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

February 2025

Price Gouging

Notice of Proposed Rulemaking

Proposed Rule 600.7
New Essential Products

Preliminary Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A table of correspondence is below:

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

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

Rule 600.7—New Essential Products

Rule Text

Proposed Action: Add New Part 600.7 to Title 13 N.Y.C.R.R.

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

Subject: Price Gouging

Purpose: Clarify that the price gouging statute covers products new to the market when the disruption begins; provide means of determining whether new essential products are set at an unconscionably excessive price.

Text of proposed rule:

600.7 New Essential Products

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

(1) A "new essential product" is an essential product that was neither sold by the seller nor readily obtainable in the trade area prior to the abnormal disruption of the market;

(2) A "comparable essential product" is any essential product that is either:

(i) a good or service that the seller used as a point of comparison when determining or justifying the price the seller charged for the new essential product (whether internally or in public-facing communications), or

(ii) a good or service whose design or technology the seller adapted to create the new essential product, or,

(iii) a good or service that, if it possessed the same price as the new essential product, would be treated by a reasonable person in the position of the buyer as an acceptable substitute for the essential product;

(3) The "benchmark price" is the price at which a comparable essential product was readily obtainable in the trade area between 30 days prior to the triggering event and the date of the scrutinized sale;

(4) A product "was readily obtainable in the trade area" if the average reasonable person in the position of buyer could obtain possession or use of that product.

(b) *Application of Statute to All Essential Products Irrespective of Novelty.* General Business

Law § 396-r applies to all essential products, including new essential products.

(c) *Unconscionably Excessive Price of New Essential Products*.

(1) *Presumption of Gross Excess in Price for New Essential Product Sales in Trade Area*. During any abnormal disruption of the market for a new essential product, the amount charged for a new essential product ("the scrutinized price") is *prima facie* unconscionably excessive pursuant to General Business Law § 396-r(3)(b)(ii), if the scrutinized price is more than 10% greater than the benchmark price.

(2) *Rebuttal of Presumption*. The presumption established in subdivision (c)(1) of this rule may be rebutted with evidence that:

(i) The scrutinized price was necessary to permit the new essential product to be sold at the same margin of profit as the essential product in the sale used to determine the benchmark price; or,

(ii) The scrutinized price was necessary to recover additional costs not within the control of the seller imposed on the seller for the new essential product that were not imposed on the seller of the comparable essential product in the sale used to determine the benchmark price.

(d) *New Essential Products Without Comparable Essential Products*. If a new essential product has no comparable essential product, a new essential product may have an unconscionably excessive price if the price of the new essential product is unconscionably extreme, or there was an exercise of unfair leverage or unconscionable means, or a combination of both.

(e) *No Effect on Other Grounds for Unconscionably Excessive Prices*. Nothing in this rule shall be so construed as to foreclose the court's determination that an unconscionably excessive price has been charged based on General Business Law § 396-r(3)(a), or to affect a prima facie case made under General Business Law § 396-r(3)(b)(ii) for any essential products other than new essential products.

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

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

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

[37] G.B.L. § 396-r(2)(d).

[38] G.B.L. § 396-r(2)(e).

[39] G.B.L. § 396-r(2)(e).

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

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

G.B.L. § 396-r(3)(b) provides that "prima facie proof that a violation of this section has occurred"—that is, that an unconscionably excessive price has been charged—shall include evidence that "a gross disparity" between the price at which a good or service was sold or offered for sale during the disruption and "the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of

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

[41] G.B.L. § 396-r(3)(a).

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

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

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

Statutory Economic and Policy Framework

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

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

[44] G.B.L. § 396-r(3)(b)(ii).

[45] G.B.L. § 396-r(3)(c).

[46] *Id.*

[47] G.B.L. § 396-r(1).

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

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

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

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

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[50] NY Const, art III, § 13.

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

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

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

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

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

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

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

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

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

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

[57] G.B.L. § 396-r(1).

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

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

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

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

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

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

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

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

3. Needs and benefits:

This rule covers "new" essential products: those that are introduced to the trade area during an abnormal market disruption, such that there are no pre-disruption sales from the seller or "same" goods to which they can be compared.

During the ongoing COVID-19 pandemic, OAG received many complaints about price gouging on goods and services introduced in response to needs created by the pandemic, such as COVID-19 at-home tests, vaccinations, and medical treatments. Future crises also may result in price gouging on novel essential products. The Legislature, facing price gouging complaints related to medical supplies, some of which were being developed directly in response to the pandemic, amended the statute to expressly cover medical supplies, and as recent experience has shown, medical supplies are often created in direct response to particular health crises.[63]

Certain forms of price gouging for new essential products are straightforwardly encompassed by the statutory text. To take the COVID-19 test example, if ACME was selling tests for $10 and XYZ Corp next door was selling them for $20, it would be straightforward to apply G.B.L. § 396-r(3)(b)(ii) and find that XYZ's prices grossly exceeded ACME's prices and thus required justification by costs or profit margin maintenance. But new products often involve lawful monopolies granted by the patent system, or other circumstances of varying legitimacy (ranging from coincidental lack of competition to excessive market concentration) where such benchmark sales are not available to anchor a price gouging determination. This proposed rule aims to set out guidance for new products without comparable pre-disruption sales to ensure new

[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] NY Assembly Debate on Assembly Bill A10270, May 27, 2020, at 17 ("This legislation would update New York's statute regarding the price gouging of consumer goods by expanding it to cover essential medical supplies and services and other goods or supplies and services used to promote the health and welfare of the pubic. During the COVID-19 pandemic we've seen countless instances of egregious price gouging; hand sanitizer, face masks, bandages, . . . medical-grade apparel and other crucial medical supplies that are desperately needed by our frontline workers, hospitals and other healthcare facilities."); NY Senate Debate on Senate Bill S8189, May 27, 2020, at 1575 ("[The amendment] will ban price gouging on essential medical supplies and service[s]. It will ban price gouging against hospitals, healthcare providers, and state and local governments."); Sponsor's Mem., Bill Jacket, L. 2020, ch. 90 ("These examples [of pandemic price-gouging] have illustrated ways to strengthen our existing price gouging statute, namely by broadening its application to any goods and services vital for the health, safety, and welfare of the general public, specifically applying it to medical supplies and services used to treat, cure, or prevent disease or illness.").

products do not enable sellers to take unfair advantage of the public during abnormal disruptions of the market.

Proposed subdivision (b) restates the statutory command that all essential products, irrespective of novelty, are subject to the price gouging statute. One of the challenges of evaluating price gouging in the case of a *new* essential product, however, is that a straightforward comparison of pre- and post-disruption pricing is not possible. Proposed subdivision (c) of the rule addresses this problem by elaborating on the application of the prima facie case most readily applicable to new essential products: that is, a showing that "the amount charged [for the new essential product] grossly exceeded the price at which the same or similar goods and services were readily obtainable in the trade area."[64]

Subdivision (c)(1) provides a standard to determine whether the price of a new essential product "grossly exceeds" the price of a "similar" essential product that was readily available in the trade area: a difference in price of 10% or more from the price of a "comparable essential product" readily obtainable in the trade area in the time between 30 days before the onset of the disruption and the scrutinized sale. A "comparable essential product" is defined in subdivision (a)(2) to be either the essential products used by the defendant as benchmarks to price the new essential product, the old essential products the defendant adapted to make the new essential product, or an essential product that, if it possessed the same price as the new essential product, a reasonable person in the position of the buyer would the comparator product as an acceptable substitute for the new essential product.

If that comparable essential product was readily available in the trade area—that is, per the definition in subdivision (a)(3), and the new essential product was sold or offered for sale at a price more than 10% greater than the comparable essential product, then the burden shifts to the seller of the new essential product to justify the disparity in price.

Subdivision (c)(2)(i) adapts the profit margin defense set out in G.B.L. § 396-r(3)(c)(1) to the new essential products context, permitting a defendant to rebut the prima facie case with evidence that the new essential product was sold at a price necessary to yield the same profit margin as the essential product used to establish the prima facie case.

Subdivision (c)(2)(ii) adapts the cost affirmative defense set out in G.B.L. § 396-r(3)(c)(2) to the new essential product context, underscoring the necessary statutory implication that the cost comparison is between the new essential product in the scrutinized sale and the comparable essential product used as the basis for the prima facie case. Thus, for example, if the comparable essential product cost $X in research and development costs and the new essential product cost $X+$Y in research and development costs, $Y is properly counted as an additional

[64] G.B.L. § 396-r(3)(b)(ii).

cost (provided it fits within the statutory limitations on additional costs, as explained in proposed rule 13 N.Y.C.R.R. § 600.8).

Subdivision (d) restates the statutory text by way of clarification: in the case of a new essential product where there is no pre-/post-disruption comparison possible under G.B.L. § 396-r(3)(b)(i), *and* no comparable essential product that would permit comparison under G.B.L. § 396-r(3)(b)(ii), then the new essential product's price must be examined under G.B.L. § (3)(a), the content of which is repeated verbatim in the rule.

Proposed subdivision (e) clarifies that the rule sets out only one way in which a new essential product may be found to be sold or offered for sale at an unconscionably excessive price, and emphasizes that a new essential product might also be found to bear an unconscionably excessive price if it meets the definitions set forth in G.B.L. § 396-r(3)(a) *even if* a comparable essential product is available for the analysis contemplated in subdivision (c) of the rule. Thus, even if a new essential product was not priced at an amount grossly in excess of the price at which same or similar goods were available in the trade area (the G.B.L. § 396-r(3)(b)(ii) inquiry), the excess in price may still be found to be unconscionably extreme (the G.B.L. § 396-r(3)(a)(i) test) or that obtained through unfair leverage or unconscionable means (the G.B.L. § 396-r(3)(a)(ii) test).

Similarly, the rule, addressed as it is to new essential products, does not bear on the G.B.L. § 396-r(3)(b)(ii) inquiry when an essential product other than a new essential product is at issue. Thus, for example, a defendant who sold an essential product in the usual course of business before and during an abnormal disruption of the market may attract liability under G.B.L. § 396-r(3)(b)(i) if the amount charged post-disruption represents a gross disparity from the amount charged pre-disruption and may also attract liability under G.B.L. § 396-r(3)(b)(ii) if the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area.

The needs and benefits of subdivisions (b), (d), and (e) are self-explanatory: each either restates existing statutory text to allow the rule to be a "one stop shop" or clarifies the limits of the rule. The needs and benefits of each element of subdivision (c) and its component definitions in subdivision are discussed below.

Defining the Comparable Essential Product for the Prima Facie Case in Considering a New Essential Product's Price

The proposed rule sets out a definition of "similar" essential products for a new essential product, responding to comments on prior notices of proposed rulemakings in this area that identified the absence of guidance on the meaning of "similar" essential products (or, in the parlance of this rule, "a comparable essential product"), as risking "potentially prohibit[ing] a range of lawful behavior that may be beneficial during an abnormal market disruption" unless a

more granular definition was provided.[65]

First, any essential product the seller used as a comparator when determining or justifying the price the seller charges for the new essential product is a "similar" essential product—by the seller's own admission. Inventors of new essential products do not price them in a vacuum; usually such enterprises look to the essential products that serve or served an analogous market function to determine a price that the market will accept.[66] A seller that elected to price a new essential product during an abnormal market disruption well above the price charged for an essential product *the seller itself* thought or represented to be an appropriate pricing benchmark necessarily creates a rebuttable presumption that the seller "used the leverage provided by the market disruption to extract a higher price."[67]

This part of the definition emphasizes that the comparable essential product could be derived by the seller's internal deliberations over the appropriate price or the seller's representations as to an appropriate comparable essential product in its public communications. Because businesses are forbidden from making any public representations that tend to deceive—without regard to whether anyone is in fact deceived[68]—such representations are an appropriate source of evidence as to a "comparable" essential product.

Second, if the seller adapts the new essential product from an existing essential product, the price of the essential product adapted from is an appropriate comparator for purposes of determining a gross excess in price. As with the first set of comparable essential products, here the seller has itself attested to the propriety of comparing the old and new essential products because the new essential product's existence was predicated (whether necessarily or incidentally) on the old essential product. As discussed below, when using a technological comparator, the cost of developing the new essential product from the old may be used to justify the difference in price.

Third, an essential product is reasonably interchangeable with another essential product if a reasonable person in the position of the buyer of the new essential product would treat the new essential product and comparable essential product as acceptable substitutes. This third definition has roots in the "reasonable interchangeability" test applied in competition law cases to

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[65] *See* Comment of Business Council of New York, First NPRM Comments at 44.

[66] *See* Paul T. M. Ingenbleek, *Best Practices for New Essential product Pricing: Impact on Market Performance and Price Level Under Different Conditions*, 30 J Prod Innovation Mgmt 560, 560-62 (2013) (reviewing literature).

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

[68] *See People v. Northern Leasing Sys., Inc*., 193 A.D. 3d 67 (1st Dep't 2021); *People v. Applied Card Sys., Inc*., 27 A.D.3d 104, 107 (3d Dep't 2005), *aff'd on other grounds*, 11 N.Y.3d 105 (2008); *State v. Gen. Elec. Co., Inc*., 302 A.D.2d 314, 314 (1st Dep't 2003); *see also State v. E.F.G. Baby Prods. Co*., 40 A.D.2d 364, 368 (3d Dep't 1973).

determine the relevant essential product market.[69] It departs from these cases by focusing the inquiry on the function of the new essential product rather than the susceptibility of the new essential product to price-disciplining competition. This is because the purpose of the similarity inquiry in the context of establishing a prima facie case of price gouging is to anchor a determination that the price of a new essential product should not grossly exceed the price of an essential product that can be readily substituted for the new essential product absent cost or profit-margin-maintenance justification, rather than to determine which essential products compete with the new essential product for purposes of determining the market power of the seller of the essential product.

Thus, for example, generic drugs and brand-name drugs are often thought of as operating in different markets and thus not being reasonably interchangeable in the context of antitrust law.[70] But for purposes of the price gouging inquiry, a generic drug identical to a brand-name drug would be viewed as "similar" under the price gouging statute at the consumer patient level because both fulfil the same function (the "care, cure, mitigation, treatment, or prevention of any illness or disease") to the same extent in the same circumstances, such that a reasonable person in the position of the buyer patient would treat them as acceptable substitutes but for their different prices.[71] Conversely, a *pharmacy* buyer may well not treat generic and brand name drugs as acceptable substitutes because from the pharmacy's perspective they fulfill very different economic roles and functions—the function of the drug for the pharmacy being its ability to be sold.

It follows that certain econometric tests employed in determining an essential product market for competitive purposes, such as the hypothetical monopolist test that examines the effect of a small and sustainable non-transitory increase in price,[72] will not be useful in making this price-agnostic comparable essential product determination to the extent to which they examine price-based market segmentation. But some of the practical indicia set out in *Brown Shoe Co. v. United States* and its progeny may be helpful in determining practically whether any given essential product is reasonably interchangeable with the new essential product and thus a

[69] *See Global Reins. Corp. U.S. Branch v. Equitas Ltd*., 18 N.Y.3d 722, 732 n. 8 (2012); *Todd v. Exxon Corp*., 275 F.3d 191, 202 (2d Cir. 2001) (Sotomayor, J.)

[70] *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496-99 (2d Cir 2004).

[71] It would be unusual for a brand-name drug to be released during a disruption (thus qualifying as a "new essential product") into a market where generic competition for that brand-name drug already existed such that a generic "comparable essential product" could serve as a pricing benchmark; if a generic drug preceded a brand-name drug, it would not be generic. In the much more common situation where the "new essential product" is a generic drug released that is functionally identical to a brand-name drug, it will likewise be highly unusual for the generic essential product to bear a higher price than the brand-name drug with which it seeks to compete.

[72] *See generally United States v. Am. Express Co.*, 838 F.3d 179, 198-99 (2d Cir. 2016).

comparable essential product for purposes of this rule.[73]

The regulation explains that the perspective from which reasonable interchangeability must be judged is that of the class of *buyer* in the transaction supplying the price, cost, or profit, against which the comparison is made, and not the end-user of the essential product. Wholesalers, retailers, and consumers will often diverge on whether an essential product is reasonably substitutable for another—for example, a consumer with a headache may view a brand-name and store-brand painkiller as reasonably substitutable if they were priced the same, but the pharmacy may not treat the two painkillers as the same even if they bore the same price.

This modification of the reasonable interchangeability test best effectuates and enforces the statutory text. Essential products are defined in the statute in functional terms: "consumer goods and services *used, bought or rendered primarily for* personal, family, or household purposes," "essential medical supplies *used for the care* . . . of any illness or disease," "essential goods and services *used to* promote the health or welfare of the public."[74] Because the test of an essential product is the purpose to which the good or service is put, it makes sense that the similarity inquiry should likewise look to similarity of purpose rather than other characteristics.

Although partial adoption of the reasonable interchangeability standard from competition law is appropriate, wholesale adoption of the reasonable interchangeability standard would undermine the statutory text and purpose. If the only thing a seller of a new essential product needed to remove it from the comparability inquiry was to price it high enough that it entered a different submarket then, practically speaking, G.B.L. § 396-r(3)(b) would not apply to new essential products. That contradicts the statutory text, which includes all essential products irrespective of novelty and indicates that a prima facie case is made out for any sale at a price that "grossly exceeds the price at which . . . similar goods or services were readily obtainable in the trade area." If the test of "similarity" were price, then either a good will be "similar" and not grossly disparate or grossly disparate and dissimilar, rendering the statutory text a nullity.

But the remainder of the reasonable interchangeability test fits both the statutory purposes and the lived experience of consumers and businesses of all kinds. When sellers set the price for an essential product that is new to the trade area, they look to the prices offered by their competitors for essential products that would compete with the new essential product.[75] So do

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[73] 370 U.S. 294, 325 (1962). *See* Daniel Hanley, *Redefining the Relevant Market: Abandonment or Return to Brown Shoe* 31-39 (Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404081 (reviewing the *Brown Shoe* "qualitative approach" and describing relevant factors).

[74] G.B.L. § 396-r(2).

[75] *See* Praveen Kopalle, et al, *Retailer Pricing and Competitive Effects*, 85 J. RETAILING 56 (2009).

consumers.[76] If a seller can charge a much higher price for an essential product that is reasonably interchangeable with much lower-priced essential products in the trade area during a disruption, there is at least a prima facie case that the business is employing "the leverage provided by the market disruption to extract a higher price," the use of which "is what defines price gouging."[77]

The reasonable interchangeability standard is also appropriate in this context because it expressly contemplated that certain new essential products would have no comparable essential product and thus not be subject to subdivision (c) or G.B.L. § 396-r(3)(b)(ii). The Attorney General agrees with commentators that a truly *sui generis* essential product, with no reasonably interchangeable essential product in the trade area and with no comparator employed by the seller in its development—appearing fully formed on the proverbial clamshell—must have its prices measured against the broader norms encompassed in G.B.L. § 396-r(3)(a) rather than the comparative analysis required in G.B.L. § 396-r(3)(b). But such an essential product is, and will likely remain, exceedingly rare if not nonexistent.[78]

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[76] *See* Ronald Neidrich et al, *Reference Price and Price Perceptions: A Comparison of Alternative Models*, 28 J. CONSUMER RES. 339 (2001); Sangkil Moon, *Profiling the Reference Price Customer*, 82 J. RETAILING 1 (2006).

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

[78] Although many commentators described the possibility of "innovative [essential] products" that would lack comparators, the only essential product described in any comment as *sui generis* was "the COVID-19 vaccine" (in context, the mRNA COVID-19 vaccine rather than vaccines using more conventional mechanisms of operation). The proposed rule would allow for several comparable essential products for such a vaccine even at the time it was first introduced. First, a vaccine manufacturer could look to other vaccines that served a comparable role in similar circumstances when determining the price charged for the COVID-19 vaccine. *See, e.g.*, Susan Martonosi, et al, *Pricing the COVID-19 Vaccine: A Mathematical Approach*, 103 OMEGA 102451 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7992367/ (adapting the pricing model created for pediatric vaccines to the COVID-19 vaccines by Kayla Cummings et al, *Centers for Disease Control and Prevention as a Strategic Agent in the Pediatric Vaccine Market: An Analytical Approach*, 23 MFG & SERV. OPS MGMT. 1333 (2020)). Second, although the mRNA COVID-19 vaccine may arguably lack a progenitor essential product—*but see* Nat'l Inst. Health, *Decades in the Making: mRNA COVID-19 Vaccines* (Jan 10, 2023), https://covid19.nih.gov/nih-strategic-response-covid-19/decades-making-mrna-covid-19-vaccines—vaccines based on more conventional vectors like Novavax or the AstraZeneca vaccine could be compared to those past technologies, although the R&D differential on the rebuttal side of the equation would make these unlikely comparators. Finally, in the United States there was never a point in time in which fewer than two COVID-19 vaccines were generally available: although the Pfizer-BioNTech vaccine was granted an Emergency Use Authorization on December 11, 2020, *see* Press Release, *FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 11, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19, while the Moderna vaccine received its EUA seven days later, *see* Press Release, *FDA Takes Additional Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for Second COVID-19 Vaccine* (Dec. 18, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid, as a practical matter the Pfizer vaccine was inaccessible to consumers or distributors until well after the Moderna authorization was granted, *see* AJMC Staff, *A Timeline of COVID-19 Vaccine Developments in 2021*, AM. J. MANAGED CARE, https://www.ajmc.com/view/a-timeline-of-covid-19-vaccine-developments-in-2021. In addition to the prices of the vaccines being open to challenge as unconscionably extreme, G.B.L. § 396-r(3)(a), or the essential product of unfair leverage, *id*., the Pfizer and Moderna vaccines were reasonable substitutes for each other.

Whether or not a new essential product represents an improvement (or regression) from a comparable essential product is relevant to this analysis only to the extent that it ceases to make the two essential products reasonably interchangeable. There will naturally be a point where an "improvement" reflected by a new essential product over the essential product with which it is attempting to compete will cease to make the two reasonably substitutable. But the fixing of that point will depend on the facts and circumstances of the good or service in question. Major smartphone manufacturers, for example, typically release a new version of their essential products each year.[79] A consumer may view the difference between a 2022 model and 2023 model as so minor as to make the essential products reasonable substitutes, but a 2008 model and 2023 model are almost certainly not interchangeable (although the 2008 model may well be comparable under the other strands of the definition, if the defendant used the 2008 model as a basis for pricing or developing the 2023 model). The *Brown Shoe* factors and other relevant considerations will determine when improvements or regressions cross the substitutability line.[80]

The Attorney General acknowledges commentators' concerns that conventional market definition analysis can sometimes be complex.[81] But much of the complexity in market definition analysis in antitrust arises from the need to determine the complete characteristics of the relevant essential product market, because market shares are calculable only once all possible competing essential products are included or excluded.[82] Although drawing from market definition analysis, the comparable essential product analysis set out here is much simpler: it does not require calculation of pricing power or the prospect of price-based consumer defections but instead asks the functional question of whether the relevant buyer of the goods or services would consider a new essential product a substitute for the proposed comparable essential

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See Mayo Clinic, *Comparing the Differences between COVID-19 Vaccines* (Nov. 7, 2023) https://www.mayoclinic.org/diseases-conditions/comparing-vaccines. This being the case, a gross disparity in price between them would have raised a prima facie case under G.B.L. § 396-r(3)(b)(ii).

[79] This example assumes that smartphones are essential products purely for the sake of illustration. OAG has not formed a view on whether all smartphones, or some subset of smartphones, meet the statutory definition for essential products.

[80] One commentator appeared to argue that when a service is "improved" then "a reference to prior iterations likely would not be appropriate." Comment of Uber Technologies, Inc., First NPRM Comments at 105. Insofar as this comment references the possibility that improvements or other changes to an essential product might be so dramatic that at some point it makes that essential product no longer comparable to a product for which it was formerly a substitute, the Attorney General agrees with it. Insofar as the comment contemplates that *any* "improvement" as rendering a product categorically beyond comparison, the Attorney General does not agree. The statute expressly prohibits the sale of any service when "the amount charged grossly exceed[s] the price at which the same or similar . . . services were readily obtainable in the trade area." There is no "except when the similar services were worse" exception in this statutory text.

[81] Comment of Consumer Brands Association, First NPRM Comments at 95. *See generally* David Glasner, Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293 (2020) (reviewing literature expressing dissatisfaction with market definition analysis).

[82] *See Chapman v. New York State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008) (requiring plaintiff to plead a proposed relevant market that "encompass[es] all interchangeable substitute essential products").

product.

The comparable essential product (whatever the definition) must also be itself an essential product. This limitation was inserted to avoid confusion that might arise for sellers of both luxury and basic essential products that may propose to justify the price of a new basic essential product by reference to a luxury essential product.

For example, if a retailer sold a high-price, high-margin fancy refrigerator with a panoply of extra non-vital features and a low-price, low-margin refrigerator pitched to the bargain market that solely kept food cold, it could not introduce a new basic refrigerator and claim the luxury refrigerator as a comparable essential product (thus justifying a high price for the new basic refrigerator) on the argument that consumers would consider the two essential products interchangeable if they were priced the same. Such an argument would fail on its own merits, because interchangeability is a two-way street: someone looking for a fancy multi-feature refrigerator would not consider the basic refrigerator interchangeable (particularly if the basic refrigerator was had the same high price of the fancy refrigerator, but also if the fancy refrigerator had the same low price as the basic refrigerator), even if a shopper for a basic refrigerator might accept the fancy refrigerator at the basic refrigerator's price. By clarifying that the comparable product must itself be an essential product, the rule helpfully refines the inquiry for businesses looking to ensure they have selected an appropriate comparator.

"Grossly Exceeded" Threshold of 10%

As with proposed rule 13 N.Y.C.R.R. § 600.6, proposed rule 13 N.Y.C.R.R. § 600.7 sets the presumptive threshold for a gross excess in price for new essential products to be a price 10% greater than the price of the same or similar goods or services readily obtainable in the trade area. The proposed rule does not pass on whether a >10% excess is a gross excess for essential products other than new essential products.

A percentage threshold is proposed as a definition of "gross excess" for the same reason as a percentage threshold was proposed in rule 13 N.Y.C.R.R. § 600.6: it provides superior guidance for consumers, businesses, and enforcers alike.

The selection of a 10% gross excess threshold for new essential products, rather than a different percentage, was chosen for two reasons. First, a 10% threshold creates uniformity with proposed rule 600.6, simplifying compliance. Second, a 10% threshold reflects expected general pricing behaviors for sellers of new essential products that do not exceed 10% except during disruptions. As discussed above, sellers of new essential products typically price a new essential product using a cost-plus-margin approach (cost-based pricing) or by examining reasonably interchangeable essential products against which the new essential product would compete and

using those prices to guide the price of the new essential product (demand-based pricing).[83]

As discussed below, the proposed rule creates a safe harbor for cost-based pricing provided the profit margin employed is the same or less than the profit margin of a comparable essential product sold by the defendant pre-disruption. The 10% threshold will therefore have practical application only for users of demand-based pricing for new essential products that select a premium "skimming" pricing strategy for an essential product in the middle of a disruption. For such a seller to depart by any amount—much less upwardly depart by more than 10%—from reasonably interchangeable essential products in the middle of a disruption for an essential product raises an inference of exploitation of disruption conditions.[84]

The 10% gross excess threshold used in this rule applies only to the narrow category of new essential products that have comparable essential products. A new essential product with no comparable essential products may violate G.B.L. § 396-r(3)(a), but not subdivision (c) of the proposed rule.

Rebuttal of Presumption

The proposed rule sets out two means by which a prima facie case may be rebutted in subdivision (c)(2) by mirroring the statutory language at G.B.L. § 396-r(3)(c). Subdivision (c)(2)(i) adapts the profit margin defense of G.B.L. § 396-r(3)(c)(1) to new essential products. On its face, the affirmative defense of G.B.L. § 396-r(c)(1) does not apply to new goods, as it requires a comparison to the profit margins "the defendant received for the same goods or services prior to the abnormal disruption of the market," while new essential products (from the perspective of a given disruption) have, by definition, not been sold by the defendant prior to the abnormal disruption. Nonetheless, it was appropriate to provide for an affirmative defense of profits in the context of new essential products, reflecting concerns of commentators that the production or introduction of new essential products are not discouraged during disruptions.

Subdivision (b)(2)(ii) applies the additional cost defense in G.B.L. § 396-r(3)(c)(2) to the specific context of new essential products being compared to reasonably interchangeable essential products. It repeats what the text already provides, which is that "additional" costs are compared against the costs of the comparable essential product. The cost rules set out in proposed rule 13 N.Y.C.R.R. § 600.8 would also apply to this analysis.

The subdivision (c)(2) affirmative defenses may not apply to a *new business* that in turn

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[83] *See* Roger Calatone & C Anthony Di Benedetto, *Clustering Essential product Launches by price and launch strategy*, 22 J BUS & INDUS MARKETING 4 (2007) (reviewing literature articulating "skimming" and "penetration" pricing strategies, both of which configure prices for new essential product launches around comparable essential product prices).

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

introduces a new essential product, because that new business will have no comparable essential products it has previously sold to compare against. But such new businesses will still be able to take advantage of cost and profit defenses founded on comparison with competing essential products used in the prima facie case—and would likely take their pricing cue from such competing essential products to begin with.[85] This affirmative defense effectuates the statutory intent to curb profiteering.[86]

Effect of Rule on Innovation and New Inventions

Several industry commentators expressed concerns that applying the price gouging law to new essential products as described in a prior proposed rule would "squelch innovation."[87] Commentators did not explain how this squelching might occur, but they appeared to rest on the premise discussed in section 2 of this Regulatory Impact Statement: namely that inventors will not release new essential products without exemplary profit margins as inducement; in other words, inventers will not invent unless they can gouge along the way.

The Attorney General disagrees with these comments on several grounds. First, accepting the comments would require the Attorney General to act in derogation of the statute. The Legislature did not create an exception to the price gouging law for new essential products. The Attorney General's regulations may elaborate on what the Legislature left in, but may not add what the Legislature left out.

Second, as discussed in OAG Staff Report, there is little empirical evidence that a price gouging law (rather than a price ceiling) has any significant role in constraining innovation once it is understood that R&D costs are fully recoverable along with the profit margin of the comparable essential product. As explained in more depth in the Regulatory Impact Statement of 13 N.Y.C.R.R. § 600.8, the R&D expenses involved in creating a *new* essential product post-disruption may be counted in determining either an affirmative defense of cost or profits, even if incurred pre-disruption, because R&D expenses incurred for the new essential product *but not the comparable essential product* would be "additional" costs of the new essential product.

To illustrate, suppose ACME sells a conventional electric Generator A prior to a snowstorm at a pre-disruption price of $2,000. The storm hits just as ACME finishes production

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[85] *See* Paul T. M. Ingenbleek, *Best Practices for New Product Pricing: Impact on Market Performance and Price Level Under Different Conditions*, 30 J. PROD INNOVATION MGMT. 560, 560-62 (2013) (reviewing literature). The much rarer scenario where a business introduces a new essential product that has no comparable essential products—i.e. an essential product with a monopoly over the relevant market *and* no essential product against which the defendant compared it when determining the essential product's design or price—does not engage the prima facie case and is instead handled under G.B.L. § 396-r(3)(a), as explained in subdivision (d) of the proposed rule.

[86] G.B.L. § 396-r(1); *see also* discussion of statutory purposes in item #1 of this Regulatory Impact Statement.

[87] Comment of Consumer Brands Association, First NPRM Comments at 105.

on a new and improved Generator B that is a "comparable essential product" to Generator A, but all the R&D costs on Generator B were incurred before the storm hit.

Post-snowstorm sales of Generator A would trigger a cost-justification inquiry if the generators were sold at 10% or more from the pre-disruption price of generator A (i.e. more than $2,200). Generator B has no pre-disruption sales to compare itself to. So instead it can be compared to the pre-disruption price of Generator A (assuming A was readily available immediately prior to the disruption). Generator A's pre-disruption price was $2,000, and so the cost-justification inquiry is likewise triggered if Generator B is priced over $2,200. But R&D was part of the cost of Generator B versus Generator A, and so it can be included in the cost justification inquiry.[88] This would effectively allow Generator B to be sold for more than Generator A, assuming Generator A had no special costs of its own.

If the comparison were between pre-and-post-storm Generator A sales, or pre-and-post-storm Generator B sales, the R&D cost per generator exclusive to Generator B would not be able to be counted because that cost arose before the storm; it is not an "additional" cost. It is only comparing the new Generator B to the old generator A that pre-storm R&D costs are countable, because that is a relevant difference in cost between the two essential products no matter when it was incurred.[89]

This analysis assumes that Generator B was an essential product that "did not exist" prior to the onset of the disruption. Whether an essential product exists or not is a functional inquiry, not a semantic one: a seller cannot attempt to avail themselves of the provisions of this rule by re-labeling or re-branding an essential product to be "new" (including by taking an existing essential product and emphasizing in its marketing its use for the present period of disruption). That said, given the requirement that a "new" essential product be compared to the closest comparable "old" essential product, a semantically new but functionally old essential product will be subject to the standard G.B.L. § 396-r(3)(b)(ii) analysis whatever the labels a seller might employ.

Third, the proposed rule's affirmative defenses provide sufficient incentive for innovation and the development of new essential products in the market. Truly incomparable novel inventions are outside the prima facie case; businesses introducing new essential products comparable to existing essential products can reap the same profit margins from the new

[88] As explained in the proposed 13 N.Y.C.R.R. § 600.6, the gross disparity prima facie case is considered rebutted when the total justified price, minus the price charged, equals or is less than the benchmark price plus 10% of the benchmark price.

[89] This simplified example considers R&D costs to be a direct expense associated solely with generator B; if the pre-disruption R&D costs of generator B include some R&D that went into a difference generator C, the costs would properly be understood as relevant overhead expenses that would require proportional allocation pursuant to proposed rule 13 N.Y.C.R.R. § 600.8.

essential products as were reaped from comparable essential products pre-disruption, increasing overall business profitability and thus incentivizing introduction.

In sum, these rules clarify how the New York price gouging statute protects vulnerable New Yorkers from profiteering by companies making new essential products, and new companies taking unfair advantage of an abnormal market disruption.

4. Costs:

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

b. Costs to agency, the State and local governments: The OAG does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

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

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

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

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

8. Alternatives: The Attorney General considered no action, but given the consumer and industry confusion about baselines for price gouging for new essential products, it was appropriate to provide elaboration on the statutory standards for such essential products. Although the prices of new essential products are always subject to challenge under the more qualitative standards set out in G.B.L. § 396-r(3)(a), in the interests of business certainty and facilitating enforcement the more quantitative standards set out in G.B.L. § 396-r(3)(b) and (c) should be adapted to the new essential product context as the rule goes on to do.

The Attorney General considered retaining the previous draft's profit margin liability standard, but following a review of comments concluded that a burden-shifting G.B.L. 396-r(3)(b)(ii) framework was more congruent with the statutory text, easier to enforce, and easier for

businesses to understand.

The Attorney General considered other percentage thresholds for a presumption of gross excess in price for new essential products but elected to retain 10%. Whereas multiple pragmatic and principled reasons favored the 10% threshold (discussed in Needs and Benefits, above), there was no discernible factual or pragmatic basis for a different threshold. Commentators advocating for higher thresholds provided no data to suggest that their proposed thresholds were a superior measure of what constitutes a "gross" excess or disparity for new products.

Attorney General considered alternatives to the proposed definition of "similar" essential products. One such alternative would be a multi-factor balancing test listing various indica of similarity. Another alternative would be to tie the similarity inquiry either directly to consumer perceptions or to the attributes of the goods or services that made them essential products. The Attorney General rejected these alternatives because they introduced unnecessary complexity given that they would yield the same results as the proposed test in most cases.

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

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

Regulatory Flexibility Analysis For Small Businesses And Local Governments

The Attorney General determined that a Regulatory Flexibility Analysis for the proposed rule is not necessary because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself." [90]

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, after noting that the text of the statute applies it to "new" essential products (that is, essential products new to the trade area post-disruption), to set out how the existing statutory text applies to such new essential products and to articulate means by which defendants may satisfy the cost or profit defenses in G.B.L. § 396-r(3)(c) in a proceeding concerning a new essential product.

The rule elaborates on what constitutes as "similar good[] or service[]" against which the price of a new essential product can be compared, drawing from principles used in antitrust law to determine reasonable interchangeability of essential products; clarifies that a truly incomparable essential product (i.e. an essential product that cannot be substituted for any other essential product) is subject only to the broader restrictions on prices set out in G.B.L. § 396-r(3)(a); and provides that the measure of cost or profit justification for a new essential product is the benchmark sale, thus ensuring that in most cases R&D associated with the new essential product is countable as a "cost" and can be recovered by higher prices.

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**. This rule reduces compliance burdens for businesses by setting out numerical rules by which a business about to introduce a new invention can determine whether doing so risks price gouging liability. It simply elaborates on the pre-existing statutory prohibition against pricing products, old or new, at an amount that is a gross excess from the

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

price at which the same or similar goods or services were readily obtainable in the trade area without a cost or profit margin maintenance justification.

The rule would require businesses to determine the existence of comparable essential products, but this is not more burdensome than applying the statutory term "similar," and may be less burdensome as the analysis proposed mirrors existing antitrust law standards with which businesses must already comply.

Local government would not be required to take any action to comply with this rule.

3. **Professional Services**. Neither small business nor local government is likely to need additional professional services to comply with this rule. It has no impact on local government and thus provides no cause for engagement of professional services.

As for small businesses, the rule will create either the same or less demand for professional services. Legal advice may be indicated for a small business to determine the existence of comparable essential products, but many comparable essential products in the market for essential products are obvious in context, and for non-obvious cases the rule provides more guidance as to each of these requirements than the unelaborated statutory text does. This will either vitiate the need for legal 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**. 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**. 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.

6. **Minimizing Adverse Impact**. 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 or standards consistent with existing rules, 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 the methods by which statutory costs are calculated and what costs fall within the statutory definition.

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."[91]

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. **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, this rule has no adverse impact on rural businesses, and may well be beneficial by restraining price increases by suppliers of essential products.

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

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