Office of the New York State Attorney General Letitia James

Economic Justice Division

February 2025

Price Gouging

Notice of Proposed Rulemaking

Proposed Rule 600.5
Pre-Disruption Price Determination

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 600.5—Pre-Disruption Price Determination/Dynamic Pricing

Rule Text

Proposed Action: Add New Part 600.5 of Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Provide means by which pre-disruption price may be established for purposes of proving a prima facie case pursuant to General Business Law § 396-r(3)(b)(i).

Text of proposed rule:

600.5 Determination of Pre-Disruption Price For Prima Facie Case

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

(1) The "benchmark date" is presumed to be the first of the following: (i) the date of the triggering event; or, (ii) the first date, within thirty days prior to the date of the triggering event, on which the seller increased the price at which the essential product was sold in a departure from the seller's usual course of business practices. Either the Attorney General or the seller may rebut this presumption by establishing by a preponderance of the evidence that the relevant actual or imminently threatened change in the market resulting from a triggering event occurred on a different date than the presumptive benchmark date, in which case that different date shall be deemed the benchmark date.

(2) "For-hire transportation services" means the offering of vehicular ground transportation by a seller for a price, the origin, destination, or both being within New York State, whether provided by the seller itself or provided by third parties employing the seller's platform to connect passengers and drivers. For-hire transportation services include, but are not limited to, the transportation services provided by transportation network companies as that term is defined in section 1691 of the Vehicle and Traffic Law; taxicabs, as defined in section 148-a of the Vehicle and Traffic Law and section 19-502 of the administrative code of the city of New York, or as otherwise defined in local law; livery vehicles, as defined in section 121-e of the Vehicle and Traffic Law, or as otherwise defined in local law; a black car, limousine, or luxury limousine, as defined in section 19-502 of the administrative code of the city of New York, or as otherwise defined in local law; a for-hire vehicle, as defined in section 19-502 of the administrative code of the city of New York, or as otherwise defined in local law; or a bus, as defined in

section 104 of the Vehicle and Traffic Law (but not a bus operated by a government for purposes of the provision of public transportation);

(3) "immediately prior to" a given date means the 30 calendar days before that date (but not the date itself);

(4) "seasonal events" means events that result in the demand for ride-hailing services in the relevant location being different from the usual or expected level of demand on the day of the week and time of day in question; seasonal events include but are not limited to triggering events, public or religious holidays, annual diplomatic gatherings, and large entertainment events;

(5) "type of service" means the seller's advertised tiers of service quality (for example, "economy," "deluxe," "XL-sized car").

(b) *General Rule for Determining Pre-Disruption Price*. In determining whether a prima facie case of price gouging is established pursuant to General Business Law § 396-r(3)(b)(i) for a given scrutinized sale, the value of the essential product as measured by the price at which the essential product was sold by the seller in the usual course of business immediately prior to the onset of the abnormal disruption of the market ("the pre-disruption price") shall be:

(1) If it was the seller's usual course of business to offer the essential product at a single price on a given day irrespective of the buyer, the price at which the seller last offered the essential product immediately prior to the benchmark date; or,

(2) If it was the seller's usual course of business to offer the essential product at different prices depending on the buyer:

(i) the price charged or offered by the seller to the same buyer for the same essential product in the last sale to that buyer that took place immediately prior to the benchmark date; or,

(ii) If the buyer in the scrutinized sale was not offered or sold the same essential product in the thirty days prior to the benchmark date, the last sale made immediately prior to the benchmark date in the seller's usual course of business to a different person whom, at the time of that sale, the seller would have treated the most similarly to the buyer in the scrutinized sale; or,

(iii) if it is not practical to determine the pre-disruption price by application of the method in subdivision (b)(2)(i) or (b)(2)(ii) of this rule, the median price charged by the seller to all buyers for the same essential product in all sales made by the seller in the State of New York immediately prior to the benchmark date.

(3) If it was the seller's usual course of business to offer the essential product at variable prices on a given day but without respect to the identity of the buyer, the median price charged by the seller to all buyers for the same essential product in all sales made by the seller in the State of New York immediately prior to the benchmark date.

(c) *Rules Specific to Particular Essential Products*. Notwithstanding subdivision (b) of this rule, the pre-disruption price for the essential products listed in this subdivision (c) shall be determined in accordance with the appropriate provision of this subdivision (c).

(1) *For-Hire Transportation Services*. In determining the existence of a gross disparity in price of for-hire transportation services, the pre-disruption price and price of the scrutinized sale shall be expressed as the total amount charged to the buyer divided by the distance driven ("price per mile"). The pre-disruption price for the provision of for-hire transportation services ("a ride," with respect to a challenged transaction for a ride, "the scrutinized ride") shall be the higher of:

(i) the median price per mile of all rides of the same type of service sold by the seller to all buyers within any part of New York State 20 miles of any point of the route of the scrutinized ride, on the same day of the week as the scrutinized ride, within one hour of the time of day at which the scrutinized ride took place, for each of the four weeks preceding the benchmark date; or,

(ii) If the seller or the Attorney General proves by a preponderance of the evidence that it is more likely than not that (A) the price of some or all of the rides making up the median calculated pursuant to subdivision (c)(1)(i) was abnormally high or abnormally low owing to one or more seasonal events and (B) other rides taking place within 30 days before the benchmark date more closely resemble the scrutinized ride, in all relevant respects other than price, than the rides used to supply the pre-disruption price that would otherwise be set by subdivision (c)(1)(i), the median price of those other rides.

(2) *Reserved for future rulemakings*.

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

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[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]

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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

[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 rule addresses a common question that arises when considering whether a price charged after a disruption is "grossly excessive" compared to the pre-disruption price: what sale or offering for sale supplies the pre-disruption price against which the scrutinized sale's price will be measured?

The statute defines the pre-disruption price as the "price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the [disruption]." Many businesses price their essential products at a fixed, take-it-or-leave-it price regardless of the buyer—prices on supermarket shelves or in retail outlets. When a seller uses this "Wanamaker" approach to pricing, the pre-disruption benchmark price can be readily identified by examining what the fixed price was on the benchmark date (or, if there were multiple prices charged on that date, the median of those prices).[63]

But when a seller uses "dynamic pricing," a term for pricing schemes that adjust the price of a good or service on a sale-by-sale basis in response to independent variables, often but not invariably with the assistance of computer algorithms,[64] it is problematic to uncritically compare the price "at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market"[65] to prices charged post-disruption because there may be hundreds of different pre-disruption prices charged within a reasonable interpretation of the time period "immediately prior to the onset" of the disruption.

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[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] So named because Jon Wanamaker, a Philadelphia entrepreneur, is widely credited with popularizing the fixed price tag in his department stores, replacing a system where customers and sellers haggled over price. *See* Christopher Beam, *Welcome to Pricing Hell*, THE ATLANTIC (April 16, 2024), https://www.theatlantic.com/ideas/archive/2024/04/surge-pricing-fees-economy/678078/.

[64] Dynamic pricing lacks a generally agreed-upon definition but for a broad discussion of dynamic pricing across multiple industries *see* Marco Bertini & Oded Koenigsberg, *The Pitfalls of Pricing Algorithms: Be Mindful of How They Can Hurt Your Brand*, HARV. BUS. REV. 74, 77 (Sept.-Oct. 2021).

[65] G.B.L. § 396-r(3)(b)(i). *See* Brian Wallheimer, *Are you Ready for Personalized Pricing?*, CHI. BOOTH REV. (Feb 26, 2018), https://www.chicagobooth.edu/review/are-you-ready-personalized-pricing.

For example, the "price" of a can of baby formula sold by an online retailer, even to the same consumer, might include prices ranging from $3.99 to $4.60 in the week prior to a market disruption.[66] After a market disruption, if a consumer brings a complaint for a $4.70 can of baby formula, the question becomes whether the $4.70 can represents a relatively small price increase, or unconscionably excessive pricing (assuming constant costs), a question that depends on which of the prices charged in the preceding week is the benchmark. Multiply that by a range of complaints of baby formula cans costing between $4.50 and $5.00, and the problem becomes more complex. The "price" of a delivery service may also vary substantially, with a 2-hour grocery shopping and delivery ranging from $40 to $80, depending on the seller of the delivery services' analysis of the willingness to pay, based on time of day, day of the week, and individual buyer characteristics.[67]

Rulemaking is needed because in the absence of rulemaking, it may be unclear what baseline price can be used to determine whether a price increase is unconscionably excessive. In considering this problem, the Attorney General determined that there were three sets of general pricing systems that required attention: "Wanamaker" fixed prices charged without regard to the identity of the buyer, buyer-specific dynamic prices, and buyer-agnostic dynamic prices. As discussed below, one specific pricing system, that employed by for-hire ground transportation, received more particularized treatment.

Most prior price gouging enforcements have concerned Wanamaker prices. In *Two Wheel*, for example, the Court looked to the "base price" against which post-disruption prices were assessed as "the price charged by respondents for sales immediately preceding the hurricane. These prices closely tracked the manufacturer's suggested retail prices. Accordingly, if there were no recent sales of a particular model, the manufacturers' suggested retail price was used as a base price."[68] In these and similar cases where products are sold to buyers with fixed or printed price tags, the courts have looked to the publicly posted price set in the usual course of business as the benchmark pre-disruption price, and the rule does the same.[69]

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[66] *See generally* Neel Mehta, Parth Detroja & Aditya Agashe, *Amazon Changes Prices on Its Essential products About Every 10 Minutes—Here's How and Why They Do It*, BUS. INSIDER (Aug. 10, 2018), https://www.businessinsider.com/amazon-price-changes-2018-8.

[67] Daisuke Wakabayashi, *Does Anyone Know What Paper Towels Should Cost?*, N.Y. TIMES (Feb. 27, 2022), https://www.nytimes.com/2022/02/26/technology/amazon-price-swings-shopping.html; Comment of Institute for Local Self-Reliance, ANPRM Comments at 15 ("These dynamic pricing algorithms adjust prices in real time, minute-by-minute, in response to numerous factors, including price changes made by other sellers. Dynamic pricing can result in lock-step price changes, as one seller's price adjustment triggers another, which triggers another, and so on.").

[68] *People v. Two Wheel Corp*, 71 N.Y.2d 693, 696 n. 1 (1988).

[69] *See, e.g.*, *People v. Chazy Hardware*, 176 Misc. 2d 960, 962 (Sup Ct, Clinton County 1998) (describing the seller "charging $780 for the 4400 model [electric generator] and $890 for the 5400 model . . . increas[ing] the price of the

Buyer-specific prices were discussed at length in the recent case *People v. Quality King*, in which the Appellate Division held that because

> in the usual course of business, [the seller] charged different customers different prices for the same goods. . . . for each transaction involving the [essential product] that occurred on or after [the onset date], generally the price charged for the post-onset transaction must be compared to the price charged to the same customer immediately prior to [the onset date] [FN 10].
>
> [FN 10] [Where n]o pre-onset price data exists for [a given] customer[, t]o ascertain whether any of these customers were gouged and, if so, the extent of the gouge, consonant with General Business Law § 396-r, the court should identify a similar-type customer who made a pre-onset purchase from [the seller]. The court can compare the post-onset transaction of the new customer to the price charged by [the seller] to the similar customer immediately prior to [the onset date], and gauge whether there is a gross disparity between the prices.[70]

A third category of pricing is variable pricing that is buyer-agnostic but dependent on other variables, such as discounting food and drink sales at unpopular times or lowering the price of food as it reaches its sell-by date.[71] Although past price gouging investigations have dealt with at least some such pricing schemes, the question of what prices to use for comparison has hitherto been academic given the size of the disparities between the prices in the scrutinized transactions and any plausible pre-disruption price.[72] Given the dearth of caselaw on the subject, these price-setting systems would particularly benefit from more clarity on how to calculate the pre-disruption benchmark.

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14 uncommitted 4400 model generators and the 1 remaining 5400 model to $1,190"); *People v. Wever Petroleum*, 14 Misc. 3d 491, 495 (Sup Ct, Westchester County 2006) ("the price of the gasoline at Wever Petroleum's ExxonMobil station in Schaghticoke, New York, immediately before Hurricane Katrina was $2.73 per gallon...[i]n contrast, the price of gasoline at [that station] immediately following Hurricane Katrina was $3.14, $3.25, and $3.60 per gallon [referencing various daily prices]").

[70] 209 A.D.3d 62, 79-80 (1st Dep't 2022) (emphasis added).

[71] *See* Whizy Kim, *Uber-Style Pricing is Coming for Everything*, VOX (Mar. 19, 2024), https://www.vox.com/money/24105250/fast-food-restaurants-dynamic-pricing-algorithm-wendys; B. Adenso-Diaz et al., *Effects of Dynamic Pricing of Perishable Essential Products on Revenue and Waste*, 45 APPLIED MATHEMATICAL MODELLING 148 (2017).

[72] *See, e.g.*, Office of the Attorney General, *Attorney General James Stops Three Amazon Sellers from Price Gouging Hand Sanitizer and Recoups Funds for New Yorkers* (Nov. 17, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-stops-three-amazon-sellers-price-gouging-hand-sanitizer

A few commenters to prior rulemaking proposals expressed the view that even if default rules could apply to some sectors of the essential product economy, at least one sector—for-hire ground transportation services—required bespoke pre-disruption price calculations.[73] The Attorney General has accepted this submission and divided the rule into two parts. First, the proposed rule sets out general default method for determining the pre-disruption price. Then, the proposed rule provides specific rules for the for-hire ground transportation sector, leaving space for further industry-specific rules (although no other industry-specific rules are being proposed at this time).

In all cases, the purpose of the rule is to help everyone—consumers, businesses, and enforcers alike—calculate "the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market."[74]

Benchmark Date Calculation

Before describing either the general or special rules for pre-disruption price determination, subdivision (a)(1) of the proposed rule first tackles a threshold issue: what is the date on which "the usual course of business immediately prior to the onset of the abnormal disruption of the market"[75] ends? The price gouging statute requires that determining this date to identify the sales or offerings for sale that will form the pre-disruption price.

In many situations, the date on which a seller departs from the usual course of business immediately prior to the abnormal disruption of the market will be the date of the event that triggers the abnormal disruption. But not always. There are two considerations that may push the benchmark date earlier than the date of the triggering event: if, before the triggering event, the disruption resulting from the triggering event is "imminently threatened," or the seller departs from its "usual course of business," the statute moves the benchmark date to the date of the threat or departure, whichever is earlier.[76]

The price gouging statute is usually triggered for the first time by the imminent threat of the triggering event and not the triggering event itself. Hurricane Gloria, the disruption at issue in *People v. Two Wheel*, struck Long Island on September 27, but there was consensus between all parties and the Court in *Two Wheel* that the disruption began September 25 or earlier, as by September 26 the hurricane was imminently threatened even though at that point it was still

[73] *See* Comment of Uber Technologies, First NPRM Comments at 113-14; Comment of Tech:NYC, First NPRM Comments at 120; Comment of Lyft, Inc., First NPRM Comments at 131.

[74] G.B.L. § 396-r(3)(b)(i).

[75] *Ibid*.

[76] *Ibid*.

centered around North Carolina.[77] In *Quality King*, for another example, the Court determined that the abnormal disruption to the Lysol market from COVID-19 began February 26, 2020, even though the Governor's declaration of emergency was issued on March 7, 2020, because that was the date that "the United States faced a situation requiring immediate and extraordinary action . . . by that date, a deadly disease that health care providers and systems in various parts of the world could not contain was likely to spread in our country, and the citizenry needed to proactively brace for the threat."[78]

Next, subdivision (a)(1) of this proposed rule elaborates on the statutory requirement that the pre-disruption price must be measured *not only* "immediately prior to the onset of the abnormal disruption of the market" *but also* "in the usual course of business." The purpose of "the usual course of business" language is to ensure that a seller that, for example, gets special advance warning of a disruption cannot preemptively raise their prices before what would otherwise be the benchmark date to avoid price gouging liability.

The regulation implements the "usual course of business" qualifier by setting the benchmark date as the date, within 30 days of the triggering event, that the seller raised the price of the product in a departure from the seller's usual course of business practices. To use both literally and metaphorically a phrase used in commercial litigation, the benchmark date is the last "clear day" before the disruption becomes threatened.[79] "Usual course of business" is defined in proposed rule 13 N.Y.C.R.R. § 600.1, a definition that clarifies that a "usual course of business practice" that provided for price increases in disruptions is not, for statutory purposes, a usual course of business practice.

These qualifications work together. Suppose ACME is the State's only supplier of baby formula, an essential product. On February 2, XYZ, a retailer who buys baby formula from ACME, gets a tip that the FDA is about to shut down ACME's factory starting February 3. Anticipating a spike in demand for formula, XYZ preemptively doubles its formula prices that same day, February 2. The shutdown duly occurs on February 3; news of the shutdown becomes widespread on February 4, and the governor issues a declaration of emergency on February 5.

Suppose XYZ now sells formula on February 6 at a price equal to the doubled price it set when it first learned of the imminent shutdown. Against what benchmark price should those sales be compared: the February 1 price (before any prices were modified), the February 2 price

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[77] 71 N.Y.2d 693, 696 n.1 (1988). *See* U.S. Dep't of Commerce, Atlantic Oceanographic & Meteorological Laboratory, *30th Anniversary of Hurricane Gloria*, https://www.aoml.noaa.gov/hurricane_blog/30th-anniversary-of-hurricane-gloria/ (review of Hurricane Gloria's course day by day and collecting sources) (last accessed January 21, 2025).

[78] 209 A.D.3d 62, 76 (1st Dep't 2022).

[79] *See Kellner v. AIM ImmunoTech Inc.*, 307 A.3d 998, 1024 (Del. Ch. 2023).

(when XYZ doubled prices in anticipation of the disruption), the February 3 price (the day the disruption proper began), or the February 4 price (immediately prior to the declaration of disruption)? Here, the doubling of prices in response to the rumor was a departure from the usual course of business—such that the last sale to take place both immediately prior to the disruption and in the usual course of business was in fact a sale made February 1. It is the day before the usual course of business ended (that is, February 1), even if that moment comes before the abnormal disruption of the market was threatened, that is the benchmark date.

This analysis would not change even if XYZ had a long-standing policy that read "If we learn of imminent supply disruptions, we will double the price of the product being disrupted." Although in the colloquial sense we might say XYZ raised their prices during disasters "in the usual course of business," in the *statutory* sense of that term the departure from pricing practices employed under normal market conditions (i.e. markets *not* marked by disruptions resulting from triggering events) is sufficient to take the pricing activity outside the usual course of business.

In unusual circumstances, it may be possible that the abnormal disruption occurs substantially after the date of the triggering event. For example, the used car market experienced a disruption resulting from the COVID-19 national emergency but that disruption manifested more than a year after the triggering date of the emergency because it was a direct result of a shutdown in new car production, resulting from the emergency, that took a year to flow into the used car market.[80]

To accommodate this scenario, the benchmark date rules described above merely establish a presumption that can be rebutted by either the seller or the Attorney General establishing that it is more likely than not that a different date was the date on which the change in the market occurred. If so, the benchmark date is that different date. This structure provides more predictability for most cases while ensuring that the rules do not inadvertently deviate from the statutory requirement that the date of the change in the market resulting from the triggering event serve as the benchmark date.

Default Rules for Pre-Disruption Price Calculation

Subdivision (b)(1) articulates the rule applied in *Two Wheel* for the conventional situation in which a seller charges a fixed "Wanamaker" price: the price it was charging on the benchmark date (or if it wasn't offering the essential product for sale on the benchmark date, the price it charged the last time it offered the product for sale in the 30 days before the benchmark date). Subdivision (b)(2) applies the standard in *Quality King* to sellers that use buyer-dependent

[80] Brian Finkelmeyer, *Why are Prices So High? The Used-Car Factory Was Shut Down*, COX AUTO. (May 3, 2023), https://www.coxautoinc.com/market-insights/why-are-prices-so-high-the-used-car-factory-was-shut-down/ (describing the relevant market dynamics).

pricing, matching sales to the same buyer or, if there were no sales to that buyer in the last 30 days before the benchmark date, a similar-type buyer in the 30-day period.[81] It provides that if the seller is using buyer-dependent pricing, an earlier sale to that buyer within the 30-day window beats a later sale to another buyer in determining the sale that will supply the pre-disruption price. This follows the *Quality King* Court's analysis in its three examples of buyer-to-buyer matching.[82] Finally, subdivision (b)(3) addresses buyer-agnostic dynamic pricing, and calls for the median of all prices charged in the 30 days prior to the benchmark date.

In all cases, the proposed rule defines "immediately prior" as a set number of days, namely 30 before the benchmark date (excluding the benchmark date itself). This threshold was chosen for two reasons.

First, many businesses track their sales (and input costs) on a 30-day basis. Further up the supply chain, OAG has observed that many businesses are *supplied* on a once-a-month basis, especially for large, steady orders of essential goods. Meanwhile most pricing average measures, which serve as one of the bases for the Attorney General's findings about gross disparities in price, are also measured on a month-to-month basis.[83] The *commercial* period "immediately prior" to a disruption therefore appears to be around 30 days in most industries.[84]

Second, although any specific day cutoff will always create edge problems, extending the window to 30 days but no further ensures a significant degree of recency while allowing enough time to capture most sales to ordinary buyers. Particularly for buyer-agnostic dynamic pricers, a 30-day lookback window ensures businesses are not unduly helped or harmed by the fortuity of chaotic variations in price coinciding with the onset date. For Wanamaker prices, the regulation adopts the same standard as judicial decisions and looks to the last price charged before the benchmark date.

Subdivision (b)(2)(ii) supplies further definition to what *Quality King* called a "similar-type customer" used when a per-buyer-pricing seller did not sell to that buyer before the disruption. The rule proposes that the "similar-type customer" is the buyer that the defendant, before the disruption began, would treat most similarly to the buyer in the scrutinized sale. For many businesses with identifiable customers this determination will be straightforward: ask which other customer obtained the most similar commercial terms to that of the buyer in the scrutinized sale. For sellers employing buyer-specific automated dynamic pricing, it will be

[81] 209 A.D.3d 62, 79-80.

[82] *Quality King*, 209 A.D.3d 62, 80.

[83] The average prices compiled by the Bureau of Labor Statistics, for example, are almost always captured on a month-by-month basis.

[84] The Attorney General elected to use 30 calendar days in preference to "a month" to avoid confusion and complexity inherent in variable month lengths.

necessary to identify those variables that the dynamic pricing algorithm uses (and with what weights), and then reverse-engineer those variable settings as applied to the buyer in the scrutinized sale to the universe of buyers in the pre-disruption 30-day time window to find the closest match. This definition is the most easily administrable definition of "similar-type customer" for enforcers and businesses alike.

Subdivision (b) follows the *Quality King* framework by employing median prices in circumstances where different prices were charged to different buyers, but per-sale or per- buyer pricing data is not available or the dynamic pricing was buyer-agnostic.[85] The median transaction over 30 days was chosen as the best balance between various competing factors. On the one hand, selection of the last price charged to a buyer pre-onset in the usual course of business would most literally be the price "immediately prior to the onset of the abnormal disruption of the market." But where individual transactions are not identifiable and price fluctuates rapidly, such a selection would leave too much to chance with little benefit for defendants or enforcers. Providing a 30-day window and selecting a median obeys the statutory directive for "immediately prior," but in a way where outlier or unusual prices do not distort the benchmark calculation.

Conversely, in a situation where Wanamaker prices are being charged, selecting the very last price charged in the usual course of business immediately prior to the onset of the disruption substantially simplifies the cost analysis (because fewer sales need to be considered when working out the cost baseline) with much less chance of unfairness given the low likelihood of genuine "usual course" price adjustments in the previous 30 days. Here, the balance tips in favor of fewer inputs rather than more.

For-Hire Transportation Services Benchmark Date Determination

The Attorney General agrees with commenters[86] that certain industries benefit from a more specialized pre-disruption price calculation method that still obeys the statutory requirement spelled out in G.B.L. § 396-(r)(b)(i) that such pre-disruption prices be the price the essential product "was sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market." These methods are set out in subdivision (c) and displace the more general method set out in subdivision (b) for the essential product to which they apply.

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[85] *See Quality King*, 209 A.D.3d at 80 ("In light of the detailed purchase and sale information in the record, scrutiny of the individual relevant transactions is feasible and will yield the most accurate results; there is no need to consider median or mean statistics regarding the transactions.") Although the *Quality King* Court did not directly endorse the acceptability of medians, the median used here was chosen as the fairest and most easily administrable method of finding a pre-disruption price when, as the Court foreshadowed, appropriate data is lacking.

[86] *See* Comment of Uber Technologies, First NPRM Comments at 110-17; Comment of Lyft, Inc., First NPRM Comments at 127-34.

At present the Attorney General has opted to propose only one industry-specific pre-disruption price calculation method: for-hire ground transportation services. In the first NPRM comments, for-hire ground transportation service providers argued that the pricing dynamics of their service merited different methods of pre-disruption price calculations.[87] Although prior proposed rulemakings expressed the Attorney General's tentative view that it would be appropriate to create a single "dynamic pricing" rule for all businesses employing dynamic pricing, the Attorney General was persuaded by commenters that for-hire ground transportation dynamic pricing methods were sufficiently distinctive as to merit separate treatment.[88]

The proposed rule provides that the pre-disruption price for for-hire ground transportation is the median price per ride taken from the set of all rides sold in the same hour of the day on the same day of the week as the scrutinized ride in the four weeks before the benchmark date. So if a for-hire ride took place during a severe rainstorm that occurred at 10pm on Thursday, February 1, 2024, travelling between two points in Manhattan that were six miles apart, the pre-disruption price would presumptively be the median per-mile price of all rides that took place in New York State within 20 miles of the scrutinized ride's route between 9pm and 11pm on Thursday, January 25, 2024, Thursday, January 18, 2024, Thursday, January 11, 2024, and Thursday, January 4, 2024.[89] The Attorney General has set the window to the same day of the week and time period over the previous *four* weeks to harmonize this part of the industry-specific rule with the general 30-day lookback window employed in the general case as outlined in subdivision (b).

The Attorney General's rationale for a median similar-day-similar-time-similar-location benchmark is that ride-hailing pricing depends primarily on day, time of day, and location; maintaining these three as constant as can be practically done has the greatest chance of creating a fair comparator.[90] It will be observed that this benchmark largely resembles the buyer-agnostic

[87] *See ibid*.

[88] Many other states' laws that reference "dynamic pricing" do so exclusively in the context of for-hire ground transportation services and no other goods or services. *See, e.g.*, CONN. GEN. STAT. § 13b-118 (2017) ("For the purposes of this subdivision, 'dynamic pricing' means offering a prearranged ride at a price that changes according to the demand for prearranged rides and availability of transportation network company drivers."); 53 PA. CONS. STAT. § 57A01 (2023) (defining dynamic pricing as "[a] transportation network company's practice of adjusting the calculation used to determine fares at certain times and locations in response to the supply of transportation network company drivers and the demand for transportation network company drivers' services."); MD. CODE REGS. 11.07.05.02 (2020) ("'Dynamic pricing' means a method of calculating the toll where the dynamic pricing mileage rate varies within the approved toll rate range in real time.").

[89] Although some businesses may use a more sophisticated method of deriving price "per mile," the rule employs a simpler method to avoid undue confusion with flag falls and idle fees: take the total price of the ride and divide it by the distance the ride took.

[90] *See* Tulio Silveria-Santos, et al., *Understanding and Predicting Ride-Hailing Fares in Madrid: A Combination of Supervised and Unsupervised Techniques*, 13 APPLIED SCIENCES 5147 (2023); UBER, *How are fares calculated?*, https://help.uber.com/riders/article/how-are-fares-calculated-/?nodeId=d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d (last accessed January 21, 2025).

dynamic pricing calculation method in the general case set out in subdivision (b)(3) but with further refinements to reflect the specific variables that drive prices in the for-hire ground transportation sector.

The selection of the 20-mile window (rather than a different distance) aims to strike a balance between more and less densely populated areas of New York State in crafting a general rule.[91] A radius that varied depending on jurisdictional lines would present formidable calculation difficulties given the frequency of trips that traverse those lines and trips between more and less densely populated areas. Meanwhile a shorter radius (say 2 miles) while well-suited to Manhattan, a dense urban area, is much less suitable for a location in, say, Essex County, which contains large tracts where development is constitutionally restricted.[92] In general, the Attorney General took the position that it was better to err more on the side of additional inputs into the overall median benchmarks rather than fewer, and thus a 20-mile radius, encompassing the boundaries of most cities, was the appropriate size. The Attorney General welcomes comment on whether another radius would be more suitable.

Comments to the contrary did not offer alternative benchmarking measures for the normal case, although some comments identified a few special cases like seasonal events that would render a presumptive benchmark unsuitable.[93] The Attorney General has accounted for those comments by incorporating commentators' suggestions that either the defendant or Attorney General may propose a different set of rides to be used as the source of the benchmark per-mile price that are more appropriate benchmarks if a seasonal event occurred during the comparator period. By removing these outliers, this provision implements for the ride-hailing industry the requirement that the pre-disruption price be that charged in the "usual course of business" immediately prior to the onset of the disruption.[94]

To illustrate, suppose that in the above example of the for-hire ride occurring at 10pm on Thursday, February 1, 2024, during an intense rainstorm, it so happened that 10pm the previous Thursday, January 25, 2024, coincided with the end time of a popular concert in downtown Manhattan. A concert is not by itself a triggering event, but may cause a spike in demand for for-hire ground transportation services that raises prices by ordinary operation of the for-hire ride pricing algorithm. In this circumstance, it would not be appropriate to use the concert-inflated January 25 10pm ride prices as the benchmark. The straightforward solution to this problem will be to exclude the "concert Thursday" from the set of four Thursdays contributing to the median,

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[91] The input rides are limited to New York State to avoid adding unnecessary confounding factors that might arise from drawing in ground transportation regulated by other States.

[92] *See* NY Const, art XIV, § 1.

[93] *See* Comment of Tech.NYC, First NPRM Comments at 119; Comment of Lyft, Inc., First NPRM Comments at 131.

[94] *See* G.B.L. § 396-r(3)(b)(i).

but the regulation allows for the party seeking to rebut the presumption to propose another more appropriate benchmark if such a benchmark exists. The burden rests on the party seeking to rebut the presumptive median to both prove that the presumptive median draws on rides materially incomparable with the scrutinized ride and propose a better comparator basket of rides instead.

4. Costs:

a. Costs to regulated parties: The Attorney General does not anticipate additional costs incurred as a result of this rule because the statute already requires regulated parties to discern the benchmark date and determine a pre-disruption price. This regulation simply refines that inquiry by making it quantitative, increasing certainty without imposing any new compliance requirements beyond those already imposed by statute.

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, given the increasing prevalence of dynamic pricing and the lack of clarity about how to apply the statute to these situations, providing a rule reduces uncertainty for businesses.

In addition, the Attorney General was concerned that an old agreement with a single counterparty is still influencing industry behavior. Ten years ago, when the use of dynamic pricing in for-hire ground transportation services marketed to consumers was relatively new, OAG entered into an agreement with Uber to pre-emptively address price-gouging.[95] In the agreement, Uber agreed that it would not raise prices higher than the fourth-highest price charged in the same city and surrounding area in the sixty days preceding the abnormal market disruption. The agreement expired in 2017.[96] The agreement allowed for significant above-cost price increases during market disruptions,[97] and has become materially inconsistent with subsequent caselaw authoritatively interpreting the price gouging statute, above all *Quality King*.

In submissions to a prior version of this rule, Uber proposed a rule that extends the 2014 framework: "permitting reasonable dynamic pricing with a maximum of a 3.0x base fare multiplier, during Governor-declared States of Emergency; the maximum, or 'cap', would be restricted to the geographic region affected by the emergency . . . and the restriction would expire when the emergency is no longer influencing the marketplace."[98] The Attorney General considered this proposed but rejected it on the grounds that it was inconsistent with the statutory text in several ways. First, as discussed in proposed rule 13 NYCRR § 600.6 and OAG Staff Report analyzing price trends across a wide basket of goods and services, a 10% disparity in price is a "gross" disparity as an empirical matter. Even if it were not, the *Quality King* Court held that a 34% increase was a "gross disparity" as a matter of law. A rule permitting a 300% increase would permit gross disparities, in contravention of the statutory text.

Second, Uber and other large ride-hail businesses have not articulated what the "base fare" against which this markup would be in any given situation. The phrase "base fare" as Uber and others use it does *not* appear to mean "the fare charged immediately before the disruption" but some other measure of fares that takes some but not all demand factors into account. It also appears distinct from the "base rate" high-volume ground transportation providers operating in New York City file with the New York City Taxi and Limousine Commission. The proposed

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[95] Letter from Eric T. Schneiderman, Att'y Gen. of N.Y., to Travis Kalanick, Co-Founder/CEO, Uber Technologies, Inc. (July 8, 2014).

[96] *Id*. at 2 ("This agreement . . . shall expire and be deemed null and void three days after it takes effect.").

[97] In New York City alone, there are approximately fifteen million rides a month between Uber and Lyft. *See* Todd W. Schneider, *Taxi and Ridehailing Usage in New York City*, https://toddwschneider.com/dashboards/nyc-taxi-ridehailing-uber-lyft-data/ (finding an average 423,751 Uber trips per day in New York City in March 2022 and 171,525 Lyft trips per day in New York City in March 2022); N.Y.C. TAXI AND LIMOUSINE COMM'N, *Monthly Data Reports*, https://www1.nyc.gov/site/tlc/about/aggregated-reports.page (finding an average 591,746 high-volume for-hire vehicle ("FHV") trips per day in New York City in April 2022, and an average 595,270 high-volume FHV trips per day in New York City in March 2022). Uber in New York City constitutes approximately 400,000 rides per day. *See* Schneider, *supra* (finding an average 423,751 Uber trips per day in New York City in March 2022 and an average 408,604 Uber trips in February 2022). Therefore, the fourth-highest priced charged in the last sixty days can be high. Imagine, for instance, that the average price per mile during rush hour in Manhattan is $10. In the last sixty days, there was one day where the highest price per mile of the approximately 100,000 rides was $50, another in which it was $49, another in which it was $48, and a fourth in which it was $46. The $46 ride is the cap, well over the average of $10, and well over the overwhelming majority of rides.

[98] Comment of Uber Technologies, Inc., First NPRM Comments at 113.

rule addresses this problem by articulating a flexible standard for determining a pre-disruption benchmark that is consistent with the factors the firms have described themselves as using in the usual course of business. Third, "[a] declaration of a state of emergency by the Governor . . . is not a precondition to the onset of an abnormal disruption of a market under the statute."[99] A rule that limited enforcement of the statute to gubernatorially-declared emergencies would be in direct contravention of the statutory text and authoritative judicial construction thereof.

The Attorney General considered omitting any specific mention of for-hire ground transportation and instead retain a general rule for dynamic pricing, but concluded that for-hire ground transportation services, which are by far the most prominent service using dynamic pricing, merited separate treatment. Nonetheless, it remains true that there are several firms that now use dynamic pricing and some suggestion that these numbers will grow.[100] The dynamic pricing employed by these firms, however, appears more amenable to the general pre-disruption price calculation method set out in subdivision (b) than that used by for-hire ground transportation. The Attorney General welcomes comments identifying specific industries that would also benefit from a more tailored pre-disruption price calculation method.

As discussed in section 3 of this Regulatory Impact Statement, the dynamic pricing algorithm itself provides the means by which a seller can identify a similar-type sale to another buyer that can then be used as the pre-disruption price. In the specific context of for-hire ground transportation services, exogenous factors separate and apart from the identity of the buyer, like the weather, the time of day, and the location of the ride, are well known to impact dynamic prices, making a more tailored rule appropriate.[101]

The Attorney General considered alternatives to the 30-day median as the benchmark for the pre-disruption price for buyer-agnostic dynamic pricing. As discussed above, simply selecting the last price charged before the end of the usual course of business pre-disruption was felt to be too arbitrary and risked creating incentives for more rapid price changes in the usual course of business. Another alternative the Attorney General considered was using the lowest price charged for a good or service in the relevant period, but it was determined that such a rule would unduly constrain dynamic prices without sufficient consumer benefit. Using the highest price charged during the relevant period, or some subset of the highest prices charged (as a 2014 agreement with Uber did), would lead to far too much condoned profiteering. Failing to provide a rule at all leaves too much uncertainty for businesses, enforcers and courts trying to make the

[99] *People v. Quality King Distributors, Inc*., 209 A.D.3d 62, 75 (1st Dep't 2022).

[100] Comment of Institute for Local Self-Reliance, ANPRM Comments at 14-15; *see, e.g.*, Jordan Valinsky, *Wendy's Will Test New Menus That Change Prices Throughout the Day*, CNN (Feb 28, 2024, 7:11 AM), https://www.cnn.com/2024/02/27/food/wendys-test-surge-pricing/index.html.

[101] The Attorney General welcomes comments as to other factors that significantly weigh on for-hire ground transportation service pricing that would also be suitable for inclusion in the benchmark calculation.

best and fairest comparison of pre- and post-disruption prices. This rule balances the interests of firms in using dynamic pricing with an easily administrable enforcement mechanism to protect the public.

If, as at least one seller has declared, dynamic pricing will be employed solely to permit the business to cut usual-course prices during periods of low demand,[102] the 30-day median will serve as a useful benchmark to apply to the dynamic pricing algorithm to permit the business to continue to engage in price reductions benefiting the public.

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.

[102] John Towfighi, *Wendy's Says It Won't Use Surge Pricing*, CNN (Feb 28, 2024, 4:10 PM), https://www.cnn.com/2024/02/28/business/wendys-dynamic-pricing-surge-explained/index.html (quoting email to CNN from Wendy's: "Wendy's will not implement surge pricing, which is the practice of raising prices when demand is highest. This was not a change in plans. It was never our plan to raise prices when customers are visiting us the most.").

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."[103]

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 provide with precision how a pre-disruption price is calculated for purposes of G.B.L. § 396-r(3)(b)(i), concerning gross disparities in price between the price charged in the usual course of business immediately prior to an abnormal disruption of the market and the price charged by the seller during an abnormal disruption of the market. The rule provides specific guidelines for the calculation of pre-disruption prices for the for-hire ground transportation sector, reflecting distinctive pricing dynamics of that sector.

This rule does not affect local governments, which may continue to enforce their own price gouging laws as before.

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**. Small businesses will not be required to take any affirmative action to comply with this rule. As with other price gouging rules, a small business can comply with the statute, and thus the rule, by doing nothing: keeping prices where they were before and after an abnormal market disruption, or at least not raising prices except to accommodate bona fide additional costs.

This rule simply adds more definition to the existing statutory standard; pricers of all kinds are presently required to determine the pre-disruption price under the statute, and this regulation simply takes that existing task and simplifies it by providing clear qualitative standards for its application.

Local government would not be required to take any affirmative action to comply with

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

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 engagement of professional services.

As for small businesses, the Attorney General determined that 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 pre-disruption price; the rule provides more guidance as to the pre-disruption price that will either vitiate the need for interpretation by counsel of this statutory phrase or maintain the same need as the status quo, with the legal advice now concentrating on the application of the regulatory definition.

4. **Compliance Costs**. The Attorney General has determined that 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, and the concreteness of the rule may reduce professional service expenses.

5. **Economic and Technological Feasibility**. The Attorney General has determined that compliance with this rule requires no new investment or technology that does not presently exist, as small businesses can readily apply the calculations called for in the rule, based as it is on prices the seller itself charged.

6. **Minimizing Adverse Impact**. The Attorney General determined this rule has a positive impact on small business and no impact on local government. Small business is already subject to a requirement to avoid gross disparities in price without cost justification; this obligation has been quantified to facilitate application of the statutory standard.

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 applying cost determination and allocation standards that already exist, combined with performance standards where such standards are consistent with the statutory text and purposes.

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; it may *enhance* that defense because a business now knows with greater clarity the benchmark against which an excess in price must be measured.

Small businesses which must accept their suppliers' prices are one of the classes of intended beneficiaries of the statute; insofar as (crediting the above assumption) the rule influences their suppliers to restrain the prices of essential products, this rule will provide a direct benefit to small business by lowering supply costs during times of abnormal disruption.

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.

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."[104]

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 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.

5. **Rural Area Participation**. The Attorney General 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.

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