Office of the New York State Attorney General Letitia James
Economic Justice Division

February 2025

Price Gouging

Notice of Proposed Rulemaking

Proposed Rules 600.1, 600.2, 600.10

Preliminary Note

On June 6, 2020, the Legislature approved and the Governor signed Chapter 90 of the Laws of 2020 (S. 8191), which amended General Business Law § 396-r, the general price gouging statute for New York State, to insert into G.B.L. § 396-r a new subdivision (5) reading "The attorney general may promulgate such rules and regulations as are necessary to effectuate and enforce the provisions of this section."

Pursuant to this grant of authority, on March 4, 2022, the Attorney General issued an advance notice of proposed rulemaking seeking public comment on new rules to effectuate and enforce the price gouging law.[1] In response, the Attorney General received 65 comments from advocacy groups, consumers, industry representatives, and academics ("ANPRM Comments").[2]

The majority of the ANPRM Comments addressed individual instances of possible price gouging, including comments on gas, milk, cable, and car dealerships. Of the more prescriptive comments, advocacy groups representing retail, including the New York Association of Convenience Stores and the National Supermarket Association, requested more clarity for terms like "unconscionably excessive" and a recognition that retailers are often accused of price gouging when their own costs are increasing.

Three economic justice advocacy groups and one economist (American Economic Liberties Project, Groundwork Collaborative, the Institute for Local Self Reliance, and Professor Hal Singer) submitted comments suggesting that market concentration and large corporations are a key driver of price gouging. Law Professor Luke Herrine submitted a comment concerning the fair price logic underpinning price gouging laws. Law Professor Ramsi Woodcock submitted a comment concerning the economic logic of price gouging laws.

The Consumer Brand Association requested clarity defining "unfair leverage" and other terms it argued were susceptible to different interpretations, and a recognition of causes of inflation that, it asserted, may not be price gouging. The American Trucking Associates and an aged care concern submitted comments particular to their industries.

Following careful consideration of these comments and with reference to the Office of the Attorney General ("OAG")'s extensive experience in administration of the statute, the

[1] Press Release, *Attorney General James Launches Rulemaking Process to Combat Illegal Price Gouging and Corporate Greed*, Office of the New York State Attorney General (March 4, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-launches-rulemaking-process-combat-illegal-price-0.

[2] These comments are collected and published on the Attorney General's website on the same page hosting this Notice. For ease of reference, citations to advance notice comments will include a pincite to this document in the form "ANPRM Comments at XX."

Attorney General announced on March 2, 2023, her intention to publish in the State Register Notices of Proposed Rulemaking proposing seven rules effectuating and enforcing the price gouging statute.[3] At the time of the announcement the Attorney General also published a Regulatory Impact Statement for each rule, preceded by a preamble setting out general considerations applicable to all rules ("First NPRMs"). The Notices of Proposed Rulemaking were published in the State Register on March 22, 2023.[4]

The Attorney General received approximately 40 comments on the First NPRMs during the comment period. Approximately 20 of these comments were unique, detailed comment letters representing diverse interests.[5] These commentators included national and regional industry trade associations, members of the Legislature, community groups, small businesses, and individuals. The remaining comments were part of a comment submission initiative organized by industry and community groups that advocated for or against provisions in the NPRMs and urged additional changes. These comments were considered by the Attorney General along with all other comments received, including any additional remarks included in otherwise identical comment letters.

Following consideration of the comments made in the First NPRMs, the Attorney General elected to issue new Notices of Proposed Rulemaking on largely the same topics as the First NPRMs, subject to the standard 60-day comment period for new Notices of Proposed Rulemaking. Although it is not necessary for the Attorney General to publish an Assessment of Public Comment under these circumstances, many of the comments made in response to the first round NPRMs are addressed in the Regulatory Impact Statements that follow as well as an OAG Staff Report on price gouging economics issued concurrently with these proposals.

The proposed rules that follow continue to address the same subject areas as prior rulemaking proposals, but have been reordered to address their subjects in the same order as those topics are covered in the statute: beginning with common definitions and a restatement of G.B.L. § 396-r(3) with cross-references to the remaining rules, and then continuing with examples of unfair leverage or unconscionable means (G.B.L. § 396-r(3)(a)(ii), proposed rules

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[3] Press Release, *Attorney General James Announces Price Gouging Rules to Protect Consumers and Small Businesses*, Office of the New York State Attorney General (March 2, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-announces-price-gouging-rules-protect-consumers-and-small.

[4] NY St. Reg., March 22, 2023 at 24-29, *available at* https://dos.ny.gov/system/files/documents/2023/03/032223.pdf. The State Register's content is identical to that of the NPRM Preamble, save that footnotes were converted to main text (as the State Register format system does not accommodate footnotes) and a clerical error respecting rule numbering was corrected. For ease of reference, all citations to the Notice of Proposed Rulemaking will be to the First NPRMs in the format "First NPRMs at XX."

[5] These comments were collected and published on the Attorney General's website. For ease of reference, citations to the comments received on the proposed rules will include a pincite to this document in the form "First NPRM Comments at XX."

600.3 and 600.4), then the pre-disruption/post-disruption price disparity prima facie case (G.B.L. § 396-r(3)(b)(i), proposed rules 600.5 and 600.6), then gross price disparities in the specific context of new products (proposed rule 600.7), then the rebuttal of the prima facie case (G.B.L. § 396-r(3)(c), proposed rule 600.8), followed finally by the geographic scope of the statute as a whole (proposed rule 600.9) and a severability clause (proposed rule 600.10).

A table of correspondence is below:

Proposed Rule and Rulemaking	**Most Nearly Resembles from First NPRM**
600.1, 600.2 & 600.10: Definitions and Unconscionably Excessive Prices	*None, includes definitions common to all rules*
600.3: Unfair Leverage Examples	Rule 4 (LAW-12-23-0009-P)
600.4: Unfair Leverage of Market Position	Rule 5 (LAW-12-23-0010-P)
600.5: Pre-Disruption Price Determination/Dynamic Pricing	Rule 7 (LAW-12-23-0012-P)
600.6: 10% Gross Disparity Threshold	Rule 1 (LAW-12-23-0006-P)
600.7: New Essential Products	Rule 3 (LAW-12-23-0008-P)
600.8: Cost Definition and Allocation Methods	Rule 2 (LAW-12-23-0007-P)
600.9: Geographic Scope	Rule 6 (LAW-12-23-0011-P)

Each of these proposals is a separate rulemaking. Although certain rules contain cross-references, these are solely for reader convenience and do not reflect a determination that any one or more of the proposals stands or falls on the strength of any other.

Rule 600.1, 600.2, and 600.10—Definitions, Overview, and Severability

Rule Text

Proposed Action: Add New Part 600.1, 600.2, and 600.10 of Title 13 NYCRR

Statutory Authority: General Business Law 396-r(5)

Subject: Price Gouging

Purpose: Provide common definitions for rules adopted pursuant to General Business Law § 396-r(5) and restate the statutory definition of an unconscionably excessive price.

Text of proposed rule:

600.1 Definitions

For the purposes of this Part:

(a) *Abnormal Disruption*.

(1) The phrases "abnormal disruption of the market," "abnormal disruption," or "disruption" mean any change in the market for an essential product, whether actual or imminently threatened, resulting from a triggering event.

(2) *Triggering Event*. A "triggering event" means one or more of (i) stress of weather, (ii) convulsion of nature, (iii) failure or shortage of electric power or other source of energy, (iv) strike, (v) civil disorder, (vi) war, (vi) military action, (vii) national or local emergency, (viii) drug shortage, or (ix) other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the Governor.

(3) *Drug Shortage*. The term "drug shortage" means, with respect to any drug or medical product intended for human use, that such drug or medical product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration pursuant to 21 U.S.C. § 356c or any other provision of federal law.

(b) *Benchmark Sale*. A "benchmark sale" is a sale or offering for sale whose price is used as a basis to conclude that the price in the scrutinized sale is *prima facie* proof of a violation of General Business Law § 396-r pursuant to General Business Law § 396-r(3)(b)(i) or General Business Law § 396-r(3)(b)(ii).

(c) *Buyer.* A "buyer" is the person to whom the scrutinized sale or offer for sale is made.

References to any particular buyer include any entities controlled by the buyer (or entities controlled by the same person as the buyer), and any successor in interest to that buyer.

(d) *Consumer*. "Consumer" is an individual or small business.

(e) *Essential Products*. "Essential products" are goods or services a reasonable person in the buyer's position at the time of the sale would believe are vital and necessary for the health, safety, and welfare of consumers or the general public.

(f) *Goods and Services*. "Goods and services" means consumer goods and services used, bought or rendered primarily for personal, family or household purposes; essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease; any other essential goods and services used to promote the health or welfare of the public; and any repairs made by any party within the chain of distribution of goods on an emergency basis as a result of an abnormal market disruption.

(g) *New Essential Product*. A "new essential product" is an essential product that did not exist prior to an abnormal disruption of the market for that new essential product.

(h) *Pre-Disruption Price*. "Pre-disruption price" is the price determined by application of the method in 16 N.Y.C.R.R. § 600.5.

(i) *Price.* "Price" means the maximum total of all fees or charges a buyer must pay for an essential product, including but not limited to any mandatory additional good(s) or service(s) offered to a buyer as part of the same transaction and fees or charges imposed on the buyer by a Federal, State, or local government agency, unit, or department.

(j) *Price Gouging Statute*. "Price gouging statute," without additional context, means General Business Law § 396-r.

(k) *Sale.* "Sale" includes a sale or offering for sale. A seller that contracts or offers to contract with a buyer to sell multiple goods (or a volume of fungible goods) on multiple dates or in multiple locations, whether for a fixed or variable price, engages in a separate sale or offer for sale on each such date or location. The sale or offering for sale of a good or service by one party to another where both buyer and seller are under common ownership or control, or where the sale or offering for sale is not an arms-length transaction, does not constitute a sale or offering for sale.

(l) *Scrutinized Sale*. A "scrutinized sale" is the sale or offering for sale made during an abnormal disruption of the market being examined for compliance with the price gouging statute.

(m) *Seller.* A "seller" means the party making the scrutinized sale, including any manufacturer, supplier, wholesaler, distributor, or retail seller of goods or services within the chain of

distribution for the essential product, or a subsidiary, parent company, affiliate, agent, or representative thereof.

(n) *Small Business.* "Small business" is a person other than an individual that is independently owned and operated, not dominant in its field, and employs 100 or fewer persons.

(o) *Third Party*. A "third party" is a person not owned or controlled by a seller.

(p) *Usual Course of Business.* Methods or practices used or prices charged in "the usual course of business" are methods or prices the seller employed or charged either prior to the onset of the disruption at issue with respect to the scrutinized sale, or prior to the time at which the seller knew or had reason to know that the disruption would occur, whichever is earlier. A method or practice adopted prior to a disruption that specifies an alteration in practices or prices during a disruption, or a method or practice that a reasonable person would conclude was implemented for the sole or dominant purpose of enabling the seller to increase prices or alter the seller's accounting of costs or profits during a disruption or in the lead up to a disruption, is not a method or practice used in the usual course of business.

600.2 Unconscionably Excessive Prices

The price in a scrutinized sale is unconscionably excessive if there is sufficient evidence of any one of the following:

(a) The amount of the excess in price is unconscionably extreme; or,

(b) There was an exercise of unfair leverage or unconscionable means, as defined by 13 N.Y.C.R.R. § 600.4; or,

(c) There was a combination of an unconscionably extreme price and unfair leverage or unconscionable means; or,

(d) There is a gross disparity, as defined by 13 N.Y.C.R.R. § 600.6, between the price of the essential product in the scrutinized sale and its pre-disruption price as defined by 13 N.Y.C.R.R. § 600.5, and the seller does not rebut this prima facie case with evidence that the increase in the amount charged preserves the margin of profit that the defendant received for the same essential product prior to the abnormal disruption of the market or additional costs not within the control of the seller were imposed on the seller for the essential product, as provided in 13 N.Y.C.R.R. § 600.8; or

(e) The amount charged in the scrutinized sale grossly exceeded the price at which the same or similar essential products were readily obtainable in the trade area, and the seller does not rebut

this prima facie case with evidence that the increase in the amount charged preserves the margin of profit that the defendant received for the same essential products prior to the abnormal disruption of the market or additional costs not within the control of the seller were imposed on the seller for the essential products, as provided in 13 N.Y.C.R.R. § 600.8; or,

(f) If the scrutinized sale is for a new essential product, the amount charged for the new essential product in the scrutinized sale grossly exceeds the benchmark price defined in 13 N.Y.C.R.R. § 600.7(b)(1), and the seller does not rebut this prima facie case with evidence described in 13 N.Y.C.R.R. § 600.7(b)(2).

600.10 Severability

The provisions of this Part shall be severable, and if any item, subclause, clause, sentence, subparagraph, paragraph, subdivision, section, or subpart of this Part, or the applicability thereof to any person or circumstances, shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, nor the application thereof, but shall be confined in its operation to the item, subclause, clause, sentence, subparagraph, paragraph, subdivision, section, or subpart thereof, or to the person or circumstance directly involved in the controversy in which such judgment shall have been rendered.

Regulatory Impact Statement

1. Statutory authority: G.B.L. 396-r(5) authorizes the Attorney General to promulgate rules to effectuate and enforce the price gouging statute.

2. Legislative objectives:

The primary objective of the price gouging statute, and thus the regulations promulgated pursuant to G.B.L. § 396-r(5), is to protect the public from firms that profiteer off market disruptions by increasing prices, and to deter violations.

The objectives of the rules are to: (a) ensure the public, business, and enforcers have guideposts of behavior that constitutes price gouging; (b) ensure enforcers have the information necessary to enforce the price gouging statute; (c) clarify the grounds for the affirmative defense in a prima facie case.

The Attorney General has concluded that the proposed rules are necessary because they are the most effective means available to educate the public as to what constitutes price-gouging, to deter future price gouging, to protect New Yorkers from profiteering, and to effectuate the Legislature's goals.

Statutory History

New York passed General Business Law § 396-r, the first anti-price gouging statute of its kind in the nation, in 1979.[6] G.B.L. § 396-r was enacted in response to price spikes following heating oil shortages in the winter of 1978–1979.[7] The Legislature imposed civil penalties on merchants charging unconscionably excessive prices for essential goods during an abnormal disruption of the market.[8] It established that an unconscionably excessive price would be established prima facie when, during a disruption, the price in the scrutinized sale was either an amount that represented a gross disparity from the pre-disruption price, or an amount that grossly exceeded the price of other similar goods, and the amount charged was not attributable to additional costs imposed on the merchant by its suppliers.[9] The Legislature stated that the goal of G.B.L. § 396-r was to "prevent merchants from taking unfair advantage of consumers during abnormal disruptions of the market" and to ensure that during disruptions consumers could access goods and services vital and necessary for their health, safety, and welfare.[10]

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[6] L. 1979, ch. 730 § 1, eff. Nov. 5, 1979.

[7] *Id.*

[8] L. 1979, ch. 730 §§ 2, 4, eff. Nov. 5, 1979.

[9] L. 1979, ch. 730 § 3, eff. Nov. 5, 1979.

[10] L. 1979, ch. 730 § 1, eff. Nov. 5, 1979.

Price gouging during disasters and other market disruptions continued to be a major problem for New Yorkers, and the Legislature has amended the statute multiple times since its passage.[11] In 1995, the statute was amended to include repairs for the vital and necessary goods covered by the statute as well as to increase the maximum penalty from $5,000 to $10,000.[12]

In 1998, the statute was updated in several significant ways. First, it was rewritten to explicitly cover every party in the supply chain for necessary goods and services.[13] Second, the Legislature made it the defendant's burden to show cost justification in response to a prima facie showing of price gouging.[14] Third, the Legislature added military action as one of the enumerated examples of an abnormal market disruption.[15] The amendment sponsor's memorandum explained that the amendments were needed because the pricing activities of oil producers in the wake of the Iraqi invasion of Kuwait and the Exxon Valdez oil spill were not clearly covered.[16]

Fourth, the 1998 amendment clarified that a price could violate the statute even without a gross disparity or gross excess in price, building on the language used by the Court of Appeals in *People v. Two Wheel Corp*.[17] In that case, the Attorney General sought penalties and restitution for the sale of 100 generators sold by defendant at an increased price after Hurricane Gloria. Five of the 100 sales included price increases above 50%; two-thirds greater than 10%; the remaining third, less than 10% (including some under 5%). The defendant argued that the price gouging statute did not cover the lower price increases. The Court of Appeals rejected the argument, explaining "[a] showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness."[18] The Court went on:

> the term "unconscionably excessive" does not limit the statute's prohibition to "extremely large price increases", as respondents would have it. The doctrine of unconscionability, as developed in

[11] The statute was amended in 1995, 1998, 2008, 2020, and 2023. *See* L. 1995, ch. 400, eff. Aug. 2, 1995; L. 1998, ch. 510, eff. July 29, 1998; L. 2008, ch. 224, eff. July 7, 2008; L. 2020, ch. 90, eff. Jun 6, 2020; L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.

[12] L. 1995, ch. 400, §§ 2, 4, eff. Aug. 2, 1995.

[13] L. 1998, ch. 510, § 2, eff. July 29, 1998.

[14] L. 1998, ch. 510, § 3, eff. July 29, 1998.

[15] L. 1998, ch. 510, § 2, eff. July 29, 1998.

[16] Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[17] 71 N.Y.2d 693 (1988); *see* Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[18] 71 N.Y.2d at 698.

> the common law of contracts and in the application of UCC 2-302, has both substantive and procedural aspects. Respondents' argument focuses solely on the substantive aspect, which considers whether one or more contract terms are unreasonably favorable to one party. The procedural aspect, on the other hand, looks to the contract formation process, with emphasis on such factors as inequality of bargaining power, the use of deceptive or high-pressure sales techniques, and confusing or hidden language in the written agreement. Thus, a price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors.[19]

Although the statute as it stood when *Two Wheel* was decided had included only a definition of what constituted a prima facie case, and not a mechanism for proving price gouging outside the prima facie case, the 1998 amendments redefined "unconscionably excessive price" to be satisfied by evidence showing one or more of the following: (1) that the amount of the excess of the price was unconscionably extreme; (2) that there was an exercise of unfair leverage or unconscionable means; (3) that there was some combination of (1) or (2); (4) that there was a gross disparity between the pre- and post-disruption prices of the good or services at issue not justified by increased costs; or (5) that the price charged post-disruption grossly exceeded the price at which the goods or services were readily available in the trade area, and *that* price could not be justified by increased costs.[20] In a change from the 1979 structure, the burden on providing evidence of costs was shifted from the Attorney General to the defendant: where previously the Attorney General had to prove that the increase in prices was not justified by increased costs, the burden was now on the defendant to show that a price increase *was* justified by increased costs.[21] In another change, where the *Two Wheel* opinion referenced "unconscionable means" as a method of establishing price gouging, the legislature added "unfair leverage" as another method by which price gouging could be established.

Setting aside a 2008 amendment increasing penalties from $10,000 to $25,000,[22] the next major substantive amendment to the statute was made in 2020, when the law was amended after thousands of price gouging complaints were made to the Attorney General during the early days

[19] *Id*. at 698-99 (citations omitted).

[20] L. 1998, ch. 510, § 3, eff. July 29, 1998.

[21] *Ibid*.

[22] L. 2008, ch. 224, eff. July 7, 2008.

of the COVID-19 market disruption.[23] In this amendment the Legislature expanded the scope of the statute to explicitly cover medical supplies and services as well as sales to hospitals and governmental agencies, expanded the scope of potentially harmed parties, replacing "consumer" with "the public" in several instances, and enhanced penalties by requiring a penalty per violation of the greater of $25,000 or three times the gross receipts for the relevant goods and services, whichever is greater.[24]

Alongside these expansions of the statute's scope, the Legislature added a defense to rebut a prima facie showing of price gouging: in addition to showing that the increase was attributable to increased costs imposed on the seller, a seller could show that the increased prices preserved the seller's pre-disruption profit margin.[25] Finally, these amendments gave the Attorney General the rulemaking authority being exercised here to effectuate and enforce the statute.[26]

Finally, in 2023, the law was further amended to expand the list of triggering events for a statutory abnormal market disruption to include a "drug shortage," defined to mean "with respect to any drug or medical essential product intended for human use, that such drug or medical essential product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration."[27]

The Department of Law (better known as the Office of the Attorney General or "OAG"), of which the Attorney General is the head,[28] has extensive expertise in administering the price gouging law, as well as the many other multi-sector economic statutes entrusted to its jurisdiction by the Legislature.[29] The OAG has been the agency responsible for administering and enforcing this statute for 43 years, complimenting over a century of experience in the

[23] Press Release, *Attorney General James' Price Gouging Authority Strengthened After Governor Cuomo Signs New Bill into Law*, Office of the New York State Attorney General (June 6, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-price-gouging-authority-strengthened-after-governor-cuomo.

[24] L. 2020, ch. 90, eff. June 6, 2020.

[25] L. 2020, ch. 90, § 3, eff. June 6, 2020.

[26] L. 2020, ch. 90, § 5, eff. June 6, 2020.

[27] L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.

[28] N.Y. Const, art V, § 4.

[29] *See, e.g.*, G.B.L. § 340, 343 (Donnelly Act, New York's general antitrust statute); G.B.L. § 349 (general deceptive business practices statute). Over 200 statutes regulating business, ranging from regulations on purveyors of Torah scrolls, G.B.L. § 863, to prize boxes, G.B.L. § 369-eee, to dangerous clothing articles, G.B.L. § 391-b, are entrusted to the attorney general's enforcement. This wide collection of laws is entrusted to OAG because of its expertise in cross-sector enforcement of economic regulations.

enforcement of cross-sector economic regulations.[30] In 2011, OAG conducted a statewide investigation leading to a major report examining gasoline prices.[31] The OAG regularly issues guidance[32] regarding price gouging and provides technical advice to the Legislature when amendments to the law are proposed. The Attorney General has also engaged in multiple enforcement actions.[33] Over nearly five decades, OAG has received and processed thousands of price gouging complaints, sent thousands of cease-and-desist letters, negotiated settlements, and worked with retailers and advocacy groups to ensure that New Yorkers are protected from price gouging.[34]

Current Statutory Terms

General Business Law § 396-r(2)(a) sets out the central prohibition of the price gouging statute; much of the rest of the statute is given over to defining the underlined terms in this sentence:

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[30] Indeed, many major cross-sector business laws now enforceable in private rights of action were initially entrusted exclusively to the Attorney General. *See, e.g.*, L. 1899, ch. 690 (first enactment of Donnelly antitrust laws designating Attorney General sole enforcement agency); L. 1970, ch. 43 § 2 (first enactment of G.B.L. § 349, providing only for OAG enforcement).

[31] *See* Press Release, *Report on New York Gasoline Prices*, Office of the New York State Attorney General (December 11, 2011), https://ag.ny.gov/sites/default/files/pdfs/bureaus/consumer_fraud/REPORT-ON-NEW-YORK-GASOLINE-PRICES.pdf.

[32] *See, e.g.*, Press Release, *Consumer Alert: Attorney General James Warns Against Price Gouging During Winter Storm*, Office of the New York State Attorney General (Dec. 23, 2022), https://ag.ny.gov/press-release/2022/consumer-alert-attorney-general-james-warns-against-price-gouging-during-winter; Press Release, *Consumer Alert: Attorney General James Warns About Price Gouging in Aftermath of Hurricane Henri*, Office of the New York State Attorney General (Aug. 23, 2021), https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-warns-about-price-gouging-aftermath; Press Release, *Consumer Alert: Attorney General James Issues Warnings to More than 30 Retailers to Stop Overcharging for Baby Formula*, Office of the New York State Attorney General (May 27, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-issues-warnings-more-30-retailers-stop-overcharging-baby.

[33] *See, e.g.*, *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988); *People v. Chazy Hardware, Inc.*, 176 Misc. 2d 960 (Sup Ct, Clinton County 1998); *People v. Beach Boys Equipment Co*, 273 A.D.2d 850 (4th Dep't 2000).

[34] *See, e.g.*, Press Release, *Attorney General James Delivers 1.2 Million Eggs to New Yorkers*, Office of the New York State Attorney General (Apr. 1, 2021), https://ag.ny.gov/press-release/2021/attorney-general-jam L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.es-delivers-12-million-eggs-new-yorkers; Press Release, *Attorney General James Sues Wholesaler for Price Gouging During the Coronavirus Pandemic*, Office of the New York State Attorney General (May 27, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-wholesaler-price-gouging-during-coronavirus-pandemic; Press Release, *Ice Storm Price Gouging Victims to Receive Refunds*, Office of the New York State Attorney General (Dec. 11, 2000), https://ag.ny.gov/press-release/2000/ice-storm-price-gouging-victims-receive-refunds; Press Release, *Fifteen Gas Stations Fined In Hurricane Price Gouging Probe*, Office of the New York State Attorney General(Dec. 19, 2005), https://ag.ny.gov/press-release/2005/fifteen-gas-stations-fined-hurricane-price-gouging-probe; Press Release, *A.G. Schneiderman Announces Agreement with Uber to Cap Pricing During Emergencies and Natural Disasters*, Office of the New York State Attorney General (July 8, 2014), https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and.

> During any abnormal disruption of the market for goods and services vital and necessary for the health, safety and welfare of consumers or the general public, no party within the chain of distribution of such goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.[35]

An "abnormal disruption of the market" is statutorily defined in G.B.L. § 396-r(2)(b) as "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, drug shortage"; or (2) any cause of an abnormal disruption of the market that results in the Governor declaring a state of emergency.[36] The word "disruption" used in this Regulatory Impact Statement should be taken to mean this statutory definition, rather than the broader colloquial meaning of the word "disruption."

The "goods and services" covered by the statute are defined in G.B.L. § 396-r(2)(d) and (e) as "(i) consumer goods and services used, bought or rendered primarily for personal, family, or household purposes, (ii) essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease, [] (iii) any other essential goods and services used to promote the health or welfare of the public[,]"[37] and "any repairs made by any party within the chain of distribution of goods on an emergency basis as a result of such abnormal disruption of the market."[38] A "party within the chain of distribution" includes "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."[39] For brevity, throughout this rule vital and necessary goods and services are called "essential products."

G.B.L. § 396-r(3) sets out several means by which OAG may provide evidence that the

[35] G.B.L. § 396-r(2)(a) (emphasis added).

[36] A "drug shortage" is defined by G.B.L. § 396-r(2)(c) to arise when "such drug or medical essential product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration." The FDA reports drug shortages pursuant to section 506C of the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. 356(c); *see* 21 C.F.R. § 600.82 (implementing regulations).

[37] G.B.L. § 396-r(2)(d).

[38] G.B.L. § 396-r(2)(e).

[39] G.B.L. § 396-r(2)(e).

defendant has charged an "unconscionably excessive price."[40]

G.B.L. § 396-r(3)(a) provides that an unconscionably excessive price may be established with evidence that "the amount of the excess in price is unconscionably extreme" or where the price was set through "an exercise of unfair leverage or unconscionable means,"[41] or a combination of these factors. By separately stating that a G.B.L. § 396-r(3)(a) case may be stablished by such a combination of factors, the statute allows an unconscionably excessive price to be established with evidence of only one of the two factors; by adding "unfair leverage" to "unconscionable means," with the disjunctive "or," the statute allows for evidence of unfair leverage alone to establish a violation of the statute.[42]

G.B.L. § 396-r(3)(b) provides that "prima facie proof that a violation of this section has occurred"—that is, that an unconscionably excessive price has been charged—shall include evidence that "a gross disparity" between the price at which a good or service was sold or offered for sale during the disruption and "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

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[40] Although the statute prefaces these definitions with the phrase "whether a price is unconscionably excessive is a question of law for the court," this language does not prevent the Attorney General from making regulations effectuating the definitions (nor could it, given the express rulemaking authority granted in G.B.L. § 396-r(5)). The phrase "question of law for the court" when applied to the element of a civil offense is a term of art that has invariably been read by the Court of Appeals to mean that a judge and not jury decides the issue, and that the determination can be appealed to the Court of Appeals, as that Court's jurisdiction is limited to "questions of law." NY Const, art VI § 3(a). *See, e.g.*, *White v. Cont. Cas. Co*., 9 N.Y.3d 264, 267 (2007) ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court"); *Silsdorf v. Levine*, 59 NY2d 8, 13 (1983) ("Whether [allegedly defamatory] statements constitute fact or opinion is a question of law for the court to decide"); *Hedges v. Hudson R.R. Co*., 49 N.Y. 223, 223 (1872) ("the question as to what is reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court. A submission of the question to the jury is error, and, in case the jury finds different from what the law determines, it is ground for reversal").

[41] G.B.L. § 396-r(3)(a).

[42] *See generally Sisters of St. Joseph v. City of New York*, 49 N.Y.2d 429, 440 (1980); McKinney's Cons Laws of NY, Book 1, Statutes §§ 98, 235. This treatment contrasts to conventional unconscionability analysis, which "generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., 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." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988) (citing *Williams v. Walker-Thomas Furniture Co*., 350 F.2d 445, 449 (D.C. Cir. 1965)). When the price gouging statute applies, either procedural or substantiative unconscionability is sufficient to satisfy 3(a). *See People v. Two Wheel Corp*., 71 N.Y.2d 693, 699 (1988) ("[A] price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors."). In addition to the unconscionability factors recited in *Two Wheel*, the 1998 amendment added an additional concept, that of "unfair leverage," which necessarily sweeps beyond common-law unconscionability to encompass a wider range of circumstances where a seller takes unfair advantage of a buyer during an abnormal disruption of the market. L. 1998, ch. 510, eff. July 29, 1998.

the abnormal disruption of the market."[43] Alternatively, a prima facie case may be established with evidence that the price of the goods or services in question sold or offered for sale during the disruption "grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area."[44]

A prima facie case may be rebutted by a seller employing the affirmative defense provided in G.B.L. § 396-r(3)(c) by showing that the price increase "preserves the margin of profit that the [seller] received for the same goods or services prior to the abnormal disruption," or that "additional costs not within the control of the [seller] were imposed on the defendant for the goods and services."[45] Not every cost can be used to rebut a prima facie case; G.B.L. § 396-r(3)(c) requires any cost used as a defense must be additional, out of the seller's control, imposed on the seller, and be associated with the specific essential product at issue in the prima facie case.[46] This language underscores that even if a business were to account for an item as a "cost," unless that item satisfies the statutory criteria it is not relevant to the rebuttal.

Statutory Economic and Policy Framework

The price gouging statute aims to stop sellers "from taking unfair advantage of the public during abnormal disruptions of the market" by "charging grossly excessive prices for essential goods and services."[47] The statute "excises the use of such advantage from the repertoire of legitimate business practices."[48] By focusing on fairness, the statutory text and legislative intent pay "special attention to buyers' vulnerabilities and to sellers' power, and especially to their interaction."[49]

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[43] G.B.L. § 396-r(3)(b)(i). Although the Appellate Division characterized this showing of a gross disparity to establish *prima facie* that the unconscionably extreme/unconscionable means factors in G.B.L. § 396-r(3)(a) were satisfied, this additional step in the analysis is academic. For clarity of analysis, given that the (3)(a) factors are capable of being proven directly without a *prima facie* case, in addition to being proven through the burden-shifting (3)(b) *prima facie* case procedure, this rulemaking and the rule treats these showings as separate evidentiary paths to the same "unconscionably excessive" destination.

[44] G.B.L. § 396-r(3)(b)(ii).

[45] G.B.L. § 396-r(3)(c).

[46] *Id.*

[47] G.B.L. § 396-r(1).

[48] *People v. Two Wheel Corp*., 71 N.Y.2d 693, 699 (1988).

[49] Comment of Professor Luke Herrine, ANPRM Comments at 193-204. For a broader discussion of fairness considerations underlying price gouging laws, *see generally* Elizabeth Brake, *Price Gouging and the Duty of Easy Rescue*, 37 ECON. & PHIL. 329 (2021), *and* Jeremy Snyder, *What's the Matter with Price Gouging?*, 19 BUS. ETHICS Q. 275 (2009), as well as the seminal article by Daniel Kahneman et al, *Fairness as a Constraint on Profit Seeking*, 76 AM. ECON. REV. 728 (1986). Although these arguments have been critiqued, mostly on consequentialist grounds that themselves rest on accepting empirical claims made by economists skeptical of price gouging laws, *see, e.g.*, Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347 (2008), it was the distinctly *non*-consequentialist theory of fairness that was accepted by the Legislature, *see* G.B.L. § 396-r(1).

The price gouging statute represents a decision by "the people of New York, represented in Senate and Assembly"[50] to penalize a form of unfair business conduct, protect against the unique harms that can result from price increases for essential products during an abnormal disruption, and balance values differently during an abnormal market disruption than during a normal economic period.[51] The Legislature decided that the imbalances of power that either result from, or are exacerbated by, an abnormal market disruption should not lead to either wealth-based rationing of essential products, on the one hand, or windfalls, on the other.[52] Indeed, research on consumer perceptions indicates that most consumers intuitively believe demanding a higher price in the service of profit increase during a disaster is inherently unfair.[53]

The price gouging law protects the most vulnerable people. Poor and working-class New Yorkers are the most likely to be harmed by price increases in essential items and the least likely to have savings or disposable income to cover crises.[54] The law ensures that market disruptions do not cause essential products to be rationed based on ability to pay. When there is a risk of New Yorkers being priced out of the markets for food, water, fuel, transportation, medical goods, and other essentials like diapers, soap, or school supplies, the stakes are especially high. The law addresses the urgency created by this risk by putting limitations on the degree to which participants can raise prices during disruptions, limitations that would not apply under ordinary circumstances.[55]

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[50] NY Const, art III, § 13.

[51] *See* Governor's Approval Mem,, Bill Jacket, L. 1979, ch. 730 at 4-5; Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[52] *See* Governor's Approval Mem., Bill Jacket, L. 1979, ch. 730 at 5 ("These price increases must be justified; the State cannot tolerate excessive prices for a commodity which is essential to the health and well-being of millions of the State's residents."); Sponsor's Mem., Bill Jacket, L. 2020, ch. 90 at 6 ("This legislation would be a strong deterrent to individuals seeking to use a pandemic or other emergency to enrich themselves at the expense of the general public….").

[53] *See, e.g.*, Bruno S. Frey & Werner W. Pommerehne, *On the Fairness of Pricing: An Empirical Survey Among the General Population*, 20 J. ECON. BEHAV. & ORG. 295 (1993) (revealing price increases in response to excess demand is considered unfair by four-fifths of survey respondents), Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking*, 76 AM. ECON. REV. 728, 733 (1986) (price increases during disruptions for goods purchased at normal pre-disruption rates are regarded as unfair by most respondents); Ellen Garbarino & Sarah Maxwell, *Consumer Response to Norm-Breaking Pricing Events in E-Commerce*, 63 J. BUS. RSCH. 1066 (2010) (discussing how consumers perceive company price increases that break with pricing norms to be unfair).

[54] *See 8 Months and 10,000+ Complaints Later: Department of Consumer and Worker Protection Analysis Shows Price Gouging Preys on Vulnerable New Yorkers*, N.Y.C. CONSUMER AND WORKER PROTECTION (Nov. 9, 2020), https://www.nyc.gov/site/dca/news/042-20/8-months-10-000-complaints-later-department-consumer-worker-protection-analysis-shows ("[T]he neighborhoods with the most [price gouging] complaints are [those] already financiallly vulnerable and, with median household incomes of approximately $30,000, can least afford to be gouged on lifesaving items . . . .").

[55] *See* Kaitlin Ainsworth Caruso, *Price Gouging, the Pandemic, and What Comes Next*, 64 B.C. L. REV. 1797, 1851 (2023) ("[A]nti-gouging laws may help impose some legal constraint on the different burdens that communities already challenged by corporate disinvestment face in an emergency. . . . If so, anti-gouging laws may be a reasonable attempt to protect poorer communities from being disparately impacted by price increases.")

The OAG has conducted an analysis of economic data and scholarship relevant to price gouging and has compiled these analyses in a separate document ("OAG Staff Report") alongside this Notice of Proposed Rulemaking. In the Report, OAG staff review economic analyses of price gouging statutes, including studies suggesting that price gouging laws may be economically beneficial when they acts to restrain profit increases in the aftermath of abnormal market disruptions when supply cannot be ramped up to meet sudden demand no matter what price is charged, or, on the demand side, when hoarding will occur at any price such that price changes merely change the identity of the hoarders rather than the negative consequences of the hoarding.

The Staff Report also examines mounting evidence that price gouging is exacerbated by market concentration. Finally, the Staff Report sets out the results of OAG staff's examination of price data collected by the Bureau of Labor Statistics, indicating that the price of essential products varies by less than 10% on a month-to-month basis except in abnormal market disruptions. This finding is consistent across multiple types of essential products and over several decades.

In considering this economic evidence, the Attorney General remained mindful that the regulations must effectuate the statute. The Legislature's primary concern in adopting the statute was eliminating "unfair advantage," and fairness concerns are not necessarily the same as the goal of maximizing economic efficiency.[56] To put it another way, the Legislature decided that any negative economic consequences that may result from effectuation of the price gouging statute were outweighed by the positive social consequences of preventing "any party within the chain of distribution of any goods from taking unfair advantage of the public during abnormal disruptions of the market."[57] It is that policy choice that the Attorney General must respect and effectuate in these rules.

This background informed the rulemaking, along with comments on a past Advanced Notice of Proposed Rulemaking, comments on a prior set of proposed rules treating many of the same subjects as the present proposed rule (the "First NPRMs"), and three additional considerations:[58]

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[56] *See generally* Casey Klofstad & Joseph Uscinski, *Expert opinions and negative externalities do not decrease support for anti-price gouging policies*, Res & Pol 1 (Jul-Sept 2023), https://journals.sagepub.com/doi/pdf/10.1177/20531680231194805; Justin Holz, et al., *Estimating the Distaste for Price gouging with Incentivized Consumer Reports*, 16 AM. ECON. J.: APPLIED ECON. 33 (2024) (arguing that popular opposition to price gouging is at least partially driven by "distaste for firm profits or markups, implying that the distribution of surplus between producers and consumers matters for welfare")

[57] G.B.L. § 396-r(1).

[58] The First NPRMs, numbered LAW-12-23-00006-P through LAW-12-23-00012-P were published in NY St Reg, March 22, 2023, at 24-29, *available at* https://dos.ny.gov/system/files/documents/2023/03/032223.pdf. Comments to the First NPRMs were considered in the drafting of this proposed rule, and have been published on OAG website.

First, the heart of the statute is a prohibition on firms taking advantage of an abnormal market disruption to unfairly *increase* their per-unit profit margins. Firms are allowed to *maintain* prior profit margins during an abnormal market disruption, and even increase total profit by increasing provision and thus sales. None of the proposed rules limit any firm from maintaining the per-unit profit margin it had for an essential product prior to the market disruption, even where that means increasing prices to account for additional costs not within the control of the firm imposed on the firm for the essential product. While the statute bans profiteering, the statute does not put any seller in a worse off position than that they were in prior to the disruption.

Second, the proposed rules are designed to help detect and enforce upstream price gouging, and not merely the retail-level price gouging that may be more noticeable to consumers. New York's retail sector employs over 800,000 workers.[59] They are a driver of economic health and central to communities around the State as employers, providers of essential products, and participants in local affairs. Retail establishments are also a major taxpayer.[60] Many retailers provide necessary goods, during, before, and after, market disruptions. Despite this, as the point of contact for most consumers, retailers are the most likely to get blamed when prices increase due to an abnormal market disruption, even if they are trying to themselves stay afloat after being the victims of upstream price gouging. By aiding enforcement efforts against upstream firms, and by clarifying that retailers themselves are not liable for merely passing on upstream costs imposed on them, OAG expects that New York's small businesses will benefit from the guidance provided by these rules.

Third, OAG was informed by comments by the Groundwork Collaborative, the American Economic Liberties Project, the Institute for Local Self Reliance, and Professor Hal Singer, as well as data and studies discussed in OAG Staff Report, that identified multiple ways in which corporate concentration can encourage price gouging.[61] Corporate concentration can exacerbate the effect of demand or supply shocks caused by an unexpected event, and firms in more concentrated markets may be more willing to exploit the pricing opportunity that a disruption offers. Big actors in concentrated markets already have more pricing power than small actors, and a market shock can amplify that pricing power. In a concentrated market, participants may be more accustomed to engaging in parallel pricing and preserving market share than in less

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[59] *See* New York Dep't of Labor, *Current Employment Statistics*, https://dol.ny.gov/current-employment-statistics-0 (listing current retail employment at 834,300) (last accessed January 21, 2025).

[60] In 2023, New York State sales taxes collected nearly twenty billion dollars. *See Fiscal Year Tax Collections: 2022-2023,* NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, https://www.tax.ny.gov/research/stats/statistics/stat_fy_collections.htm (showing that collected sales, excise and use taxes accumulated to $19.5 billion).

[61] *See* Comment of Groundwork Collaborative, ANPRM Comments at 47-161; Comment of American Economic Liberties Project, ANPRM Comments at 1-7; Comment of Institute for Local Self Reliance, ANPRM Comments at 13-15; Comment of Hal Singer, ANPRM Comments at 223-35.

concentrated markets, where firms compete more vigorously. It may be easier for big actors to coordinate price hikes during an inflationary period, even without direct communication between them.[62]

3. Needs and benefits:

This rulemaking proposes two new sections in a new price gouging article of the New York Regulations. The first section, proposed section 600.1, sets out several defined terms that will be used throughout other proposed rules concerning the price gouging statute.

The second section, 600.2, restates the text of G.B.L. § 396-r(3) with cross-references to the other proposed rules. This section 600.2 has two benefits. First, it will improve comprehensibility and ease of reference for all the price gouging rules by situating the remaining rules in the context of the statute. Second, it clarifies that the statute does not require a showing of common-law unconscionability to establish a violation of the price gouging statute if the Attorney General provides evidence of gross disparity in price from pre-disruption price or the trade area, as permitted by G.B.L. § 396-r(3)(b), and the defendant does not provide a satisfactory rebuttal under G.B.L. § 396-r(3)(c).[63]

Definitions

In almost all cases, the defined terms in proposed rule 600.1 are specified for the sake of brevity and convenience: phrases like "sale or offering for sale" or "abnormal disruption of the market" describe concepts that are more conveniently referred to by a shorthand term. A few definitions merit further discussion.

Essential Product

The phrase "essential product" is a shorthand for the goods and services with which the statute is concerned; the regulatory definition here simply collects into a single phrase the various definitions for "vital and necessary goods and services" set out in G.B.L. § 396-r(2). It also adds a clarification from case law that the determination of whether a product is vital and necessary is made from the perspective of the average reasonable person in the position of the buyer at the time of sale.

This point arose in *People v. Quality King Distributors, Inc*., where the defendant argued

[62] *See* Comment of Hal Singer, ANPRM Comments at 227 ("It is easier to coordinate with three rivals in an oligopoly than with thirty in a competitive industry . . . Inflation [allows firms to coordinate on prices] by giving firms a target to hit—for example, if general inflation is seven percent, we should raise our prices by seven percent. Inflation basically provides a 'focal point' that allows firms to figure out how to raise prices on consumers without communicating.").

[63] *See People v. Quality King Distributors*, 209 A.D.3d 62, 79 (1st Dep't 2022).

that the product under scrutiny—Lysol disinfectant wipes—was not "vital and necessary" because subsequent research showed such wipes were of minimal assistance in combating COVID-19. The Appellate Division disagreed: "[r]egardless of which party is correct in its assessment of the danger COVID-19 presented when lingering on surfaces and Lysol's effectiveness in eliminating or reducing that danger, consumers in the first several months of 2020 had good reason to believe that the virus could be killed if a surface were treated with a disinfectant. The Lysol essential product was, at least in the eyes of consumers, of the utmost importance and absolutely needed to address the terrible danger posed by COVID-19. Whatever wisdom hindsight might have to offer regarding the efficacy of Lysol in combatting the coronavirus, we put ourselves in the shoes of the consumer facing the emerging pandemic."[64]

Price

"Price" is defined as the maximum total of all fees or charges a buyer must pay for an essential product. It appears to be uncontroversial that a generator sold for $1,000 is the same "price" as a generator sold for $500 where the consumer must pay an extra $500 added as a "convenience fee" at checkout. This definition does *not* prescribe any manner of presentation of prices or "hidden fees," but merely clarifies that when determining the price a buyer pays for an essential product in the scrutinized sale, the statute looks to the entire amount a buyer pays for an essential product.

This definition has been proposed to simplify the price/cost analysis by focusing both enforcers and sellers on the final dollars-and-cents amount a buyer paid and then identifying and giving the seller credit for all the parts of that final amount on the cost side that the statute allows the seller to count.[65] The alternative where certain parts of the price would be excluded from the analysis complicates matters with no benefit, since most if not all of the parts that would conventionally be excluded from the price (government charges, for example) would, if included in the price, be countable as statutory costs.

Sale

The proposed rule clarifies that the transfer of goods and services between different legal persons under common ownership or control is not within the scope of the statute. This is most relevant to enterprises that distribute goods through state or regional subsidiaries (such that for example a procurement entity buys the goods, and then "sells" the goods to the subsidiary to then sell to third party buyers). This clarification ensures that businesses that structure themselves in this way are not put at a competitive advantage or disadvantage to businesses that transfer goods wholly within a single legal person. A party cannot cleanse itself of price gouging liability by

[64] 209 A.D.3d 62, 78–79 (1st Dep't 2022).

[65] Discussed in more detail in 13 N.Y.C.R.R. § 600.8.

constructing a transaction with itself or a straw purchaser to fabricate "costs" it then passes on down the supply chain.[66]

The definition of "sale" also clarifies that a contract for sale may incorporate many different "sales," each of which would be a separate "sale" for price gouging statute purposes.[67] Thus if for example a seller of gasoline contracted with a gas station in New York to provide between 10,000 and 20,000 gallons of gasoline at a rack in New York once a week, at an index-linked price, for the course of a year, the contract would encompass 52 sales, with each sale occurring on the date the gas station lifted the contracted-for gas, the quantity of the sale being the amount of gasoline the gas station lifted, and the price the actual price paid on that date.

This result is congruent with the Uniform Commercial Code definition of "sale" (in contrast to a "contract for sale") and is also consistent with the statutory purposes. Sellers cannot evade the price gouging statute by contracting with a buyer, before a disruption, to supply the buyer for $1 per unit during non-disruptions and $10 per unit during disruptions and claim that the price gouging statute does not apply because the "sale" took place outside the disruption. Sellers of commodities that elect to price supply contracts using a floating pricing scheme (e.g. index prices) must ensure that those supply contracts provide for a modification of floating price during disruptions such that the sales that take place during market disruptions do not do so at an unlawful price.[68] The price gouging statute is indifferent as to how and why a price was set. Liability attaches whenever a party "sell[s] or offer[s] to sell any such goods and services or both *for an amount which represents* an unconscionably excessive price."[69] The question is simply: what is the amount of the price at which the seller sold the product or offered it for sale?

Small Business

The definition of small business used in this regulation was derived by combining section 102(8) of the State Administrative Procedure Act with section 131 of the Economic Development Law, which sets out the leading statutory definition of "small business." It omits the qualifier in both statutes that the small businesses be within the State to avoid any implication

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[66] *See People v. Beach Boys Equipment Co*, 273 A.D.2d 850, 851 (4th Dep't 2000) (rejecting such "costs").

[67] *See* N.Y.U.C.C. § 2-106(1) (defining "contract for sale" which "includes both a present sale of goods and a contract to sell goods at a future time" in contrast to "sale" which consists "in the passing of title from the seller to the buyer for a price").

[68] G.B.L. § 396-r(2)(a). As discussed in the Regulatory Impact Statement to proposed rule 13 N.Y.C.R.R. § 600.8, index prices *are* highly relevant to the *cost* inquiry if the seller is buying their product at an index price and then selling at that same index price plus a consistent margin of profit, as the rise in the price of purchases via the index may naturally be matched by increasing the price of sales by the same index. This rule, by contrast, is concerned with substantive price gouging liability rather than a price gouging defense; for liability purposes, what matters is what price was charged, and not why the price was as it was.

[69] *Id.*

that the law will be applied differentially based on state of residence, as by its terms the statute's application turns on the location of the essential product rather than of its seller.[70]

Usual Course of Business

This definition in the proposed rule applies the common-sense understanding that, in the context of disruptions, the "usual course of business" ends not when the disruption occurs but when seller "knew or had reason to know that the disruption would occur." This is a necessary implication of the statutory text setting the pre-disruption price as the price charged "in the usual course of business immediately prior to the onset of the abnormal disruption of the market."[71] If it were sufficient for the sale to merely be before the disruption, the phrase "usual course of business" would be redundant in that sentence. Likewise, sellers cannot short-circuit the price gouging statute by adopting business practices on a clear day that provide for a price increase when the disruption begins.

Unconscionably Excessive Price

Proposed section 600.2 aims to set out a roadmap for most of the remaining rules, restating the statutory text of G.B.L. § 396-r while adding cross-references to the other proposed rules to illustrate in one place how the rules fit into the price gouging statute. This section has been added to improve the comprehensibility of the rules and identify areas where rulemaking has not been attempted at present—such as defining "unconscionably extreme" prices.

Proposed section 600.2 also addresses a longstanding point of confusion that has arisen the course of OAG's discussions with regulated parties: whether common-law unconscionability must be proven *in addition to* an unrebutted gross disparity in price from the pre-disruption price or gross excess in price compared to trade area prices. For example, suppose a seller of cases of Lysol disinfectant wipes with a pre-disruption price of $60 per case sells them at $88 per case following the onset of the COVID-19 emergency. Does this establish a *prima facie* violation of the price gouging statute, or must the Attorney General also show that the seller's price was unconscionable at common law?

The statutory text and relevant caselaw says "no." G.B.L. § 396-r(3)(b) provides that "in any proceeding" brought by the Attorney General under the statute, "prima facie proof that a violation *of this section* has occurred shall include evidence" of an unrebutted gross disparity. "This section" means the entire G.B.L. § 396-r.[72] Similarly, in *People v. Quality King*, the

[70] G.B.L. § 396-r(2)(e).

[71] G.B.L. § 396-r(3)(b)(i).

[72] G.B.L. § 396-r(3)(b). *See People v. Quality King Distribs., Inc*., 209 A.D.3d 62, 73 (1st Dep't 2022) (explaining that G.B.L. § 396-r(3)(b) outlines what is needed "to establish a prima facie showing of price gouging").

Appellate Division explained that the

> third element of a price-gouging claim that the AG must establish is that the good was sold (or offered for sale) for an unconscionably excessive price, which must be demonstrated by an unconscionably extreme amount of excess in price, an exercise of unfair leverage or unconscionable means, or both. *To make a prima facie showing of this element*, the AG must submit evidence establishing that the amount charged during the period of market disruption represents a gross disparity between the prices of the Lysol product and the price at which the product was sold or offered for sale by Quality King in the usual course of business immediately prior to the onset of the abnormal disruption of the market.[73]

Consistent with the statutory text, the Appellate Division held that evidence of gross disparities in price—without anything more—was sufficient to "demonstrate[], prima facie, that [the seller] sold the Lysol product at unconscionably excessive prices on at least several occasions."[74]

Despite the clear text and judicial application of the same, OAG has repeatedly encountered the argument that some form of common-law unconscionability is necessary to violate the statute even if a *prima facie* case has been made and not rebutted. This regulation, restating the statutory requirement that no such showing is needed, dispels such confusion.

Severability

Finally, a new section 600.10 clarifies that all sections in this Part (both those added in this rulemaking and those added in any other or subsequent rulemaking) are severable both from each other and individually. Although the rules, particularly the rules proposed in this rulemaking, contain cross-references for the convenience of the reader, they have been designed to work equally well separately or together, such that if any of the rules is held invalid, the remaining rules would continue to fulfil the purposes for which they were proposed.

4. Costs:

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely sets out largely non-substantive definitions.

b. Costs to agency, the State and local governments: The OAG does not anticipate that it will

[73] *Id.* (emphasis added).

[74] *Quality King*, 209 A.D.3d at 79.

incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed rule.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered no action, but concluded that action was prudent in the interests of clarifying other proposed regulations. Definitions sections are a commonly used part of regulations and both assist the drafter by standardizing various expressions and aid the reader by simplifying the substantive regulations themselves. Likewise, severability sections are standard practice in regulatory regimes that, like this one, contain multiple independent regulatory provisions.

9. Federal Standards: The proposed regulatory revisions do not exceed any minimum standards of the federal government for the same or similar subject. There is a strong presumption against preemption when states and localities use their power to protect public health and welfare.

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis For Small Businesses And Local Governments

The Attorney General determined that a Regulatory Flexibility Analysis for the proposed rule is not necessary because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[75]

Nonetheless, the Attorney General has elected to provide such an analysis. It is included below.

1. **Effect of Rule**. The effect of the rule is to set out various common definitions. It has limited, if any, substantive effect. This rule does not affect local governments, which may continue to enforce their own price gouging laws as before.

2. **Compliance Requirements**. Small business will not be required to take any affirmative action to comply with this rule. Local government would not be required to take any affirmative action to comply with this rule.

3. **Professional Services**. Neither small business nor local government is likely to need additional professional services to comply with this rule. It has no impact on local government and thus provides no cause for local government engagement of professional services. As for small businesses, the rule will create either the same or less demand for professional services. Legal advice may be indicated for a small business to determine the meaning of various statutory terms defined in this rule, but the rule provides more guidance for understanding those terms that will either clarify the application of the term (thus leading to less need for professional services) or require comparable legal services to those required to advise on the meaning of the statutory terms themselves.

4. **Compliance Costs**. This rule will impose no compliance costs on small businesses or local governments for the reasons stated above: insofar as any obligations are imposed on small businesses they already existed under the statute and have merely become easier to understand because of this rule, and the rule may reduce professional service expenses.

5. **Economic and Technological Feasibility**. Compliance with this rule requires no new investment or technology that does not presently exist, as small businesses can readily apply the

[75] *Seneca Nation of Indians v. State*, 89 A.D.3d 1536, 1538 (4th Dep't 2011).

principles set out in this rule.

6. **Minimizing Adverse Impact**. To the extent that this rule has an adverse impact on small businesses, the Attorney General has considered, and applied, the approaches prescribed in section 202-b of the State Administrative Procedure Act. The Attorney General has taken account of limited resources available to small businesses and local governments by providing various shorthand definitions.

The Attorney General considered and rejected creating exemptions from coverage of the rule for small businesses and local governments, as such an exemption would be in derogation of the text and purpose of the statute and would impinge on the general welfare, which is advanced by the eradication of price gouging from all parts of the marketplace. Given that these provisions mostly contain nonsubstantive definitions, an "exemption" from the provisions of this rule would be counterproductive.

7. **Small Business and Local Government Participation**. The OAG has actively solicited the participation of small businesses and local government in the rulemaking by providing direct notification of the notice of proposed rulemaking to local governments and associations representing small businesses. The Attorney General has relaxed all applicable rules of comment format, instead permitting comments be sent in any form to the email address stopillegalprofiteering@ag.ny.gov.

Rural Area Flexibility Analysis

The Attorney General determined that a Rural Area Flexibility Analysis for the proposed rule need not be submitted because the rule will not impose any adverse impact or significant new reporting, record keeping, or other compliance requirements on any public or private entities in rural areas. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[76]

Nonetheless, the Attorney General has voluntarily elected to provide such an analysis. It is included below.

1. **Type and Estimated Number of Rural Areas**. The statute, and therefore necessarily the rule, applies to all rural areas in the State.

2. **Reporting, Recordkeeping, and Other Compliance Requirements and Professional Services**. As described in the regulatory flexibility analysis above, no affirmative reporting, recordkeeping, or other compliance requirements are imposed on rural areas as a result of this rule; the effect of the rule will be either to maintain reliance on professional services at present levels or to decrease reliance on professional services.

3. **Costs**. None; see regulatory flexibility analysis above.

4. **Minimizing Adverse Impact**. As discussed above, this rule has no adverse impact on businesses, including rural businesses.

5. **Rural Area Participation**. The OAG has taken reasonable measures to ensure that affected public and private interests in rural areas have been given an opportunity to participate in this rulemaking. The Attorney General has relaxed all applicable rules respecting the form and format of comments; comments may be in any form and emailed to stopillegalprofiteering@ag.ny.gov.

[76] *Seneca Nation of Indians v. State*, 89 A.D.3d 1536, 1538 (4th Dep't 2011).