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

February 2025

Price Gouging

Notice of Proposed Rulemaking

Proposed Rule 600.4
Unfair Leverage of Market Position

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

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[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 600.4—Unfair Leverage of Market Position

Rule Text

Proposed Action: Add to Part 600.4 of Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Create a presumption of unfair leverage based on thresholds related to market share or market concentration.

Text of proposed rule:

600.4 Unfair Leverage of Market Position

(a) *Definitions*. In addition to the definitions set forth in 13 N.Y.C.R.R. § 600.1, in this rule:

> (1) "Herfindahl-Hirshman Index" is the sum of the squares of the market shares of each firm in a relevant market;
>
> (2) "market share" is the percentage of the relevant market controlled by the seller immediately prior to the onset of the abnormal disruption of the market;
>
> (3) "relevant market" is an area of effective competition, comprising both a relevant product market and a relevant geographic market, based on market circumstances immediately prior to the onset of the abnormal disruption of the market. A relevant product market consists of products that are reasonably interchangeable with the essential product in the scrutinized sale (whether they are essential products or not). A relevant geographic market consists of the areas where buyers can practically turn for supply of the relevant essential product in the scrutinized sale.

(b) "Unfair leverage," for purposes of General Business Law § 396-r(3)(a)(ii), includes but is not limited to unfair leverage of market position.

(c) A seller will be presumed to have engaged in unfair leverage of market position and thus engaged in an exercise of unfair leverage for purposes of General Business Law § 396-r(3)(a)(ii) if the seller sells an essential product during a disruption and:

> (1) the amount the seller charges for the essential product in the scrutinized sale is greater than the pre-disruption price; and,
>
> (2) immediately prior to the onset of the abnormal disruption of the market, the seller

(i) had a market share greater than 30% in a relevant market for that essential product; or
(ii) had a market share greater than 10% in a relevant market for that essential product and the relevant market had a Herfindahl-Hirschman Index of 1,800 or more.

(d) A seller may rebut the presumption of subdivision (c) of this rule with evidence that:

(1) the increase in the amount charged in the scrutinized sale preserves the margin of profit that the seller received for the same essential product prior to the abnormal disruption of the market; or

(2) additional costs not within the control of the seller were imposed on the seller for the essential product in the scrutinized sale; or

(3) specific circumstances in the relevant market demonstrate that, immediately prior to the onset of the abnormal market disruption, the relevant market was not highly concentrated and that the seller lacked market power in the relevant market notwithstanding the seller’s market share or the Herfindahl-Hirschman Index of the relevant market.

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]

[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

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[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

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[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

[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]

[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

[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 proposed rule provides guidance on one way in which the statutory term "exercise of unfair leverage" applies to sellers in concentrated markets for essential products. As described in more detail in OAG Staff Report, firms in markets that are concentrated in normal market circumstances pose a special risk of exercising unfair leverage and imposing unconscionably excessive prices during an abnormal market disruption.[63] Abnormal market disruptions enable market participants with already high market shares to unfairly "use[] the leverage provided by the market disruption to extract a higher price."[64]

The rule has been proposed in part to address a comment raised in connection with the proposal to establish a 10% threshold for gross disparities in price, as proposed 13 N.Y.C.R.R. § 600.6 does. In its comment to the Advance Notice of Proposed Rulemaking, the American Economic Liberties Project argued:

> Collusion requires the sharing of some form of information, whether sales volume, pricing plans, costs, plans for capacity increases or restrictions, or direct price increases. For large firms in consolidated industries, those barriers are already low, and by providing an upper limit to those price increases, OAG would be solving a cartel's coordination problem for it! If OAG selected 10% as the limit for sellers with leverage, sellers would be able to identically increase their prices by 9%, and credibly claim that their price increases are identical because of the constraints created by the rulemaking, rather than the collusion from which such increases actually stem. The same would go for 8%, 5%, or any other, more lenient standard.[65]

[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* OAG Staff Report at 12-14; *see also* Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, 58 REV. INDUS. ORG. 25-27 (2020), https://scholarship.law.georgetown.edu/facpub/2285.

[64] *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 698 (1988).

[65] Comment of American Economic Liberties Project, ANPRM Comments at 2-7.

Or, as the U.S. Court of Appeals for the D.C. Circuit put it: "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, . . . to restrict output and achieve profits above competitive levels."[66] The New York price gouging statute reflects a judgment by the New York Legislature that the risk of supply constriction arising from the absence of temporary profit spikes is outweighed by fairness concerns.[67]

The proposed rule addresses such tacit collusion concerns by providing a presumption of the exercise of unfair leverage where leverage and pricing power exist, and coordination or tacit collusion is most likely.[68] The rule supports the purposes of the statute, not least because holders of large market share or participants in concentrated industries may already be charging super-competitive prices and thus reaping excess profits in the normal course.[69]

The proposed rule establishes a rebuttable presumption of unfair leverage for any price increase for an essential product during an abnormal market disruption,[70] provided that, immediately prior to the abnormal market disruption, at least one of two indicia of market power or market concentration is satisfied: (1) the seller has a market share greater than 30% in a relevant market; or (2) the seller has a market share greater than 10% in a relevant market with an Herfindahl-Hirshman Index of at least 1,800.

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[66] *FTC v. H.J. Heinz Co*., 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986)).

[67] *See* Governor's Approval Mem., Bill Jacket, L. 1979, ch. 730 at 5; Sponsor's Mem., Bill Jacket, L. 2020, ch. 90 at 6.

[68] *See* FALK BRÄUNING, JOSÉ L. FILLAT & GUSTAVO JOAQUIM, FED. RSRV. BANK OF BOS. CURRENT POL'Y PERSPS., COST-PRICE RELATIONSHIPS IN A CONCENTRATED ECONOMY 2, 8 (2022) (finding that the pass-through of cost shocks into prices is "25 percentage point[s] larger . . . when industries become more concentrated at the rate they have in the United States during our estimation sample of 2005 through 2018" and concluding that "our results suggest that the recent rise in concentration is an amplifying factor for the pass-through of current cost shocks emanating from supply shortages, energy price shocks, and labor market tightness."); *see also* Hal Singer, *Antitrust Should Be Used to Fight Inflation*, AM. PROSPECT (Feb. 2, 2022), https://prospect.org/economy/antitrust-should-be-used-to-fight-inflation/ ("The pandemic provides the cover for coordinated pricing. Indeed, general inflation can serve as a pretext for a coordinated price hike."); Comment of Hal Singer, APNRM Comments at 228 (noting that "the largest bouts of inflation in 2021 tended to occur in the most concentrated industries").

[69] *See DoorDash, Inc. v. City & Cnty. of San Francisco*, No. 21-cv-05502-EMC, 2022 WL 867254, at *2 (N.D. Cal. Mar. 23, 2022) (discussing ordinance focused on combating unfair leverage exercised in concentrated markets); *see also* Comment of Groundwork Collaborative, ANPRM Comments at 47-155; Comment of American Economic Liberties Project, ANPRM Comments at 4-7.

[70] Under New York law, no price increase is too small to constitute unlawful price gouging if effectuated through unfair leverage. *People v. Two Wheel Corp.*,71 N.Y.2d 693, 699 (1988).

The proposed rule's definitions of "Herfindahl-Hirshman Index,"[71] "market share,"[72] and "relevant market"[73] follow recognized definitions from competition law, providing further predictability as to the interpretation and application of the proposed rule.

The first indicium recognizes that a firm with at least a 30% share in a relevant market has an outsized role in price setting. In the antitrust context, a market share over 30% is a recognized market share threshold that, in ordinary market circumstances, presents a threat of undue market concentration.[74] Such market concentration exacerbates the risk of unconscionably excessive pricing during an abnormal market disruption because buyers would have fewer options to which to turn and there is less likelihood that competitors would effectively restrain price increases by a firm with over 30% market share.[75]

The second indicium recognizes that concentrated markets are more susceptible to collusion, coordination, price mirroring, and high prices.[76] The Herfindahl-Hirshman Index is a recognized measure of market concentration in the antitrust context, and markets with a

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[71] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 930a (5th d. 2022) (the Herfindahl-Hirschman Index); *FTC v. IQVIA Holdings Inc.*, No. 23-cv-06188, 2024 WL 81232, at *34 (S.D.N.Y. Jan. 8, 2024).

[72] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 535 (5th ed. 2022) (Measuring Shares Within a Given Market).

[73] *Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 52-53 (2d Cir. 2016); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 40 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

[74] *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364 (1963); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir. 1989); *FTC v. IQVIA Holdings Inc.*, No. 23-cv-06188, 2024 WL 81232, at *32-33 (S.D.N.Y. Jan. 8, 2024); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 6 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023. pdf.

[75] *See* Comment of American Economic Liberties Project, ANPRM Comments at 2-7; *see also* FALK BRÄUNING, JOSÉ L. FILLAT & GUSTAVO JOAQUIM, FED. RSRV. BANK OF BOS. CURRENT POL'Y PERSPS., COST-PRICE RELATIONSHIPS IN A CONCENTRATED ECONOMY 1, 8 (2022) (finding that the pass-through of cost shocks into prices is "25 percentage point[s] larger . . . when industries become more concentrated at the rate they have in the United States during our estimation sample of 2005 through 2018" and concluding that "our results suggest that the recent rise in concentration is an amplifying factor for the pass-through of current cost shocks emanating from supply shortages, energy price shocks, and labor market tightness."); Hal Singer, *Antitrust Should Be Used to Fight Inflation*, THE AM. PROSPECT (Feb. 2, 2022), https://prospect.org/economy/antitrust-should-be-used-to-fight-inflation/ ("The pandemic provides the cover for coordinated pricing. Indeed, general inflation can serve as a pretext for a coordinated price hike."); Comment of Hal Singer, APNRM Comments at 228 (noting that "the largest bouts of inflation in 2021 tended to occur in the most concentrated industries").

[76] *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001); *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 35 (D.D.C. 2022) ("That competition is likely to be greatest when there are many sellers, none of which has any significant market share, is common ground among most economists" (quoting Phila. Nat'l Bank, 374 U.S. at 363)); *Litovich v. Bank of Am. Corp.*, 568 F. Supp. 3d 398, 430 (S.D.N.Y. 2021); *Miami Prods. & Chemicals Co. v. Olin Corp.*, 449 F. Supp. 3d 136, 158 (W.D.N.Y. 2020); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 532a (5th ed. 2022).

Herfindahl-Hirshman Index over 1,800 are considered highly concentrated.[77] Since a market with a Herfindahl-Hirshman Index over 1,800 is already operating in a highly concentrated market, it is appropriate to presume exercise of unfair leverage for any seller in such a market with at least 10% market share when the seller raises prices during an abnormal market disruption.[78]

The proposed rule creates presumptions, not conclusive proof of exercise of unfair leverage. The proposed rule replicates defenses codified at G.B.L. § 396-r(3)(c) and allow a seller to rebut a presumption of unfair leverage with evidence that the increase in the amount charged preserves the margin of profit that the seller received for the same essential product prior to the abnormal market disruption, or additional costs not within the control of the seller were imposed on the seller for the essential product. Such defenses are appropriate here because they may indicate that the seller is not charging unconscionably excessive prices, but rather is maintaining its margin or profit or accounting for additional costs.[79]

In addition, a seller may seek to defeat the presumptions in the proposed rule with evidence that specific circumstances in the relevant market demonstrate that the relevant market is not highly concentrated or the seller lacks market power in the relevant market. A seller that triggered the concentration presumption may prove that specific circumstances rendered a market with an HHI of 1,800 not highly concentrated.

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[77] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 5-6 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf. This rule adopts the latest Merger Guidelines HHI threshold. "Although the Agencies [i.e., the DOJ and FTC] raised the thresholds for the 2010 guidelines, based on experience and evidence developed since, the Agencies consider the original HHI thresholds [i.e., 1,800] to better reflect both the law and the risks of competitive harm suggested by market structure and have therefore returned to those thresholds." *Ibid*.

[78] Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, 2 HANDBOOK INDUS. ORG. 951 (Richard Schmalensee & Robert D. Willig eds., 1989); Herbert J. Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2003 (2018). In 2015, John Kwoka published a meta-analysis of post-merger studies to examine the impact on prices of mergers that were approved. Of forty-two mergers studied, thirty-four led to price increases after controlling for other factors. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 110-11 (2015). *See also, e.g.*, Hal Singer, *Antitrust Should Be Used to Fight Inflation*, THE AM. PROSPECT (Feb. 2, 2022), https://prospect.org/economy/antitrust-should-be-used-to-fight-inflation/ ("[E]conomics teaches us that concentrated industries are more susceptible to price-fixing. The pandemic provides the cover for coordinated pricing. Indeed, general inflation can serve as a pretext for a coordinated price hike."); Orley Ashenfelter et al., *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S96 (2014) ("Ex post evaluations of consummated mergers have found that prices can increase following mergers that leave only three or four major market participants. This implies that, unlike Bork's suggestion, antitrust agencies should not limit their attention to mergers that may create monopolies or dominant firms."); *see generally* Falk Bräuning et al., *Current Policy Perspectives—Cost-Price Relationships in a Concentrated Economy*, FED. RSRV. BANK OF BOS., (May 23, 2022), https://www.bostonfed.org/media/Documents/Workingpapers/PDF/2022/cpp20220523.pdf.

[79] For an extensive treatment of how costs and profit margins are to be measured, see proposed rule 13 N.Y.C.R.R. § 600.8.

Finally, this rule does not purport to limit the acts that could be found to be an exercise of unfair leverage, additional examples of which are set out in proposed rule 13 N.Y.C.R.R. § 600.3.

4. Costs

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the State and local governments: The OAG does not anticipate that it will 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 for the reasons discussed above concluded that action was prudent.

The Attorney General considered alternatives for the 30% market share presumptive threshold. Comments made in response to notice of proposed rulemaking LAW-12-23-00010-P argued that the 30% threshold, first established in *U.S. v. Philadelphia National Bank*,[80] is not consistent with modern competition law.[81] The Attorney General concluded that the 30%

[80] 374 U.S. 321 (1963).

[81] *See, e.g.*, Comment of Am. Fuel & Petrochemical Mfgrs, First NPRM Comments at 72; Comment of Am. Petroleum Institute, First NPRM Comments at 91.

threshold was appropriate. The *Philadelphia National Bank* presumption has been reaffirmed by federal courts in New York as recently as January 2024.[82] And the most recent version of the Federal Trade Commission and Department of Justice Merger Guidelines declares that "a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition" when combined with an increase in market concentration.[83]

The Attorney General considered retaining the prior rule draft's use of the five-or-fewer-significant competitors test for market concentration but concluded that the better course was to employ the standard used by the 2023 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, which concluded that markets with an Herfindahl-Hirshman Index greater than 1,800 were highly concentrated based on the federal agencies' enforcement experience. Employment of more familiar market concentration measures also facilitates both compliance and enforcement and avoids difficulties of definition.

The proposed rule sets the market share needed to trigger a presumption of unfair leverage of market position in an 1,800+ HHI at 10%. The Attorney General considered alternative market share thresholds. A threshold of some sort was necessary to avoid discouraging new entrants in highly concentrated markets, an issue in situations like weather disruptions that suddenly create demand for essential products where little demand previously existed (e.g. roof repair). A 10% market share pre-disruption was selected as a middle ground that would avoid sweeping in new entrants while still recognizing the price gouging risks that arise from market concentration such that holders of a less than 30% market share in a highly concentrated market could engage in acts of unfair leverage.

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.

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[82] *See FTC v. IQVIA Holdings Inc.*, 23-cv-06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024) (declaring "the Court is hard-pressed to conclude that the *Philadelphia National Bank* presumption has been repudiated. Second Circuit precedent appears to directly contradict that conclusion" and collecting cases).

[83] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

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." [84]

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 prescribe a specific instance in which unfair leverage, for purposes of G.B.L. § 396-r(3)(a)(ii), will be presumed: when a party that possesses either a market share greater than 30% in a relevant market or is part of a highly concentrated relevant market increases prices by any amount without cost or profit margin maintenance justification or evidence that the market is sufficiently competitive. The rule does not by its terms apply to local government.

Although it is possible that this rule affects small businesses, such a possibility is remote: a small business is "resident in this State, independently owned and operated, and employs 100 or less individuals."[85] It is highly unlikely that such a business would possess a 30% market share of a market for an essential product *before* the onset of the disruption (the relevant measure, as the proposed rule makes clear). Insofar as small retailers may be forced to do business with concentrated suppliers or suppliers with large market share, this rule will protect and advance the interests of small businesses as it will both impose heavier requirements on larger businesses and make it easier for smaller businesses to identify additional costs imposed by distributers.

Because the law and this rule are statewide in effect, to the extent it affects them at all, this rule affects all small businesses and all local governments in the State.

2. **Compliance Requirements**. If any small business is in fact covered by this rule, it need not take any affirmative action to comply with this rule. At present, G.B.L. § 396-r(3)(a)(ii) forbids price increases during abnormal disruptions of the market that are the essential product of "unfair leverage." This rule describes one specific example of this behavior. A business covered by the rule need only refrain from raising prices during an abnormal market disruption except to cover

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

[85] S.A.P.A. § 102(8)

bona fide cost increases. Absent cost increases impelling a price increase, a business can comply with this rule by doing nothing. Local government would not be required to take any affirmative action to comply with this rule as it does not affect them.

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 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 presence or absence of "unfair leverage;" the rule provides more guidance as to one example of unfair leverage 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 "unfair leverage."

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 become more concrete as a result of this rule.

5. **Economic and Technological Feasibility**. Compliance with this rule requires no new investment or technology that does not presently exist.

6. **Minimizing Adverse Impact**. The rule has a positive impact on small business and no impact on local government. Small businesses are already subject to a requirement to avoid exercising unfair leverage; almost all businesses subject to this rule will be larger businesses supplying small businesses, thus leading to small businesses being positively rather than adversely impacted by price restraint requirements.

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 limiting this rule to possessors of 30% or greater market share or businesses with 10% or more market share in highly concentrated markets.

Insofar as businesses would have previously considered it appropriate to raise prices based on interpretations of the statute that are not consistent with its text or purpose, this adverse impact is the intentional effect of the statute in its efforts to curb profiteering during abnormal market disruptions. This rule does not derogate a small business's statutory defense of increased costs or profit margin maintenance.

The Attorney General considered creating exemptions from coverage of the rule for small businesses and local governments and has largely done so; as discussed above, the rule does not apply to local governments and the market share and market concentration thresholds are so high as to exclude most, if not all, small businesses. The Attorney General determined any blanket small business exception 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.

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."[86]

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, the Attorney General concludes that as to all rural businesses this rule has no adverse impact and may well be beneficial by restraining price increases by suppliers of essential products to rural areas. Rural businesses, like urban ones, have always been subject to the statutory unfair leverage requirement, rendering the additional burden of this rule minimal.

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.

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