed Rule 500.7 clarifying that the pre-disruption comparator price will be the price of *comparable* products or services. *Second*, Lyft encourages NYAG to consider a rule that is simply based upon prices at a "comparable pre-disruption date and time," without reference to any particular day a week or a number of weeks in the past.

A. NYAG should clarify how it determines whether, for comparison purposes, one good or service is the "same" as another.

Lyft supports a rule that considers relevant fluctuations and trends when determining the relevant pre-disruption price. Lyft therefore welcomes NYAG's attempt to ensure that its proposed rule captures "apples to apples comparators." Proposed Rules at 31. And Lyft is pleased to see that the proposed rule would look at the pre-disruption price for the "same good or service." Proposed Rule 500.7.

That phrase, however, leaves unanswered a key question: *how* will NYAG determine that a pre-disruption good or service is the "same" as the good or service at issue?

Particularly in the context of dynamic pricing, the question is not a philosophical one. Consider the many kinds of rides that take place every day in Manhattan. For example, some rides — say, a ride between Grand Central and Penn Station — are relatively short. Others—say, a ride from Harlem to Wall Street—are not. In a broad sense, both kinds of rides are the "same" service because they are both rideshare journeys. But it makes little sense for purposes of the price-gouging statute to treat them as the "same" product because the much longer journey will always cost more than the shorter one. But, as discussed below, without further clarity regarding, among other things, what constitutes the "same" service, one may take the position that as a general rule, the price a rider pays for a long-distance "ride" during a disruption represents price gouging because it may be more expensive than the pre-disruption median price for all "rides" (including much shorter rides).[4] Similar issues may arise in connection with other relevant ride

[4] Lyft further seeks clarity on whether in the context of Proposed Rule 500.7 as applied to rideshare, "price" means the price a rider pays for a ride or the multiplier used for purposes of dynamic pricing. The Proposed Rules

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variables, such as, for example, different ride types, *e.g.*, standard Lyft, Wait & Save, Priority Pickup, Lux and Lyft XL; and conditions that have nothing to do with an abnormal market condition, such as, for example, traffic, rider demand and/or driver availability related to an event such as a parade.

To address this concern, Lyft urges NYAG to ensure that the final version of Proposed Rule 500.7 compares *comparable* goods and services only. One potential approach is for NYAG to (1) begin by comparing the median price of *all* rides in a geographic region during a time frame during the disruption with the median price of *similar* rides in the same geographic region during a comparable pre-disruption timeframe;[5] and (2) permit the parties to rebut the rule's presumption by demonstrating that this calculation does not yield a comparison of comparable goods and services, if that is the case in a particular instance. For example, if, as discussed above, during the disruption, there are substantial changes to the trip mix—*e.g.*, there are a substantially larger (or smaller) percentage of long-distance rides—then one would expect the median price of all rides during the disruption to be substantially greater (or smaller) than the median price during a comparable pre-disruption day and time, even if the price of comparable rides were the same both before and during the disruption.

If NYAG ends up using only a single ride or subset of rides during a disruption to assess Section 396-r compliance, then a different calculation may be appropriate—again, at least in the context of rideshare. In those circumstances, Lyft suggests that "the median price for the same good or service … prior to the abnormal disruption of the market," *see* Proposed Rule 500.7, should be interpreted to refer to rideshare rides that are "comparable" to the ride or rides during a disruption that may be the subject of a Section 396-r inquiry. Otherwise, as discussed above, simply taking a long-distance ride may be sufficient to trigger a presumption of price gouging.

Similar clarification is appropriate for the affirmative defense established by Proposed Rule 500.7. The defense allows a seller to "prov[e] 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." Proposed Rule 500.7. Consistent with the comments above, Lyft encourages NYAG to clarify that, in the context of rideshare, (1) "units sold" is intended to refer to rides or a subset of rides; and (2) "the aggregate profit divided by the aggregate [rides]" during a time frame in a disruption will be compared to "the aggregate profit divided by the aggregate" set of *comparable* rides in a geographic region during a comparable pre-disruption day and time.

refer to a now-expired 2014 agreement in which "Uber agreed that it would not raise prices higher than *the fourth-highest price charged* in the same city and surrounding area in the sixty days preceding the abnormal market disruption" Proposed Rule at 32, and reports indicate that, in that context, "the fourth highest price charged" meant the "fourth highest multiplier used." *See* Casey Johnston, *Uber's surge pricing will be capped during "abnormal disruptions,"* ARS TECHNICA, July 8, 2014, *available at* https://arstechnica.com/information-technology/2014/07/uber-gets-a-cap-on-its-surge-pricing-from-the-ny-attorney-general/.

[5] Lyft provides comments on a "comparable pre-disruption date and time" in Section I.B, below.

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B. To ensure a true apples-to-apples comparison, the Proposed Rule should focus on prices at a "comparable pre-disruption date and time," not a fixed lookback period.

Another difficulty with ensuring an apples-to-apples comparison for dynamic pricing lies in determining the point in time that will supply the appropriate pre-disruption price. As NYAG notes, dynamic pricing will often depend on the "time of day, day of the week, and individual purchaser characteristics." *Id.* at 30. After all, "[a] typical rush hour ride-hailing drive will often be different [from] a typical 5 AM ride-hailing drive." *Id.* at 31.

Although the Proposed Rule captures one important variable—time of day—Lyft is concerned that the rule is not sufficiently nuanced to ensure a true apples-to-apples comparison. Consider, for example, the effect of certain events and holidays—think St. Patrick's Day, U.N. week, or Christmas—on rideshare demand (and, consequently, rideshare price). Under the Proposed Rule, if a disruption had triggered Section 396-r in March 2023, prices on Friday March 10, 2023, would have been used to calculate the pre-disruption price for rides on Friday March 17, 2023. But March 17 was St. Patrick's Day, a holiday that, whether during or outside of a disruption period, can substantially impact rider demand, driver availability, traffic, and dynamic pricing. Accordingly, neither the median price on the prior Friday nor the median price on the Friday "of the prior three or four weeks," *see* Proposed Rules at 32, would serve as an effective proxy for the "value" of rides provided on St. Patrick's Day, *see* N.Y. Gen. Bus. Law § 396-r(3)(b)(i).

To be clear, this is just one example; Lyft is not suggesting a rule that simply accounts for seasonality. And even if the proposed rule were to comprehensively address all non-disruption factors relevant to the pricing of ridesharing platforms, such a rule would not necessarily be appropriate for the many other "firms that now [also] use dynamic pricing." Proposed Rules at 32. Instead—and consistent with the Rule's purpose of creating "a presumption of a *comparable* pre-disruption price," Proposed Rules at 29—to the extent NYAG moves forward with a broadly applicable rule regarding dynamic pricing, Lyft encourages NYAG to adopt a rule that is simply based upon prices at a "comparable pre-disruption date and time." *Cf.*, *e.g.*, La. Rev. Stat. § 29:732(A) ("During a state of emergency . . . , the prices charged . . . for goods and services sold within the designated emergency area may not exceed the prices ordinarily charged for *comparable* goods and services in the same market area . . . immediately before the time of the state of emergency." (emphasis added)). In some instances, this approach may result in the comparator time being "the same time one week prior to the abnormal disruption of the market." Proposed Rule 500.7. But, in other instances, it will not—as the above example illustrates.

At the very least, the affirmative defense to the proposed rule should be expanded to reflect the difficulty of identifying the correct pre-disruption comparator time. Specifically, Lyft encourages NYAG to clarify in the Proposed Rule that the seller may produce evidence to establish that the rule does not yield a comparable pre-disruption price. Although the Proposed Rules currently provide that the rule "does not prohibit the Attorney General from using other methods for determining a baseline price but creates an easily administrable presumption,"

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Proposed Rules at 31, neither the Proposed Rule nor anything in the document currently acknowledges that the *company* should have a similar opportunity.

II. Rule 500.5

Proposed Rule 500.5 is a gloss on subsection 396-r(3)(a)(ii), which provides that NYAG may prove a violation of Section 396-r through evidence of "an exercise of unfair leverage or unconscionable means." N.Y. Gen. Bus. Law § 396-r(3)(a)(ii). Proposed Rule 500.5 states that "[w]hen unfair leverage is used to increase prices, there is no *de minimis* percentage price increase to create a presumption of illegality." Proposed Rule 500.5(1). And it creates a presumption of unfair leverage for *any* price increase by a seller (a) with 30% market share; or (b) that is a "significant competitor" in a market for vital and necessary goods and services with five or fewer significant competitors. Proposed Rule 500.5(2)–(3). Under Proposed Rule 500.5, a seller with above a 10% market share is presumed to be a "significant competitor." Proposed Rule 500.5(3)(a). Finally, the Proposed Rule permits sellers to rebut these presumptions the same way they can rebut a *prima facie* case under Section 396-r(3)(c). Proposed Rule 500.5(2), (3)(b).

Lyft respectfully suggests that Proposed Rule 500.5 should be amended to clarify that defenses other than the affirmative defense mentioned in the proposed rule are available to rebut the rule's presumptions. Under Proposed Rule 500.5, a defendant may rebut the rule's presumptions "with the same evidence that a defendant can rebut the prima facie case as laid out in 396-r(3)(c)," which permits evidence regarding costs and profit margins. Proposed Rule 500.5(2), (3)(b). It might be inferred from the rule's omission of any other method of rebutting the presumptions that this way is the *only* way to do so. Lyft hopes that this was an oversight and suggests that NYAG clarify that other defenses are available.

As NYAG notes, Section 396-r reflects the view that "the leverage provided by the market disruption to extract a higher price . . . is what defines price gouging, not some arbitrarily drawn line of excessiveness." Proposed Rules at 2 n.7 (quoting *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 698 (1988)). Although *de minimis* price increases by sellers with certain market shares *might* reflect this kind of improper leverage, that will not always be the case—particularly in markets with dynamic pricing.

Consider the dynamic-pricing defense in Proposed Rule 500.7. *See* Proposed Rule 500.7. ("A seller . . . 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."). As already mentioned, that defense recognizes that price changes are common in dynamic markets and are not necessarily indicative of unfair leverage. This remains true when the seller that employs dynamic pricing has a market share above the thresholds set in the Proposed Rules, and Proposed Rule 500.7 appears to reflect an intent for the affirmative defense for dynamic pricing to apply to all companies, regardless of market share. Lyft respectfully suggests that, in order to avoid potential ambiguity, NYAG should clarify that this defense remains available even when one of the proposed presumptions in Rule 500.5 is triggered.

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In addition, the Attorney General should clarify that a company is permitted to produce additional evidence that may rebut a presumption of unfair leverage under Proposed Rule 500.5. This is particularly important in the context of dynamic pricing. "Automatic dynamic pricing occurs when the price increases automatically" "without human decision-making approving that particular increase." Proposed Rules at 29–30. For a seller using dynamic pricing to ensure that there is not even a *de minimis* increase in price and profit — and avoid a potential claim of unfair leverage under Proposed Rule 500.5 — the seller would arguably need to execute a series of steps with absolute perfection, from promptly learning of breaking news,[6] to deciding whether ongoing events have caused or may threaten a change in the market, to predicting what precise adjustments may be required to avoid even a *de minimis* increase in price and profit margin during what are often fast-moving and changing situations. Given the Attorney General's statement that the Proposed Rule "establishes a 0% threshold for [that seller's] non-cost-based price increases," there would arguably be precisely zero margin for error. Proposed Rules at 23. Yet, under Proposed Rule 500.5, a seller could arguably be presumed to have exercised "unfair leverage" despite its good faith efforts to avoid even a minor increase in price and profit. And, as currently worded, Proposed Rule 500.5 may be interpreted to *prohibit* the seller from offering evidence of those efforts or to otherwise show that the price increase was not a result of unfair leverage. Such a result would be inconsistent with the letter and the spirit of Section 396-r(3)(c) and the common-law tradition of unconscionability from which the section draws.

To prevent such a result, Lyft respectfully recommends that NYAG revise Rule 500.5 to expressly permit defendants to submit evidence beyond that listed in Section 396-r(3)(c) to rebut a presumption of the exercise of unfair leverage.[7]

[6] Lyft encourages NYAG to consider amending the Proposed Rules to reflect that, at least in the context of dynamically priced goods and services, the Proposed Rules would be triggered only by a declaration of a state of emergency by the governor or other formal notice of an abnormal market condition triggering Section 396-r.

[7] Permitting rebuttal evidence would also be consistent with the authorities NYAG relied upon to set the market share thresholds in Proposed Rule 500.5. For the 30% threshold, NYAG explains that "the settled law in the United States has been that 30% market concentration presents a threat of undue concentration," citing *United States v. Philidelphia Nat. Bank*, 374 U.S. 321, 364 (1963). Proposed Rule at 24. In that case, the Supreme Court of the United States made clear that even when a merger produces "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," the merger will be enjoined only "*in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects*" *Philidelphia Nat. Bank*, 374 U.S. at 363 (emphasis added). NYAG further explains that "the language of significant competitor comes from the work of John Kwoka, and the 10% presumption comes from the FTC presumption." Neither the Kwoka article nor the relevant FTC publication appear to support a hard-and-fast 10% rule. Rather, as Kwoka explained, "[a] footnote [in the FTC publication] adds, 'These firms usually have market shares in excess of 10%, *but market shares alone are not determinative of significance*.' Despite some ambiguity in the meaning of this passage, it seems clear that market shares can be related to diversion." John Kwoka, The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?, 81 ANTITRUST L.J. 837, 850 (2017) (emphasis added). In fact, the FTC has acknowledged that in certain situations, "existing market shares may be a poor predictor." FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2011, 3 n.17 (2013), *available at* https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf.

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For the reasons stated above, Lyft respectfully suggests that NYAG consider modifying Proposed Rules 500.5 and 500.7 to provide greater clarity to businesses and to better reflect market realities.

From: Woodcock, Ramsi
To: stopillegalprofiteering
Subject: Public comment submission regarding Notice of Proposed Rulemaking (Price Gouging)
Date: Tuesday, May 23, 2023 12:44:20 AM
Attachments: NYAG Price Gouging Proposed Rules.pdf

[EXTERNAL]

Please see attached.

Thank you.

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New York State Office of the Attorney General
stopillegalprofiteering@ag.ny.gov

May 22, 2023

Re: Notice of Proposed Rulemaking Pursuant to N.Y. Gen. Bus. L. § 396-r(5) (Price Gouging)

To the Attorney General:

I write to respond to your solicitation of comments regarding proposed rules implementing New York General Business Law § 396-r on the subject of price gouging. I have written extensively on antitrust law, price gouging, and related data-driven forms of pricing such as surge pricing, dynamic pricing, and personalized pricing, and am therefore in a position to comment on the proposed rules.[1]

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[1] *See* Ramsi Woodcock, *The Efficient Queue and the Case against Surge Pricing* (2021), https://osf.io/preprints/socarxiv/g8tym/; Ramsi A. Woodcock, *Toward a Per Se Rule against Price Gouging*, CPI ANTITRUST CHRON. (Sep. 2020), https://papers.ssrn.com/abstract=3710997; Ramsi A. Woodcock, *Personalized Pricing as Monopolization*, 51 CONN. L. REV. 311 (2019); Ramsi Woodcock, *Personalizing Prices to Redistribute Wealth in Antitrust and Public Utility Rate Regulation* (2019), https://papers.ssrn.com/abstract=3378864; Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 CARDOZO L. REV. 1741 (2018); Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371 (2017); Ramsi Woodcock, *Antitrust Can't Tame Inequality, Let Alone Inflation*, THEHILL (Jan. 28, 2022), https://thehill.com/opinion/finance/591609-antitrust-legislation-cant-tame-inequality-let-alone-inflation; Ramsi A. Woodcock, *What Those Shocking Texas Power Bills Have in Common With Uber Surges, Broadway Tickets, and Airfare*, SLATE (Feb. 25, 2021), https://slate.com/business/2021/02/texas-electricity-bills-griddy-marginal-cost-pricing-alfred-kahn.html; Ramsi A. Woodcock, *The Hidden Shortages of the Market Economy*, LAW & POL. ECON. BLOG (Jun. 3, 2020), https://lpeblog.org/2020/06/03/the-hidden-shortages-of-the-market-economy/; Ramsi A. Woodcock, *The Economics of Shortages*, LAW & POL. ECON. BLOG (Jun. 2, 2020), https://lpeblog.org/2020/06/02/the-

As the proposed rules acknowledge, half a dozen states—including Georgia, Mississippi, and Louisiana—consider *any* increase in the price of covered necessities during a time of emergency to be presumptive price gouging. The price of gas can go up by a penny or ten dollars—either way, the burden is on the seller to prove that it is not price gouging.

The proposed rules take a different tack. Instead of applying the presumption to any amount of price increase by any firm, the rules apply it only to any amount of price increase by firms having either a 30% market share or competing in a market with five or fewer "significant competitors" (Proposed Rule 500.5). In all other cases, only a price increase in excess of 10% will trigger the presumption of price gouging (Proposed Rule 500.1). Thus, the rules restrict to full power of the presumption to concentrated markets.

This is a mistake. *The rules should apply the presumption to any amount of price increase by any firm, quite regardless whether the firm has a large market share or otherwise operates in a concentrated market.* That is because price gouging has nothing to do with monopoly, or concentrated markets more generally.

It's about Scarcity

Price gouging is, instead, about scarcity. Or, to draw the contrast somewhat differently, monopoly is about *artificial* scarcity whereas price gouging is about the exploitation of *natural* scarcity.[2] We fear the monopolist because, in the absence of competition, the monopolist can restrict output and raise price without losing market share. By contrast, we hate price gouging because it involves taking advantage of an *involuntary* restriction in supply.

When demand for food spikes before a hurricane, the public knows that supermarkets do not have the inventory to meet demand. But the public also knows that the supermarkets originally expected to sell the inventory that they do have at normal prices. Those eggs were already on the shelves before the impending hurricane was announced. When the supermarkets raise prices, it is therefore obvious to the public that the surcharge is pure profit.[3] That is what angers the public and gives rise to price gouging laws. The manufacturing of a voluntary shortage plays no role here. No one thinks the supermarket is holding back eggs—or choosing not to order more.

Monopoly is famine while grain rots in silos. Price gouging is your neighbor demanding your house in exchange for a slice of bread—after lightning striking the silos. That is why price gouging statutes kick into gear only during an emergency—or, as in the case of New

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economics-of-shortages/; Ramsi Woodcock, *Irma Price Gouging Highlights Sad Truth: Consumer Fleecing is the New Normal*, THE CONVERSATION (Sep. 13, 2017), http://theconversation.com/irma-price-gouging-highlights-sad-truth-consumer-fleecing-is-the-new-normal-83858. The comments that follow are taken, often verbatim, from the following blog post, which was written by me: https://zephyranth.pw/2023/03/17/the-counterproductive-antimonopolism-in-new-yorks-proposed-price-gouging-rules/.

[2] Ramsi Woodcock, *The Progressive Case against Progressive Antimonopolism* (Jun. 10, 2021), https://papers.ssrn.com/abstract=3864585.

[3] Ramsi A. Woodcock, *Toward a Per Se Rule against Price Gouging*, *supra* note 1.

York's law, during a period of "abnormal disruption" of markets. A monopolist's decision voluntarily to restrict output and jack up prices is plenty evil, but one thing it is not is the sort of supply chain disruption that one would expect to trigger a price gouging statute.

Confusing Scarcity with Monopoly

So what is a market concentration requirement doing in regulations implementing a price gouging statute? The language of the statute does not explain this requirement. The price gouging law identifies "an exercise of unfair leverage" as a factor in determining whether a firm has engaged in price gouging (Gen. Bus. L. § 396-r(3)(a)(ii)). But the phrase "unfair leverage" could just as easily refer to (natural) scarcity power as it could to monopoly power. A firm that takes advantage of scarcity to raise prices leverages the scarcity unfairly to enrich itself.

The comments to the proposed rules provide more of a clue. They explain that "firms in concentrated markets pose a special risk of price gouging because they can use their pricing power in conjunction with an abnormal market disruption to unfairly raise prices." But this argument confuses scarcity power with monopoly power.

As already averred, the pricing power upon which price gouging is based is scarcity power. It is the power that arises because an "abnormal market disruption", such as an act of god, has eliminated part of the supply that would otherwise exist in the market. The pricing power enjoyed by firms in concentrated markets, by contrast, is not (natural) scarcity power. It is monopoly power (artificial scarcity)—the power voluntarily to restrict supply.

A firm in a concentrated market can use its monopoly power whenever it wants, including during an "abnormal market disruption." But whenever the firm chooses to use its monopoly power, the firm is not using (natural) scarcity power to raise prices. It is using monopoly power to raise prices. If, thanks to the abnormal market disruption, the firm is able to raise prices *higher* than the firm otherwise might, then that extra increment is price gouging due to (natural) scarcity power. But any price increase that the firm would be able to bring about without the aid of the market disruption is due to an artificial restriction in supply and remains an exercise of monopoly power.

So it makes little sense to say that firms with monopoly power pose a "special risk" during periods of market disruption because they can use their monopoly power "in conjunction" with their scarcity power to raise prices. Firms with monopoly power pose the same risk that all firms pose during periods of disruption: the risk that they will use the *additional* power conferred on them by disruption-triggered scarcity *further* to raise prices.

If we worry that (natural) scarcity is going to tempt a monopolist to raise prices we should be equally worried that it will tempt a non-monopolist to raise prices: (natural) scarcity gives both kinds of firms the exact same kind of power—the power to exploit scarcity to raise prices.

Non-Monopoly Price Gougers Probably Do More Harm

Indeed, one would expect that the harm that a firm that lacks monopoly power can do by exploiting scarcity would generally be greater than the harm that a monopolist can do by exploiting (natural) scarcity. That is because, before the disruption, the monopolist will already have artificially restricted output to try to raise prices to the most profitable extent. If a monopolist has already artificially restricted supply to the most profitable extent, any additional involuntary restriction caused by the disruption may be unprofitable for the monopolist and the monopolist may, therefore, choose not to exploit it by raising prices further.

By contrast, a firm's *first* increase in price above costs is always the most harmful to consumers, precisely because when price equals cost, output is at a maximum and consumers reap the greatest benefit from production.[4] They therefore have the most to lose. Subsequent price increases play out over progressively lower sales volumes, inflicting smaller and smaller amounts of harm.

But what kind of firms are induced by an abnormal market disruption to make a *first* increase in price above costs? Answer: *non*-monopolists. Firms in hypercompetitive markets start out with prices at or near costs before an abnormal market disruption gives them power to price-gouge. Monopolists facing abnormal disruptions have already raised their prices above costs long ago, when they first acquired their monopoly position. To the extent that they increase prices due to a market disruption, that will be far from the first increase in their prices above costs.

Disruptions Operate at the Level of Markets, Not Individual Firms, So Price Gouging Is Not Worse In Concentrated Markets

The comments to the proposed rules actually seem to reach the opposite conclusion. They argue that because a monopolist has a large market share relative to a non-monopolist, any price increase by the monopolist will tend to cause more harm because it will apply to a higher volume of sales. According to the comments, large firms "have an outsized role in price setting."

This is the sort of mistake that comes from thinking in terms of firms instead of markets. A market disruption does not enable price gouging by striking a single firm. If a single firm's output is restricted but no restriction is placed on the market as a whole, other firms in the market will bring more inventory to market to offset the loss of the first firm's output. As a result, no firm will have the opportunity to raise prices. A market disruption instead enables price gouging by striking the *entire market*. If the output of the market as a whole is restricted, then restrictions on the output of some firms will not be made up by increased

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[4] *See, e.g.*, Ian Ayres, *Pushing the Envelope: Antitrust Implications of the Envelope Theorem*, 17 MISS. C. L. REV. 21 (1996).

sales by other firms. As a result—and this is key—all firms in the market, and not just the firms that have suffered a restriction in output, will be able to raise prices.

That is because the higher prices are a rationing mechanism: they allocate the restricted market supply to the consumers who have the highest willingness to pay for it. If any firm in the market does not raise prices, consumers will all try to buy from that one firm. But because there is not enough supply in the market to satisfy all consumers, that one firm will not have enough to satisfy all consumers either. The firm will sell the same volume as the firm would have sold at the higher prices. But the firm will earn less profit. So the firm will prefer to just charge the higher prices. That is why only market-level disruptions enable price gouging.

What this means is that a supply disruption that is concentrated in a large firm does not affect more consumers than a supply disruption that hits smaller firms instead. Regardless where the disruption is felt, all prices, charged by all firms in the market, rise—so long, that is, as the disruption is a market-level event in the sense that other participants in the market are unable instantaneously to make up for the reduction in the firm's supply.

And, as I pointed out above, in markets with large numbers of small, hypercompetitive firms, those price increases are likely to be more harmful precisely because prices are likely to start out lower than in concentrated markets.

The comments to the proposed rules are therefore mistaken when they observe that "the profit maximizing choice for a smaller competitor in an industry with [a larger] seller will often be to match the larger company's price," as if that establishes that price gouging is more severe in markets that have larger competitors. When industry supply is restricted, the profit maximizing choice for a smaller competitor will also be to raise price to match *smaller* competitors' price increases. All firms, regardless of size, will find it profit-maximizing to raise price in order to ration the industry's limited output.

While targeting the biggest firms for enforcement might send a stronger warning to the market than targeting a smaller firm, prosecutors do not need a regulation making it easier to bring cases against big firms in order to pursue such a strategy. They can just elect to use their prosecutorial discretion to charge larger firms. Indeed, a rule that facilitates only the bringing of cases against larger firms effectively makes it harder for enforcers to bring cases in markets in which there are no big firms.

Does Plenty Really Make Firms More Likely to Collude?

The comments also appear to defend the concentration requirement by taking the position that market disruptions *enhance* monopoly power, enabling a monopolist to leverage scarcity to increase prices in response to a market disruption to a greater extent than could a non-monopolist. In particular, the comments seem to have in mind that market disruptions facilitate collusion. "[I]t may be easier for big actors to coordinate price hikes during an inflationary period, even without direct communication," they state.

One would, of course, expect that firms in concentrated markets that are prone to tacit collusion would be able to raise prices after a market disruption. The disruption by definition reduces the amount of output in the industry in the short term, as discussed above. That allows the firms in the market to raise prices. But such price increases are due to the increased scarcity of output, not to the collusion. In order for the collusion to be responsible for the price increase, output would have to fall further. The firms would need to engage in collusion that enables them voluntarily to restrict supply *above and beyond* both the involuntary restrictions created by the market disruption and any voluntary restrictions that the firms were capable of imposing absent the disruption.

Presumably the argument is that the impetus to raise prices independently that is created by the supply disruption puts firms in the *frame of mind* required for them further to restrict supply and raise prices in tacit collusion with other firms. That is a slim psychological reed upon which to hang a theory of harm. And one can easily imagine alternative psychologies. Plenty tends to make us self-involved and egomaniacal. Hardship, if not too great, makes us generous and cooperative. It would seem to follow that the profit opportunities created by a market disruption should undermine cooperation between firms, rather than promote it. I do not know if this story is any more likely to be true than the one that the comments seem to favor. The point is that psychological arguments of this sort do not provide a strong basis for carving out special treatment for large firms under a price gouging rule.

More Confusion of Scarcity with Monopoly

The only other argument the comments make for the concentration requirement reprises the confusion of scarcity and monopoly power that I identified eariler.

The comments argue that

> the risk of firms taking advantage of an abnormal disruption may be greater where certain market characteristics reduce the likelihood of new entry—for example, where supply chains are disrupted or key inputs are scarce or where high concentration makes investment less attractive in a particular market. . . . Incumbents are insulated from the credible threat of new competition to discipline prices during abnormal market disruptions.

This seems to misunderstand what a "disruption" is. It is, well, a disruption. Supply is destroyed. Or, equivalently, it is insufficient to meet a surging demand. By definition, *there can be no entry*. If there were entry by other firms into the market, then supply would not be insufficient anymore!

It follows that the extent to which, before the disruption, the market was already protected against entry due to the deterrent effect created by high concentration is irrelevant. If such a deterrent existed before the disruption, and firms took advantage of it, then output would already have been artificially restricted in advance of the disruption. The disruption may destroy additional supply, and firms may raise prices in response, but that destruction will not be due to market concentration but instead to the disruption.

To be sure, if the market were less concentrated and there were no concommitant entry deterrent, then prices in the market would be lower over the period of the disruption. And, moreover, the extent of the price increase created by the disruption might be different—either greater or lesser depending on the shape of the demand curve. But that increase would still be attributable to scarcity and not to monopoly. And the ability of firms to enter the market to eliminate the scarcity would be determined by the nature of the disruption and not by any deterrent power wielded by incumbent firms. The disruption destroys production that already existed notwithstanding the incumbents' monopoly power. It follows that this output could not otherwise have been precluded through incumbent firms' deterrent power—otherwise it would not have been there to be destroyed by the disruption.

Anyway, Small Amounts of Harm Are Small Amounts of Harm, Whether the Perpetrator Could Do More Harm or Not

But suppose the comments to the proposed rules were right that price gouging by monopolists causes more harm than price gouging by non-monopolists. Would it make sense to treat any price increase by a monopolist as presumptively unlawful but only increases by non-monopolists in excess of 10% as presumptively unlawful?

Of course not. That is like saying that it should be battery if a semi-trailer truck bends your fender but it should not be battery if a Prius bends your fender. Harm is harm whether it is inflicted by someone who could have done you a lot more harm or by someone who could only have done you a little more harm. A 5% increase in price above cost is a harm to consumers, whether that 5% markup is charged by a firm that could have, under some circumstances, charged you $100 more or only a dollar more.

In sum, there is no basis in theory for the position of the proposed rules that price increases by large firms or firms in concentrated markets should be subject to a stronger presumption of unlawfulness than price increases by small firms or firms in unconcentrated markets. The statute should be read presumptively to prohibit any increase in price by any firm during an "abnormal disruption" in markets, regardless the size of the firm or level of concentration of the market.

Thank you for the opportunity to comment on these proposed rules. I am

Very sincerely yours,

Ramsi Woodcock

Ramsi Woodcock.