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

February 2025

Price Gouging

Notice of Proposed Rulemaking

Proposed Rule 600.8
Cost Definition and Allocation Methods

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 600.8—Cost Definition and Allocation Methods

Rule Text

Proposed Action: Add New Part 600.8 to Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Give guidance around what does and does not constitute a "cost" or profit margin for purposes of an affirmative defense.

Text of proposed rule:

600.8 Cost and profit rebuttals on showing of gross disparities or excesses in price

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

> (1) The date on which a cost is "accrued or paid" is the first of either (i) the date on which the cost is paid or (ii) the date on which (A) all events have occurred that establish the fact of the liability, and (B) the amount of the liability can be determined with reasonable accuracy, and (C) economic performance has occurred;
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> (2) "controller payments" are any transfer of anything of value from the seller or an entity under the seller's control to the seller's directors, officers, partners, members, stockholders, or other persons who own or control the seller (either in whole or in part), other than payments the seller or seller-controlled entity was obliged to make pursuant to a contract made in the usual course of business prior to the onset of the abnormal market disruption;
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> (3) "labor costs" are the cost of compensation for labor necessary for the provision of the essential product, including compensation paid to a natural person or paid to the employer of a natural person but excluding controller payments;

(b) *Statutory Costs.* The phrase "Additional costs not within the control of the defendant" (hereafter "statutory costs"), whether used in General Business Law § 396-r or any regulation promulgated thereunder, means costs, other than excluded costs, imposed on the seller for the scrutinized sale not imposed on the seller for the benchmark sale. For the purposes of this rule:

> (1) A cost is "imposed on the seller for the scrutinized sale" when the cost is directly attributable to the production, purchase, storage, transportation, distribution, and sale (collectively, "provision") of the essential product sold in the scrutinized sale,

(2) A cost is "directly attributable" to the provision of an essential product if it is necessary for the provision of the essential product and either:

> (i) exclusively identified with the provision of that essential product ("exclusive costs"); or,
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> (ii) that essential product's proportionate share of a relevant overhead cost.

(3) A "relevant overhead cost" is a cost, including a capital cost, that is necessary for the provision of the essential product but is not exclusively identified with the provision of the essential product.

(4) A "proportionate share" of a relevant overhead cost means the share of each relevant overhead cost the seller would allocate to the essential product when evaluating that cost in the usual course of business, or, if the seller did not perform such an evaluation in the usual course of business, the share of each relevant overhead cost that would be allocated to the essential product under whichever of the below allocation methods the seller establishes would be the most fair, accurate, and practical for the seller to apply in the usual course of business (applying, in all cases, the same method of cost allocation for both benchmark and scrutinized sale):

> (i) the exclusive costs of the essential product as a percentage of the total exclusive costs of all of the seller's goods or services sharing that relevant overhead cost on the date of sale (whether or not such goods or services are sold on the date of the sale);
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> (ii) the price of the essential product as a percentage of combined price of all the seller's goods or services sharing that relevant overhead cost on the date of sale (whether or not such goods or services are sold on the date of sale); or,
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> (iii) some other method of allocation the seller shows is more fair, accurate, and practical than either (i) or (ii).

(5) A cost is "necessary" to the provision of an essential product if (i) it is a labor cost; or (ii) the provision of the essential product could not have occurred but for the cost; or (iii) the seller possessed a reasonable belief at the time the cost was incurred that the essential product could not have been provided but for the cost incurred.

(6) If there are multiple benchmark sales, the median amount of each benchmark sale essential products' exclusive cost and the median amount of each benchmark sale essential products' proportionate share of each relevant overhead cost shall be deemed the cost of the benchmark sale.

(c) *Excluded Costs.* Statutory costs do not include the following ("excluded costs"):

(1) any reported costs that do not reflect the actual transfer of assets in possession of the seller, or an entity the seller owns or controls, to a third party in an arms-length transaction, whether or not recognized as costs under international financial reporting standards or generally accepted accounting principles, including:

(i) a decline in sales of other goods or services,

(ii) internal charges levied from one part of a seller to another part of a seller, or from one person owned or controlled by the seller to another person owned or controlled by the seller,

(iii) opportunity costs, or expressions of costs as present replacement value not reflected by actual purchases of replacements pursuant to subdivision (d) of this rule,

(2) controller payments;

(3) projected, planned, or speculative future costs, prior to the moment at which the cost is accrued or paid; or,

(4) statutory costs already recovered via price increases, whether on the same essential product or other goods and services.

(d) *Costs Incurred in Acquiring Replacements for Essential Products in the Scrutinized Sale*. Costs for a given unit of a good or service that otherwise qualify as statutory costs may include the additional per-unit cost accrued or paid by the seller in the provision of a replacement for the essential product in the scrutinized sale. If the additional cost of the replacement of the essential product in the scrutinized sale is used to rebut a prima facie case with respect to another unit or provision of the same essential product, that amount of increase must not be applied to rebut the prima facie case for the price of any essential product other than the essential product the prima facie case of which was rebutted by the showing of that increased cost.

(e) *Index Prices.* A seller's use of an index price to price their goods sold or value their inventory, or the existence of a customary or industry practice of employing an external index for pricing, shall not, without more, establish that an increase in the index price reflects an increase in seller's statutory costs.

(f) *Fungible Commodities*. Where essential products are stored prior to sale in such a fashion that it is not feasible to determine the price at which any unit of the good was purchased, a seller may determine the price at which a given unit of the good was purchased for purposes of this rule by assuming that the goods produced or acquired first are the first to be sold ("first in, first out").

(g) *Excluded Costs and Profit Margin Maintenance Defense*. A seller's "margin of profit" for an essential product for purposes of rebutting the prima facie case pursuant to General Business Law § 396-r(3)(c) shall mean the seller's gross income per unit minus statutory costs per unit.

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:

The price gouging statute reaches every party in the supply chain for essential products. In response to the Advance Notice of Proposed Rulemaking, the Attorney General received comments highlighting the increased costs that retailers have faced. The National Supermarket Association argued that "when supermarkets are charged higher prices for their products, they ultimately must raise prices when selling to consumers as well."[63] The Attorney General recognizes that, as the Consumer Brands Association wrote in its comment to this proposed rulemaking, "[a]ny new legal definitions of and investigations related to price gouging should clearly differentiate between price gouging and price increases related to inflation and economic conditions,"[64] as long as such price increases are limited to lawfully passing on additional costs for the essential product that are imposed on the seller and not within their control.

These rules provide guideposts for compliance. Clarity for wholesalers, producers, retailers, and suppliers is necessary to deter illegality. Clarity for small businesses—who account for 62% of job growth and 44% of economic activity in the United States[65]—is necessary for compliance and to help businesses realize when they are themselves the victims of price gouging. Guidelines on evaluating the affirmative defense of increased costs (e.g., what can be included in financial metrics) can aid businesses in calculating lawful price increases.

Several commentators on LAW-12-23-00007-P, a previous proposed rulemaking also concerning costs, opined that the ideal cost rule would be one that accepted the business's own definition of costs so long as the business complied with Generally Accepted Accounting Practices ("GAAP"),[66] even if the costs were within the control of the seller or had never been imposed on the seller at all. Such a rule is not possible given the statutory text, which as described in part 2 of this RIS limits the costs that may be passed on through price increases

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

[63] Comment of National Supermarket Association, ANPRM Comments at 26.

[64] Comment of Consumer Brands Association, ANPRM Comments at 35.

[65] Martin Rowinski, *How Small Businesses Drive The American Economy*, FORBES (Mar. 25, 2022) https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/25/how-small-businesses-drive-the-american-economy/?sh=186d7c094169.

[66] *See, e.g.*, Comment of Consumer Brands Association, First NPRM Comments at 96-97.

("statutory costs") to costs that are "additional," "imposed on" a seller, "not within the control of the defendant" seller and "for the goods and services."[67] It would have been straightforward for the Legislature to specify in the statute that the business's own accounting controlled; it did not. To comply with the statute, then, the regulation must provide ways of differentiating between costs a business might recognize and the costs the statute allows to be counted.

The purpose of this rule is to articulate these statutory limitations on cost in more precise terms that provide as much guidance as possible for regulated parties, as well as courts and enforcers. The discussion below reviews the needs and benefits of each part of the rule, grouping together certain subdivisions for ease of discussion.

Illustrative Overview of Rule

Before discussing each component part of the rule, it is helpful to provide an illustration of how the rule guides businesses in determining the amount of additional costs that may be accounted for as price increases. This overview uses the facts of the Court of Appeals' opinion in *People v. Two Wheel Corp*.[68] In *Two Wheel*, the abnormal disruption of the market was triggered by Hurricane Gloria and the vital and necessary good or service (which the rule calls an "essential product" for brevity) was electrical generators.

First, the seller must identify the "benchmark sale," the sale used in the prima facie case to decide whether the price charged in the scrutinized sale requires a cost or profit-margin justification. In *Two Wheel*, which was an application of what is now G.B.L. § 396-r(3)(b)(i), the part of the statute outlawing unjustified price increases from pre-disruption prices charged by the same seller, the Attorney General's petition used as its benchmark the seller's sales of generators immediately before the hurricane.[69]

Once the seller has identified the benchmark sale or sales, the seller must look at the costs of that benchmark sale—that is, all the costs that the seller incurred to make that sale a reality. Our first step is to remove all the "excluded costs." These are mostly "costs" that are expressed as such for business planning or accounting terms that don't reflect actual, we-paid-someone-for-this expenses. The costs that remain are broken into two categories: exclusive costs and related

[67] "Goods and services" here is the same as "essential products" as defined in 16 N.Y.C.R.R. § 600.1.

[68] 71 N.Y.2d 693 (1998).

[69] *People v. Two Wheel*, Petition at ¶ 11 ("1) A model EX 650 generator which sold for $420 in July 1985 was sold for $519 on the day of the hurricane and for $599 one day later. 2) A model EMS 4000 generator which sold for $1,350 on September 20 sold for prices ranging from $1,500 to $1,850 in the days immediately following the hurricane. 3) A model EM 2200 generator which sold for $769 on September 21 sold for $919 and $959 on September 30"). The analysis was considerably simplified because the *Two Wheel* defendant "closely tracked" the manufacturer's suggested retail prices before Hurricane Gloria and then sharply departed from them as the storm hit. *Two Wheel*, 71 N.Y.2d at 696 n.1. Proposed rule 13 N.Y.C.R.R. § 600.5 sets out details on how to determine the benchmark sales for this kind of case.

overhead costs. For Two Wheel, the obvious "exclusive" cost for a generator sale is the cost to Two Wheel of buying the generator it then sold to consumers in the benchmark sale ("Generator A").

Next come related overhead costs. Here, Two Wheel will ideally be able to rely on its usual-course cost accounting practices to work out how much of a share of overhead costs, like freight charges, can be attributed to Generator A. If it doesn't have any such method of dividing that category of overhead between their goods and services, Two Wheel needs to apply one of two default allocation mechanisms in the regulation that is most "fair, accurate, and practical" for it to apply.

The first method is taking Generator A's share of the exclusive costs of all the goods and services supported by that overhead expense. Suppose Two Wheel had a contract with a freight company to ship all generators it bought from the manufacturer to its store and paid per shipment. The freight shipment that brought Generator A carried that generator and 49 other generators. The price Two Wheel paid for Generator A made up 5% of the price it paid for all the generators in the shipment. The cost of that shipment was $1,000. It follows that Generator A would be able to count 5% of $1,000, or $50, as its proportionate share of the overhead expense of shipping the generators.

Alternatively, Two Wheel could do the same measurement but use listed price in place of costs. Suppose Generator A was priced by Two Wheel at $500. Suppose the combined price of all the other generators in that freight shipment was $50,000. Two Wheel would be able to count 1% of the freight costs (or $10) to Generator A under this rubric.[70]

Two Wheel would apply this same rubric for each category of overhead costs until it had the sum of the statutory costs making up the sale of Generator A.

Next, Two Wheel would apply the same analysis—including discarding the excluded costs and proportionally allocating relevant overhead costs—to the generator sold in the *scrutinized* sale (i.e., the sale under price gouging scrutiny that took place during the disruption), which we'll call "Generator B." As before, Two Wheel would take the price it paid for Generator B, then add Generator B's share of each of the relevant overhead costs based on whatever

[70] This discussion illustrates how this overhead cost allocation metric properly accounts for the relative size of the freight shipments, the essential deficit that doomed the proposed cost showing by Two Wheel in the Court of Appeals: "Respondents claimed, for example, that their freight charges were three times higher than normal during the period in question, but they did not address whether the shipments were similar in size. Thus, they failed to explain how the increase affected their cost per generator and gave the court no basis to evaluate their claim of cost justification." *Two Wheel*, 71 N.Y.2d at 700.

methodology the business used to do this calculation for Generator A.[71] For example, suppose Two Wheel's freight company, as Two Wheel alleged in the Court of Appeals, trebled its freight charges such that each shipment cost $3,000 instead of $1,000. That higher $3,000 figure would need to be divided between the generators shipped alongside Generator B. Perhaps there were more (or more expensive or costly) generators in the Generator B shipment—if so, the share Generator B would be able to claim of the increased cost would be lower than the share claimed by Generator A.

There is an additional wrinkle for the scrutinized sale. Two Wheel is allowed to "front load" the additional cost of the generator it will buy to replace Generator B (call this replacement "Generator C") and recover that cost by raising the price of Generator B. But if it takes this option, Two Wheel cannot factor in that additional cost again when pricing Generator C; Generator B and C swap places, and the price of Generator C will need to come down to whatever price was going to be charged for Generator B.

The final calculation is simple subtraction: take the entire amount of statutory costs for Generator B, and deduct the entire amount of statutory costs for Generator A. What remains is the amount Two Wheel can increase the price of Generator B with full cost justification.

Statutory Costs

Subdivision (b) states the general formula for determining "statutory costs" of the essential product in the scrutinized sale (an abbreviation of the statutory phrase "additional costs not within the control of the defendant [that] were imposed on the defendant for the goods and services") and the essential product in the scrutinized sale: the sum of the costs exclusively identified with the production, purchase, storage, transportation, distribution, and sale (together "provision") of the essential product sold in the scrutinized sale ("exclusive costs") and the essential product's proportionate share of "relevant overhead costs."

The "benchmark sale" here could refer to one of two possible comparators, depending on the prima facie case the Attorney General brings. In a case brought under G.B.L. § 396-r(3)(b)(i), the benchmark sale is the sale "by the defendant in the usual course of business immediately prior to the onset" of the disruption of the essential product in the scrutinized transaction. In a case brought under G.B.L. § 396-r(3)(b)(ii) the benchmark sale is the sale of the "same or similar goods or services [that] were readily available in the trade area" against which the price of the essential product in the scrutinized transaction is being compared.

Other rules provide more guidance for working out the "benchmark sale." Proposed rule

[71] The business must use the same method of allocation between Generator A and B. If by a freak coincidence the business changed its accounting methods mid-disruption, it must still apply its pre-disruption method because that was its "usual course of business" pre-disruption.

13 N.Y.C.R.R. § 600.5 sets out guidance for the selection of this "pre-disruption" benchmark sale. The benchmark sale for *new* products (i.e. products new to the trade area post-disruption) being compared to other products in the market is defined in 13 N.Y.C.R.R. § 600.7. The Attorney General has not at this time proposed a rule covering old products compared to the same or similar goods and services readily obtainable in the trade area.

As noted in proposed rule 13 N.Y.C.R.R. § 600.5, sometimes more than one sale is used to derive the benchmark price; in those situations, the proposed rule provides criteria for choosing a set of sales and then selects the median price in that set. When that occurs, this proposed rule requires each category of cost of each benchmark sale to be measured and takes the median of each such cost as the cost of the "benchmark sale" for purposes of additional cost analysis. This choice reflects the fairness concerns that undergird proposed rule 13 N.Y.C.R.R. § 600.5's use of medians—just as it is more fair for businesses in situations where outlier sales might occur to use the median over a relatively short time window as the benchmark price, it is fair for businesses and consumers alike to perform the same find-the-median exercise on the cost side to prevent a business from unduly being punished or rewarded for outlier costs incurred before the onset of the disruption.

The general formula expressed in this subdivision is a more precise formulation of the statutory text. The statutory word "additional" requires the inquiry be limited to the difference between benchmark and scrutinized sale; the statutory words "for the goods and services" require that the costs be directly and validly connected to the provision of the good or service in the scrutinized sale.

The provision of a prior proposed rule concerning costs ("costs shall be calculated over the same time period as the time period of the market disruption") is incorporated into new subdivision (b) of this proposed rule by requiring comparison between costs imposed in the benchmark sale and costs imposed in the scrutinized sale. This new formulation makes explicit what was previously implicit, which is that a cost not incurred in the benchmark sale that is then incurred in the scrutinized sale is an additional cost even if the cost increase occurred before the onset of the disruption.

In LAW-12-23-00007-P, a past rulemaking proposal on this subject, statutory costs were said to be limited to those costs "directly attributable" to the provision of the specific good or service in the scrutinized sale along with a "directly attributable percentage" of the "overhead costs of the business." To improve clarity, the "directly attributable" formulation is retained as an umbrella into which two categories of costs go: the exclusive costs of the essential product, and that essential product's share of relevant overhead costs. For discussion of the needs and benefits of the relevant overhead expenses formulation specifically, see the discussion in the next subhead.

The division of the cost analysis in this manner was the most analytically helpful way to

implement the statutory command that costs be "for the goods and services," as that command has been interpreted by the Court of Appeals, which explained that a cost-per-unit analysis is required.[72] A helpful application of this reasoning can be found in *People v. Chazy Hardware, Inc.* where the trial court found a gross disparity in price of electric generators by first taking the price paid for the generators (i.e. exclusive costs), then proportionally allocating relevant overhead expenses (which it called "extraordinary costs") on a per-unit basis, adding pre-disruption profit margins, and then comparing that figure to the price charged.[73]

Because costs must be measured per-unit, an examination of past enforcement actions, submissions by commentators to this rulemaking, and available public information suggests that by far the most robust method of conducting the measurement is to divide it into two parts: those costs exclusively associated with the essential product, and the remaining costs that, while not exclusively associated with the essential product, were necessary for the provision of the essential product and susceptible to allocation.

Relevant Overhead Expenses

There are categories of expense that cannot be exclusively attributed to a specific good or service, but which are necessary to the provision of the essential product and whose costs must be recovered through the sale of that essential product. Rent is an obvious example, as is energy. The question is how to allocate these relevant overhead costs in the per-unit fashion demanded by *Two Wheel* to determine the correct proportion of the costs that can be lawfully borne by price increases for a given essential product.

Allocating overhead costs is a common problem in the law, one that arises whenever a defendant must pay back the net profits they reaped from a wrongful action such that the costs incurred in making those profits must be accounted for and deducted from the overall sum owed.[74] Of the various areas that employ overhead cost calculation methods, the Attorney General concluded that the setting most similar to price gouging was the calculations involved in calculating the net profits of copyright infringement.

Copyright infringement net profit methods are a useful model in the price gouging context because the copyright calculation centers on attributing the correct proportion of the defendant's overhead costs and revenues to the infringing product separate and apart from all

[72] *People v. Two Wheel*, 71 N.Y.2d 693, 700 (1988).

[73] *People v. Chazy Hardware, Inc.*, 176 Misc. 2d 960, 964-65 (Sup. Ct, Clinton County 1998).

[74] *See generally Liu v. Sec. and Exch. Comm'n,* 591 U.S. 71, 79 (2020) ("equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names" and collecting sources).

other products the defendant is selling.[75] That is the same inquiry for apportioning overhead expenses in a price gouging, where the court must determine what costs were "for the goods and services" alleged to be gouged and which were not.[76] The Copyright Act also uses a burden-shifting framework like that used in price gouging: the plaintiff is "required to present proof only of the [defendant's] gross revenue, and the [defendant] is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."[77]

The proposed rule adapts for price gouging the two-step overhead cost calculation inquiry set out by Judge Learned Hand in the leading case *Sheldon v. Metro-Goldwyn Pictures Corp*., and refined in subsequent cases, to determine the application of overhead costs between infringing and non-infringing essential products.[78] In *Sheldon*, one of the defendant's movies infringed the plaintiff's copyright, but the defendant's other movies, which obviously shared the expenses of the infringing movie, didn't. So what costs counted and which did not?

Judge Hand set out the overhead cost allocation method as comprising two steps. First, the defendant defines the categories of overhead costs that "the [defendant] can demonstrate . . . [were] of actual assistance in the production, distribution, or sale of the [essential product]."[79] In Judge Hand's words: "'Overhead' which does not assist in the production of the [essential product] should not be credited to the [defendant]; that which does, should be."[80] The proposed rule reworks this formulation slightly, in the interests of clarity and in recognition of the shift in language since the 1930s, to require that the overhead cost be "necessary" to the provision of the good or service.[81]

Next, the defendant must allocate the overhead costs between the infringing and non-infringing essential products using a "fair, accurate, and practical method of allocating the implicated overhead to the [essential product sold]. The [defendant] has the burden of 'offering a fair and acceptable formula for allocating a given portion of overhead to the particular [sold]

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[75] 17 USC § 504(b).

[76] G.B.L. § 396-r(3)(c).

[77] 17 USC § 504(b).

[78] *Sheldon v. Metro-Goldwyn Pictures Corp*., 106 F.2d 45, 54 (2d Cir. 1939).

[79] *Kamar Intern., Inc. v. Russ Berrie and Co.,* 752 F.2d 1326, 1332 (9th Cir. 1984) (citing *Sheldon*, 106 F.2d at 54).

[80] *Sheldon*, 106 F.2d at 54.

[81] When applying the *Sheldon* "full absorption rule" to relevant overhead costs in the price gouging context, it is implicit that fixed costs will seldom be counted. This is because only "additional" costs (i.e. variable costs) qualify as statutory costs. That said, there is nothing about conventionally fixed costs that exclude them from the statutory cost calculation if the "fixed" cost increased between benchmark and scrutinized sales and is a relevant overhead cost. *See generally* Stephen E. Margolis, *The Profits of Infringement: Richard Posner v. Learned Hand*, 22 BERKELEY TECH. L.J. 1521, 1524 (2007).

items in issue.' . . . all presumptions are drawn against the [defendant]."[82]

The Learned Hand method of overhead cost allocation practically applies the price gouging statute's command that the only acceptable costs are those "for the goods and services." Beginning with the categories of expense allows the seller to remove those overhead costs that the statute does not allow to be counted: those that were within the control of the defendant, or were not imposed on the defendant, or are not of assistance in producing the essential product ("excluded costs" in the language of the rule). Once the categories are excluded, it remains only to divide in a fair and reasonable manner the remaining relevant overhead charges between the essential product in the scrutinized sale and the other goods and services those overhead costs supported, with the burden of showing fairness and reasonability resting (as with all other elements of the cost showing) with the seller.[83]

The proposed rule modifies the *Sheldon* approach in one material respect, reflecting the differences between the price gouging and copyright infringement regime: if the seller has its own method of applying a permissible category of overhead expense to individual essential products in the usual course of business, that same method may be used to allocate overhead cost increases. Thus, if a seller has (for example) elected to use activity-based costing and so has already determined the share of a given category of overhead expense to an essential product, that same allocation method can be used to determine the allocation of overhead cost increases.

The Attorney General has chosen to adopt a performance standard here not merely because performance standards are generally preferred under SAPA where they do not inhibit the effectuation of the statutory purpose,[84] but also because price gouging, unlike copyright infringement, is situational. Copyright infringement begins with using intellectual property that does not belong to the defendant, an inherently wrongful act (whether willful or not). Gouging on the other hand involves an act that is ordinarily *not* wrongful under most circumstances—raising prices—that *becomes* wrongful during a disruption. A seller's own incentives to restrain their costs will, so long as they were adopted on a clear day without consideration of their impact on price gouging liability, often be sufficient to determine which of a seller's costs actually increased.

The first *Sheldon* step in this proposed rule must necessarily be a design standard

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[82] *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 105–07 (2d Cir. 1999) (quoting Melville B. Nimmer & David Nimmer, *4 Nimmer on Copyright* § 14.03 (B) 14–39 (1996) (describing the *Sheldon* procedure).

[83] One of the copyright-specific concerns addressed by the Second Circuit in *Hamil* was the extent to which the *Sheldon* cost-allocation method applies in a willful infringement case versus a non-willful infringement case. The price gouging law is a strict liability statute that does not recognize a willful/non-willful distinction and so the "willfulness enhancement" described in *Hamil* is not relevant here.

[84] S.A.P.A. § 202-a(1)

designed to exclude all but statutory costs from relevant overhead costs. With only statutory costs left, if at the second *Sheldon* step the seller's own usual-course pre-disruption cost allocation model tells the seller that they must increase prices on a particular good or service to accommodate increases in statutory costs that model allocates to that good or service, and the seller does only that, the purpose of the statute is sufficiently advanced. This standard also allows for instant compliance on the part of businesses rather than requiring the seller to come up with a new allocation model just for price gouging. And a performance standard reflects the common theme of industry commentators that various industries will use different cost allocation methods; effective overhead cost allocation is the cornerstone of effective cost management.[85]

Subdivision (b)(4) of the proposed rule, taken together with the definition of "usual course of business" set out at 16 N.Y.C.R.R. § 600.1, emphasizes that a business may only use their own overhead cost allocation model if that model was adopted and used *outside* of any abnormal disruptions of the market for purposes other than calculating their costs in a G.B.L. § 396-r analysis. These limitations are implemented as anticircumvention measures to prevent sellers from adopting a cost allocation method with the intent of inflating costs during a disaster (such as, for example, taking salary costs and, instead of applying them uniformly to essential products across time, allocating them disproportionately to essential products sold during natural disasters only). The business's continued use of usual course cost-allocation methods during an abnormal market disruption does not disqualify those methods under this subdivision, so long as those cost-allocation methods were adopted on the proverbial clear day.

It may be the case that a business does not have a pre-existing method of allocating overhead expenses to essential products in the usual course of business, or only performs such an allocation for some permissible categories of overhead expense and not others. In that circumstance, the rule in *Sheldon* applies: for those categories of overhead expense where the defendant has no pre-disruption usual-course cost allocation method, the defendant must propose a method of allocation that is the most fair, accurate, and practical for the business to apply in the usual course of business. To provide additional guidance, subdivision (b)(4) sets out two conventional allocation methods that cover the generality of cases in which a business that is not already measuring per-essential product overhead costs might perform a cost allocation,[86] but allows for a business to propose another method if they can demonstrate it is superior to the defaults available.

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[85] *See, e,g.*, Robin Cooper & Robert S. Kaplan, *Profit Priorities from Activity-Based Costing*, HARV. BUS. REV., May–June 1991, https://hbr.org/1991/05/profit-priorities-from-activity-based-costing (describing an equipment manufacturer's switch in methods of overhead cost allocation from a three unit-level basis to five drivers of overhead resources, allowing the business to discover that certain drive shafts were in fact costing far more in overhead than previously realized).

[86] *See Hamil*, 193 F.3d at 105 n.5

Capital Expenses

Capital expenses present special challenges in the context of overhead cost allocation. Suppose an area is hit by a snowstorm and ACME Corp. seeks to bring in additional generators to meet expressed demand, more than its existing trucks can carry. To accomplish this, ACME buys a truck with sturdy snow tires to help transport the generators during the storm. The truck is an overhead expense: it assisted in the transportation of the needed generators, but it cannot be identified exclusively with the generators sold during the snowstorm because it can support the transportation of any goods sold by ACME that can fit on the truck—including generators sold after the storm has passed.

The capital expense of the truck must therefore be proportionally allocated not merely across all the essential products the truck would transport but throughout the truck's useful life; it would defeat the purpose of the price gouging statute to permit businesses to raise prices in a disaster to pay for capital expenses that would ordinarily be budgeted for by considering post-crisis earnings gained from the capital investment. Capital expenses present the same issue as any overhead expense: if the business in the example would justify the expense of a new truck by applying its cost to future sales in the usual course of business, the same allocation method would apply here.

"Necessary" Costs and Exclusion of Costs Within the Seller's Control

The statute imposes certain restrictions on statutory costs: they must be "additional," "costs," "not within the control of the defendant," "imposed on the defendant," and "for the goods and services." Subdivision (b)(5) provides clarity on which costs are within or without the seller's control by requiring that the cost be necessary for the provision of the essential product. This can be shown in three ways: either the cost was in fact necessary for provision of the essential product, or at the time it was incurred the seller reasonably believed it was necessary for the provision of the essential product, or it was a labor cost as defined in subdivision (a)(2) of the rule. Subdivision (c)(2) singles out a particular example of a cost *within* the control of the defendant: payments by the defendant to itself or its controllers, other than payments already contracted to be made before the onset of the disruption.

At outset, it is important to stress that it is the "costs" *of providing* the essential product that must be outside "the control of the defendant." It is the seller's control over the *costs* of purchasing, producing, storing, transporting, distributing, and selling the essential product, not the seller's control over whether the essential product is to be provided at all (or in any quantity), that is the focus on the statutory cost inquiry. So if a seller elected to respond to a disaster by *increasing* their supply of an essential product—and incurred additional expenses not within their control to necessary to effectuate that choice to increase supply—those costs would be statutory costs even though the decision to increase supply was itself a choice within the seller's

control.[87]

In OAG's review of past price gouging enforcements and related comments, the major analytical difficulty with the "control" inquiry is that there are few situations where a particular cost is unambiguously and entirely out of a seller's control. Labor costs, for example, could be thought of as somewhat within the control of the defendant: most businesses have a degree of choice over whether and how to hire or fire workers, and wages are set in negotiations characterized by complex and shifting power dynamics within a larger market context.[88] Tax costs might be mitigated by tax planning efficiencies. Rising supply costs might be ameliorated by switching suppliers. Indeed, in practically every relationship a business has there is never a total abdication of control by one party; even adhesive supply contract prices can seldom be set without any input from buyers.

Review of the price gouging cases as well as OAG's enforcement experience indicates that a cost increase is "outside of the control" of a seller if the increase is necessary for the provision of the essential product (i.e. but for the cost, the essential product would not have been provided), or was reasonably thought by the seller to be a but-for condition for the provision of the essential product at the time the cost was incurred.[89] A "reasonable belief" standard is appropriate here to avoid penalizing businesses that incur costs that hindsight proves to be unnecessary but that appeared necessary at the time, a particular hazard given the constrained time under which resupply decisions may need to be made.

The necessity inquiry is conducted product by product. The cost of producing Product A cannot be applied to the price of Product B unless Product B cannot be provided except by providing Product A (in which case Product B and A are probably better viewed as a single product—a car on the lot and gasoline in that car, for example, without which the car cannot be taken home).

For example, suppose a supermarket sells eggs, an essential product, at $1 per dozen eggs. The supermarket buys eggs from a supplier for $0.85 per dozen, but the supermarket's pre-existing activity-based overhead cost allocation model sets each dozen's share of the supermarket's overhead costs (rent, salaries, and energy) at $0.05 per dozen. Thus, under

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[87] *See, e.g.*, *People v. Chazy Hardware, Inc.*, 176 Misc. 2d 960, 961–62 (Sup. Ct., Clinton County 1998) (defendant permitted to pass on increased cost incurred by increasing stock of generators).

[88] *See, e.g.*, William T. Dickens, et al., *How Wages Change: Micro Evidence from the International Wage Flexibility Project*, 21 J. ECON. PERSP. 195, 195 (2007) ("Workers' wages are not set in a spot market. Instead, the wages of most workers—at least those who do not switch jobs—typically change only annually and are mediated by a complex set of institutions and factors such as contracts, unions, standards of fairness, minimum wage policy, transfers of risk, and incomplete information").

[89] *See, e.g.*, *People v. Two Wheel Corp*., 71 N.Y.2d 693,700 (1988) (freight charges for shipment of generators); *People v. Wever Petroleum, Inc.*, 14 Misc. 3d 491 (Sup. Ct., Albany County 2006) (cost of gasoline supplies).

ordinary circumstances, each carton of a dozen eggs sold nets the supermarket $0.10 in profit. A hurricane hits the locality and knocks out the supermarket's power supply. Fortunately, the supermarket has backup diesel generators that can step in to provide power; unfortunately, those generators cost more money to run than using mains power. The overhead costs allocatable to each dozen eggs (using the pre-disruption overhead cost allocation model) are now $0.50 per dozen, up from $0.05. If sold at $1, each dozen would be accounted as a loss of $0.40.

The supermarket also sells bread, another essential product, at $2 per loaf, paying $1.80 to its supplier per dozen and allocating overhead expenses such that each loaf's share of overhead is $0.03 per loaf (bread not requiring refrigeration or as much space as eggs), for a $0.17 profit per loaf. After the hurricane forces a switch to backup generators, the overhead cost per loaf rises to $0.30 per loaf.

After the onset of the hurricane, the supermarket may increase the price of a dozen eggs to $1.45 per dozen, reflecting the increase in properly allocated overhead costs per dozen. It would also be justified to increase the price of loaves of bread to $2.27, reflecting the $0.27 increase in properly allocated overhead costs per loaf.[90] But the supermarket may not keep the price of eggs at $1 and increase the price of bread to $2.73, accommodating the rise in egg costs and bread costs in a single essential product. Each essential product must be evaluated on its own terms, applying the defendant's pre-existing overhead cost allocation model to the increases in overhead costs.

There would be no statutory problem, however, if the supermarket kept the prices of both eggs and bread steady and increased the price of a third non-essential product (say alcoholic beverages), to accommodate cost increases that it would usually attribute to essential products. This kind of cost recoupment is to be encouraged because it keeps essential product prices as low as possible, subsidized by purchases of non-essentials.

Conversely, a seller may not recoup cost increases or losses on other products—perhaps those for which demand has fallen owing to the hurricane—by raising the prices of essential products. As the statute provides, it is only the additional costs "for the goods and services" (that is, the essential product whose price is sought to be justified) or its replacement that are countable as statutory costs.

A necessity inquiry also avoids the possibility of sellers using the cover of a disaster to indirectly profiteer by financing capital improvements that will not be realized until after the disaster passes. Suppose the *Chazy Hardware* defendant invested in a warehouse for generators some years before the snowstorm, and decided to raise the price of their generators by $10 per

[90] By "fully justified" it is meant that if the supermarket increased prices by this amount, 100% of the amount of increase would be accounted for by an additional cost showing under G.B.L. § 396-r(3)(c).

generator to recover the cost of the warehouse over time. Chazy Hardware cannot accelerate recoupment of the cost of warehouse construction by taking advantage of the demand spike caused by the snowstorm and treat that acceleration as a cost outside its control because (granting that the warehouse itself is necessary for the provision of the generators) the *increase* in investment recoupment costs is not necessary to provide the generators. Conversely, if Chazy Hardware had secured the warehouse with a mortgage and its mortgage servicer elected to accelerate repayments, such an increase in mortgage payments would be a statutory cost because the increase in payments is necessary to retain the warehouse.

Labor Costs and Controller Payments

The proposed regulation underscores that labor costs are statutory costs unless they represent disguised profits on the part of the seller's controllers. One labor union commentator expressed concern that a prior rulemaking proposal, LAW-12-23-00007-P, risked creating "a misunderstanding" over whether labor costs were "not within the control of the defendant" as the price gouging law requires of statutory costs.[91] "Given the control firms in general, and rideshare in particular, have over labor costs," the union went on, "we are worried that rideshare firms might avoid paying their workers more during market disruptions, starving workers of much-needed pay and leaving passengers unserved during urgent and/or dangerous situations." Other commentators argued that any limitation on costs within the control of the defendant would have the effect of not permitting increases in labor costs to be accounted for in higher prices.[92]

The Attorney General has addressed the substance of these comments in the present proposed regulation by stating expressly that labor costs for line employees or contractors are generally statutory costs. As discussed above, "not within the control of the defendant" should be interpreted consistently with the statutory text and purposes, both of which point strongly in the direction of treating all labor costs as statutory costs (setting aside payments to the natural or legal persons who own or control the defendant). And there is no evidence that the Legislature intended the price gouging law to act to suppress wages or hazard pay during abnormal market disruptions.

Put another way, even if an employer might in the abstract be said to have at least some control of wages, line employees are third parties whose payment is not fully within the defendant's control and, in the context of labor costs, the statutory purposes are best advanced by treating that relative absence of control as sufficient to qualify labor costs as statutory costs. This is particularly true when considering a unionized workplace, which features no employer control

[91] *See* Comment of Independent Drivers Guild, First NPRM Comments at 45.

[92] *See* Various Form Comments of Rideshare Drivers, First NPRM Comments at 7-13; Comment of New York Taxi Workers' Alliance, First NPRM Comments at 29–31.

of compensation outside of periods in which the collective bargaining agreement is re-negotiated. Given the statute's inclusion of "strike" as a triggering event, the statute itself appears to operate from the premise that labor action is a force outside a business's control. The same principle applies with greater force still in an independent contractor relationship (a real one, that is, and not a fraudulent one created to evade unemployment insurance taxes): if an employer does not offer sufficient compensation, the worker's economic incentives will cause them to abandon the employer. Labor costs imposed on a business by operation of law (minimum wages, for example) are still more clearly costs outside of the business's control.

Because labor costs are statutory costs, prices may rise to account for them—but no further. To use commentators' preferred example, if ACME, a ride-hailing company, had "surge pricing" that raised prices for rides during times of high demand and paid drivers a bonus to have them drive during that high-demand time, the "surge" price increase would be lawful provided that *the entire amount of increase* was paid directly to drivers as their bonus. So if a given trip would have cost a consumer $20, and with "surge pricing" was then priced at $100, the $100 ride would be fully justified if the driver was compensated an additional $80 for that ride.[93] But if the driver were paid only $50 extra, the remaining $30 (or $28, if the 10% threshold in proposed rule 16 N.Y.C.R.R. § 600.6 applied) would need to be justified by other statutory costs.

To use another example, if a hospital were to increase prices owing to an increase in staffing costs imposed on them by a staffing agency for travelling nurses, that increased payment for labor would be a statutory cost (as would increases in compensation mandated by a collective bargaining agreement for employee nurses). A staffing agency, meanwhile, would not escape price gouging liability if it raised rates for staffing unless the amount of the increase was paid to the travelling nurse (i.e. became a labor cost).

The proposed rule clarifies that labor costs do not extend to increased payments made to the controllers of the seller (other than payment increases required under a contract agreed to in the usual course of business pre-disruption), because such payments are better considered as disguised profits rather than costs outside of the controller of the seller. In making this

[93] Certain businesses conceptualize themselves as "platforms" that connect independent businesses (e.g. drivers, in their view) to consumers rather than employers of drivers. Whatever the merits of this position as a matter of law, *cf. Matter of Vega [Postmates]*, 35 N.Y.3d 131, 139 (2020) (affirming Unemployment Insurance Board's determination that 'gig' delivery worker was an employee), the relevant question for the price gouging analysis is who is "selling" or "offering for sale" the relevant service at an unlawful price. The Attorney General has not set out in regulation the factors that inform this analysis at this time, but this may be a subject for future rulemakings. The OAG has historically focused enforcement on the entity that has greatest control over the price the buyer pays. For most ride-hailing companies that is the platform itself; even if driver demands influence price-setting, the final pricing decision—and design of the algorithm—rests with the platform, and so it has been the platform that has been asked to provide justification for the rates set. A different result might follow if the platform simply provided total freedom for a third-party business to set their own price; a still different result might follow if the platform offered pricing services to third-party businesses. These issues are reserved for future enforcement and regulatory development.

determination, the Attorney General considered the phrase "not within the control of the defendant" in the context of the purpose of the statute and the word "imposed." As discussed above, price gouging is fundamentally about preventing sellers from increasing their profits by exploiting abnormal market disruptions. A payment made to the defendant's owners or controllers, paid for by higher prices on essential products, represents a form of unfair profiteering even if such payments are not necessarily a profit recognized by an accountant.

At the same time, if a seller has already lawfully contracted in the usual course of business before the disruption to pay a natural person who owned or controlled it some increase in salary, as a matter of contract law the seller will be obligated to pay that money either as the contract requires or as expectation damages in court.[94] That additional cost is therefore not within the seller's control. But if the seller chose to *incur* that contractual obligation after the benchmark sale, *that* increase in costs *was* within the seller's control, because the seller is deemed to control the money it pays itself or its controllers.[95] This conclusion is underscored by the statutory word "imposed," which indicates that the cost increases must come from a third party or some source external to the defendant.[96]

In other words, subdivision (c) makes express what the statutory language and purpose imply: a statutory cost is one that is imposed on the defendant by a third party or by a prior contractual obligation, and does not include payments a defendant makes to itself or its controllers.

Research and Development Costs

A previously proposed rule on this subject, LAW-12-23-00007-P, excluded research and development ("R&D") from the statutory cost definition "because [these costs] are within the control of the defendant." This exclusion has not been maintained in this proposal in so many words because commentators' responses on the past rulemaking indicated that the way it was presented was causing undue confusion. R&D expenses will often be excluded costs because by their nature they do not meet the statutory cost criteria; rather than baldly state this conclusion, the proposed rule attempts to set out the conceptual framework leading to this conclusion in more detail with this Regulatory Impact Statement then setting out how the framework applies to

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[94] *See Walpert v. Jaffrey*, No. 13-cv-5006, 2016 WL 11271873, at *4 (S.D.N.Y. Aug. 17, 2016) (collecting cases).

[95] *See People v. Beach Boys Equipment Co.*, 273 A.D.2d 850, 851 (4th Dep't 2000) (rejecting claimed increased price in generators because generators were not bought in "an arm's length transaction").

[96] *Id.*; *see also Imposed,* Merriam-Webster Dictionary (2023), https://www.merriam-webster.com/dictionary/imposed ("[T]o establish or apply by authority; to establish or bring about as if by force"); *Imposed,* Oxford English Dictionary (2023), https://www.oed.com/dictionary/impose_v?tab=meaning_and_use#879285 ("To lay on, as something to be borne, endured, or submitted to"); WILLIAM SHAKESPEARE, HENRY VI, PART 3 act 4, sc. 4, l. 60 ("What Fates impose, that men must needs abide").

R&D.

R&D spending will seldom be relevant in a G.B.L. § 396-r(3)(b)(i) case, that is, one where OAG has shown a "gross disparity" between pre- and post-disruption prices for an essential product, and the seller is attempting to justify that disparity by pointing to cost increases. In such a case, the comparison is between the pre-disruption price of an essential product before the onset of a disruption and the scrutinized sale of that *same* essential product post-disruption; statutory costs are "additional" costs between the benchmark and scrutinized sale. If there is an essential product to be sold pre-disruption (as there must be to set a pre-disruption price), then all the R&D necessary to create that essential product would necessarily have occurred pre-disruption; there would be no additional R&D expenses to be incurred after the essential product had been researched, developed, and sold. So R&D expenses for the same essential product incurred between the benchmark and scrutinized sale are, by definition, either gratuitous and so in the defendant's control, or in the service of creating a *different* essential product and so not "for the goods and services." Either way, R&D is not a statutory cost in this analysis.[97]

Where R&D might more often be a statutory cost is in connection to a G.B.L. § 396-r(3)(b)(ii) proceeding. In that kind of proceeding, the comparison is between the amount the defendant charged versus a different benchmark: the price at which the same or similar goods or services were readily obtainable in the trade area. Those R&D expenses necessary to the creation of the defendant's essential product may be statutory costs in such an inquiry, because they would be additional costs (versus the costs underlying the price of the good in the trade area), not within the control of the defendant (they were necessary to the defendant's provision of the essential product), imposed on the defendant for the goods and services.[98]

To make this concrete, consider a branded drug B+. Suppose ACME, the defendant manufacturer, spent significant sums researching and developing B+, but secured FDA approval and took B+ to market before the onset of a disruption. ACME sets the initial price of B+ when it goes on the market; that price forms the benchmark sale price. A pandemic occurs that significantly increases demand for B+. At this point, there is no R&D cost increase that could justify a price increase of B+ because there are no *additional* R&D costs between the time of the benchmark sale and the scrutinized sale—and there is no need to raise prices still further from

[97] A seller might amortize an R&D cost over the lifetime of the product, but this too would not lead to a change (much less a gross disparity) in the essential product price immediately following a disruption unless the seller planned on accelerating R&D cost recovery by exploiting an abnormal market disruption, which is of course exactly the behavior the statute aims to outlaw. G.B.L. § 396-r(1).

[98] A business might consider a pricing strategy whereby an essential product is given a lower everyday price anticipating that a disaster would create a demand spike that would allow much higher prices, relying on the higher prices to recover old costs. Such a strategy would also be a formal instantiation of the unfair use of an abnormal disruption of the market that the statute aims to outlaw. G.B.L. § 396-r(1).

their base, because the existing pre-disruption price was presumably set to recover R&D expenses.[99]

But suppose that B+ competes with a similar drug, B-, sold in the trade area by XYZ Corp, an ACME competitor. B- treats the same condition as B+ but is cheaper; although a branded drug, its development fortuitously required less R&D expense for XYZ than did the development of B+ for ACME. It may be the case that the amount charged for B+ grossly exceeds the price at which similar good B- is readily obtainable in the trade area—a prima facie case under G.B.L. § 396-r(3)(b)(ii). But now R&D expenses may form a part of ACME's justification, because *as compared to drug B-*, whose price is the benchmark in a G.B.L. § 396-r(3)(b)(ii) inquiry, there *were* "additional" expenses necessarily incurred to produce drug B+—however much more ACME spent on R&D for B+ than did XYZ for B-.

As discussed above in the context of overhead expenses, to the extent that R&D expenses cannot be exclusively associated with the provision of the subject essential product, they must be allocated proportionally like any other category of overhead expense. Thus if, for example, a research scientist in a drug manufacturer is contributing to basic research that is applicable to both the essential product in the scrutinized sale and other goods—including goods that have yet to be fully developed—a proportional allocation of the costs associated with that research scientist must be made between all of the areas of operation in the business to which that research scientist contributes.

One result of the statutory scheme is that it is not permissible for a defendant to raise the price of one essential product to provide funds for research and development of a different essential product. That is a necessary consequence of the statutory text, which permits defendants to count only costs imposed on the defendant "for the goods and services" as justifying an increase in prices. The balancing of lower prices for essential goods now versus higher prices that spur innovations later is the Legislature's to strike, and it has instructed the Attorney General and the courts, by limiting cost justifications to cost increases "for the goods and services," that it prefers to prioritize lower prices for essential goods.

Losses on Other Products

Sometimes, a business might treat a loss incurred on a different product as a "cost"—

[99] It will be necessary in every case for the defendant to show that R&D really was a relevant overhead cost, that is, was of actual assistance in the development of the drug; otherwise it is not a cost "for the goods and services." *See generally* Oliver Wouters, et al., *Association of Research and Development Investments with Treatment Costs of New Drugs Approved From 2009 to 2018*, JAMA NETWORK OPEN, Sept. 9, 2022, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2796669 (finding no relationship between the estimated R&D costs and drug prices). If, per Prof. Wouter and his colleagues' contention, a defendant cannot show that the R&D costs claimed were necessary for the provision of the drugs, then they are not "relevant overhead costs."

consider, for example, a "loss leader" where the per-unit loss a business incurs on Product A are justified by the business because they lead to purchases of Product B, such that for management accounting purposes the business treats the loss on Product A as a cost of Product B. In price gouging statute terms, however, what is really happening in this situation is that the costs of Product A are being applied to Product B even though those costs are not necessary for the provision of Product B. As discussed in the context of direct and overhead costs, statutory costs include only those which are "for" the "goods and services" whose price increased, not for the business as a whole.[100] Subdivision (c)(1)(i) repeats this requirement to clarify that a business may not treat losses incurred on other products as statutory costs.

This exclusion provides helpful guidance in overhead cost allocation: if a business conventionally treated losses on some essential products as overhead expenses born by other essential products, that treatment would not be an acceptable basis for calculating statutory costs. If Essential Product A was sold at a loss (in the eyes of the business) as a result of the business's pre-existing overhead cost allocation method, that amount of loss cannot be treated as a cost to justify an increase in price of Essential Product B.

Proving Transfer Costs and Index Prices as Costs

The statute permits a cost to justify a price increase only if it is, among other things, a "cost" that was "imposed on the defendant." In most cases determining these costs is straightforward: a business that contracted with a third party to pay $X per unit for an essential product before a disruption onset who then pays $X + $Y for a unit of that product post-onset may raise prices for the more expensive unit by $Y.

Certain businesses, however, do not account for costs in such a straightforward way, instead preferring to use measures with some amount of abstraction. Subdivision (b)(1) and subdivision (e) of the proposed rule sets out some common cost abstractions and explains why they do not *on their own* provide the basis for a cost defense.

Transfer Pricing

Transfer pricing occurs when one part of a firm charges another part for goods and services using an internally-set price that is often, but not necessarily, the price of the essential product on the open market.[101] The proposed rule clarifies that transfer prices do not provide a defense under the statute *unless* the defendant provides satisfactory evidence that the transfer prices on which they propose to rely reflect actual third-party-imposed costs, for several reasons.

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[100] *See People v. Two Wheel*, 71 N.Y.2d 693, 700 (1988) (requiring per-essential product cost justifications).

[101] *See* John McKinley & John Owsley, *Transfer pricing and its effect on financial reporting*, J. OF ACCOUNTANCY, Oct. 1, 2013, https://www.journalofaccountancy.com/issues/2013/oct/20137721.html.

First, although generally accepted accounting principles may treat transfer prices as costs for management accounting purposes, the statute requires "costs" to be "imposed on the defendant" and "not within the control of the defendant." Transfer prices are literally within the defendant's control once it is understood that the adoption of a transfer pricing *regime* (as well as just what prices will be set and by what means under that regime) is fundamentally a choice the business has made driven by its economic incentives: "the management of a multinational entity may have strong business reasons, entirely unrelated to tax considerations, to price intragroup transactions at other than market prices."[102] To the extent transfer prices reflect abstracted or anticipated costs, the statute would treat the "costs" represented by payment of transfer prices as "within the control" instead of "outside the control" of the party—or simply discard them because they are not "costs" at all. The statutory language compels the conclusion, therefore, that transfer prices are not acceptable *unless* they can be shown to reflect actual statutory costs.

Second, and relatedly, OAG's experience from past price gouging investigations is that there is no consistent definition from business to business of what constitutes a "transfer price;" some businesses use transfer prices in an effort to reflect their actual costs with as much accuracy as possible (which is acceptable for price gouging terms) while other businesses use transfer prices to artificially change the prices of goods and services being sold within the corporate family without connecting those prices to the business's actual costs (which is not).[103] Between different uses of "transfer price," controversies over what a given transfer price must be, and incongruities between transfer prices in some settings and the text of the statute, it is not appropriate to rest on transfer prices without taking the additional step to determine whether they reflect statutory costs.[104] It is easier for everyone to require OAG and defendant alike to focus on the actual statutory inquiry—real costs, paid to real third parties, for real goods and services—and then test whether the business's in-house abstraction acceptably measures the reality that the statute looks to address.

Third, reliance on transfer prices would be an open invitation to fraud in the process of proving costs. Such a fraud has, regrettably, already been attempted. In *People v. Beach Boys Equipment Co*., the seller sought to justify charging $1,000 for generators it purchased for $480 by having one legal entity within the group of companies the seller owned purchase the generators at the original $480 price, then have that entity charge the selling entity under

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[102] Michael C. Durst & Robert E. Culbertson, *Clearing Away the Sand: Retrospective Methods and Prospective Documentation in Transfer Pricing Today*, 57 TAX L. REV. 37, 47 n.32 (2003).

[103] *See, e.g.*, Iffat Mahmud, et al., *Revisiting Responsibility Accounting: What are the Relationships Among Responsibility Centers?* 2 GLOB. J. OF ACCT. AND FIN. 84, 85-87 (2018) (reviewing such a system of intra-firm cost discipline).

[104] *See* STEVEN WRAPPE, FED. BAR ASS'N SECTION OF TAX'N, TRANSFER PRICING: THE ISSUE THAT WILL NOT DIE 4 (1998).

investigation $1,000 for the generators as a transfer price.[105] The Appellate Division rejected this evidence, explaining that the seller "failed to rebut proof establishing that its purchase of the generators [from the supplier] was not an arms' length transaction."[106] In other words, the defendant confected sales from a supplier they controlled to make it appear that their costs had increased.

The proposed rule draws from the *Beach Boys* ruling with a definition of "costs" that "reflects" the "actual transfer of assets in possession of the defendant, or a person defendant owns or controls, to a third party in an arms-length transaction." The use of the word "assets" is designed to capture sales of essential products that are accomplished through essential product swaps as well as through payments in cash; "reflect" is intended to clarify that it is not necessary for cash to change hands, merely that the item proffered as a cost reflects value being exchanged in a third-party arms-length transaction.

A seller may succeed in proving that transfer prices *do* reflect statutory costs; the rule provides only that transfer prices *standing alone* will not be treated as costs without more. A defendant seeking to rely on a transfer price must make an additional showing: that the transfer price accurately reflects statutory costs. For example, the *Beach Boys* defendant set what amounted to a transfer price of $1,000 for generators purchased for $480; had the internal transfer price from supplier to seller been $480, that it was a transfer price would not have prevented defendants from relying upon it had they then shown (perhaps with the receipt from the third-party seller) that the transfer prices reflected their actual costs.[107]

Even taking a conventional understanding of "transfer prices"—the business's best guess as to the arms-length market value of the goods or services sold—certain transfer prices will

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[105] Beach Boys Equipment Co. ("BBEC"), the defendant in *Beach Boys*, was part of a web of companies owned by the Beachy family, including stores called "Beachy's" (the record discloses no connection between the Beachys and the celebrated California rock band). BBEC claimed that it had purchased generators from "Jeff Gordon's Power Outlet" in North Carolina at an increased price, but OAG discovered that "the transaction between respondent and the Jeff Gordon's Power Outlet in North Carolina was not a bona fide, arm's length transaction, since Darryl Beachy who signed the invoices on behalf of Jeff Gordon's Power Outlet in North Carolina is Vice-President of the corporation that operates the Beachy's in New Hartford, New York. He is also President of JGRE Investments, LLC, which owns the Jeff Gordon's Power Outlet in North Carolina from which Beachy's had allegedly purchased the generators at issue." Petitioner's Br. at 9–11, *People v. Beach Boys Equip Co.*, CA99-1286 (4th Dep't Jan 27, 2000) (reviewing record). In other words, one member of the Beachy family used a corporation under his control to funnel generators originally purchased from Lowe's, *id.*, to the BBEC store under investigation. The Attorney General also offered plentiful evidence that the invoices themselves were fabrications, *id*. at 11–13, but the Fourth Department rested its holding on "proof establishing that [Beach Boys'] purchase of the generators was not an arm's length transaction." *Beach Boys*, 273 A.D.2d at 851.

[106] 273 A.D.2d 850, 851 (4th Dep't 2000).

[107] It makes no difference that the market price for generators was higher than $480, such that a less fraudulent transfer pricing scheme might reasonably set a transfer price at $1,000. The cost defense is not concerned with market prices; it is concerned with the price at which the goods or services were actually bought and sold by the seller of the essential product in the scrutinized transaction.

never satisfy the statutory criteria because they do not measure the actual economic costs to the firm of producing the relevant goods. Suppose LRH Corp., a seller of bread, controls three other companies: LRH Purchasing, LRH Baking, and LRH Marketing. Purchasing buys grain, which it sells at a transfer price to Baking, which makes bread from the grain and sells at a transfer price to Marketing, which in turn sells the bread to XYZ Supermarket. In each case, LRH sets the transfer price as the price for the good to be sold on the open market at the time of sale. The statutory costs for the bread sold to XYZ will be the increases in cost incurred by Purchasing in buying the grain, the increases in production costs of Baking in making the bread, and the increases in shipping costs of Marketing in getting the bread to XYZ. (For simplicity, assume no replacements are being purchased.)

In this example, it may be straightforward for LRH to show that the transfer price charged by Purchasing to Baking for grain reflects statutory costs, assuming the transfer price reflects the market price Purchasing actually paid for the grain (particularly if the transfer was sufficiently close in time to the purchase from third parties). It will be much more difficult to establish the statutory salience of the transfer price charged by Baking to Marketing, because there will likely be a divergence between the arms'-length cost of bread on the open market and the specific cost increases incurred by Baking in the bread-baking process. This difference may be to LRH's benefit: if a facility run by Baking caught fire, requiring a massive infusion of cash to procure alternative facilities, that additional cost may not be reflected in the transfer price (since the larger market for bread will presumably be untroubled by the facility's demise) but would be an acceptable statutory cost. Either way, for that transfer the "transfer price" sheds little light on the statutory cost inquiry.

Index Prices

In a similar way, for some essential products, including many commodities, there is a common industry practice of setting prices based on indices. A price index is a composite number designed to reflect the average value of a set of individual prices. In some cases, buyers and sellers use the index price as the basis for a floating price term in an on-going supply contract. In others, they use the index as a benchmark to determine a one-off fixed price. These customary uses of index prices can confuse firms into thinking that they are not "setting" prices, because they contract to use an external indicator, and therefore regard their pricing choices as outside the scope of G.B.L. § 396-r. But a seller's choice to use a floating index-linked price term is just that—a choice. And index-linked prices do not necessarily reflect increased statutory costs *to the user of the index*, unless the index-user is both buying and selling using the same

index. In some cases an index may not even reflect supply and demand.[108] Even setting aside distortion by speculation or outright manipulation, index prices, at their best, reflect other firms' prices, and as such are not useful tools for assessing price gouging by an individual firm.

A firm that buys at an index-based price that increased over the pre-disruption price can count the increased cost of that purchase as an increased statutory cost. But a firm that chooses to sell at an index price cannot use the mere existence of the index as a defense. In fact, because indices make it easier for firms to converge on higher prices, there are increased risks of price gouging when prices are pegged to indices. When numerous market participants increase their prices contemporaneously, consumers are prone to blame inflation rather than individual companies' pricing decisions.

One example is the egg industry—an industry that has been the subject of prior price gouging enforcement by OAG.[109] Most egg producers peg their egg prices to indices that are based in part on subjective "market assessments." Thus, egg prices are determined using a "feedback loop" where: (i) egg producers communicate their "assessment" of egg prices; (ii) these assessments are used to create price indices and are sent to the producers; and (iii) the egg producers sell their eggs at prices based on the indices. Economic theory says that prices in a competitive market are set at marginal cost. Yet this index-based methodology is not necessarily tied to costs and, thus, it creates room for egg producers to converge upon higher prices even in the absence of cost increases.[110]

To avoid ambiguity, this proposed rule clarifies that index prices are *not* external objective measures of the "right" or "lawful" price, and as such reliance on them is no more evidence of a legal price increase than would be a defense that relied on the existence of a price set by another company engaged in price gouging.

Once again, the rule does not forbid the use of index prices in the affirmative defense. It clarifies that showing that a business was *selling* at an index price does not necessarily prove that

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[108] *See, e.g.*, MIGUEL ROBLES, ET AL., INT'L FOOD POL'Y RSCH. INST., WHEN SPECULATION MATTERS, Issue Brief 57 (Feb. 2009), https://www.cftc.gov/sites/default/files/idc/groups/public/%40swaps/documents/file/plstudy_40_ifpri.pdf (describing malfunctioning of index prices in the context of the food price crisis of 2007–08); *In re Nat. Gas Commodity Litig.*, 337 F. Supp. 2d 498 (S.D.N.Y. 2004) (recapping natural gas index manipulation scheme).

[109] *See* Verified Petition, People v. Hillandale Farms Corp., No. 0451650/2020 (Sup. Ct. New York County Aug. 11 2020), https://ag.ny.gov/sites/default/files/petition_1.pdf.

[110] In a comment to a prior advance notice of proposed rulemaking, United Egg Producers asserted, with no evidence, that "[i]n no way do egg producers have control over the market quote Urner Berry [the egg industry's leading index] publishes." *See* Comment of United Egg Producers, ANPRM Comments at 241-47. UEP agrees, though, that such indices are tied to market assessments rather than costs and may instead reflect "supply/demand factors." *Id.* But even if egg producers did not manipulate indices, the choice to use an index price cannot, without more, be a defense against a claim of price gouging.

the business was *buying* at an index price. The business must prove that essential link in the evidentiary chain to then rely on index prices. Several states have provided in their price gouging statutes that selling at an index price provides an independent defense to liability.[111] New York is not one of those states, and such an exception is inconsistent with G.B.L. § 396-r's text and purposes.

Opportunity Costs

"Opportunity cost" in the context of sales of goods uses the word "cost" metaphorically to describe foregone benefits that would have been derived from a sale other than the sale that was actually made.[112] In the context used by commentators, opportunity cost refers to the difference between the hypothesized price a hypothesized buyer is willing to pay for the good and the price at which it was sold. Opportunity cost is not a GAAP-recognized measure of cost because its rests on a comparison to a hypothesized benefit rather than the reality of what the business paid to whom for the goods that were sold.[113] It is incoherent in the context of the price gouging cost defense, where the statute requires that the defense point to "costs," not hypothesized advantage or disadvantage derived from the defendant's view of the market.

Replacement Value

Replacement value is a GAAP-recognized method of inventory valuation that, unlike opportunity cost measures, attempts to determine the relative cost of a given sale by comparing the sale value to the cost of purchasing a replacement rather than a hypothesized alternative transaction. Although it is GAAP-recognized, is does not conform with the statutory requirement that a "cost" be "imposed on the defendant," because replacement cost standing alone does not establish that the defendant has in fact purchased the replacement at its replacement value price such that the replacement cost was "imposed" on it.

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[111] *See* Comment of Business Council of New York, First NPRM Comments at 43. *Contrast* La. Rev. Stat § 29:732(A) (barring selling of goods and services at a price that "exceed[s] the price ordinarily charged for comparable goods and services. . . unless the price by the seller is attributable to fluctuations in applicable commodity markets"); N.C. Gen. Stat. § 75-38(a) (factors of excessiveness include whether "the price charged by the seller is attributable to fluctuations in applicable commodity markets"); Tenn. Code Ann. § 47-18-5103(b) ("a price increase is not grossly excessive if the increase was directly attributable to . . . price increases in applicable regional, national, or international commodity markets"); *and* R.I. Gen. Laws § 6-13-21(c) ("This section shall not prohibit the fluctuation in price of essential commodities that occur during the normal course of business.") *with* G.B.L. § 396-r (conspicuously omitting any mention of commodities markets).

[112] *See Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 514 (2002) (affirming FCC's rejection of opportunity-cost-based cost model).

[113] *See* Lisa Victoravich, *When do Opportunity Costs Count? The Impact of Vagueness, Project Completion Stage, and Management Accounting Experience*, 22 BEHAVIORAL RES IN ACCOUNTING 85 (2010) (explaining that "opportunity costs are not included in the calculation of accounting profits" and that, in general, opportunity costs are presented in a vague manner).

The rule expressly permits the counting of the purchase of replacements as a statutory cost (which will be discussed in greater detail below). In practice, then, a business that is continuing to do business (i.e. buying replacements as they sell goods) may be able to prove that a replacement cost accounting method is the most accurate available measure of their actual costs, but must furnish proof that makes the empirical connection between the measure employed and prices actually paid for replacements. What is not permitted is a measure of costs that does not comport with the statutory text—that is, hypothesized replacement purchases that were not in fact made. As with transfer prices, it is open to a defendant to show that their replacement cost measures in fact measure the cost of replacement purchases made, which would then satisfy the affirmative defense.

Cost Timing and Exclusion of Planned, Projected, and Speculative Costs

The price gouging statute requires that costs be "imposed on the defendant."[114] The use of the past tense in that text indicates that the costs must have accrued or been paid, not that the defendant believes that the costs *will be* imposed on them. This point was forcefully made in *People v. My Service Center*, in which the court rejected "conclusory assertions that [respondent's] price increases were warranted based on its current and prospective perceptions of market conditions . . . Regardless of respondent's desire to anticipate market fluctuations to remain competitive, hiking the pump price to its consumers, notwithstanding the price at which it purchased that supply, is precisely the manipulation and unfair advantage G.B.L. § 396-r is designed to forestall."[115]

Permitting businesses to count as statutory costs those costs they merely anticipate would functionally nullify the statute; a business could raise their prices an unlimited amount and seek to justify the increase by pointing to the possibility of cost increases with no further substantiation. Merely requiring those expenses to be a sum certain does not address this problem, because a business could plan for a future expense to justify price increases and then scrap whatever project was proffered to justify the price increase the moment the investigation ends. No formulation that accepts future, speculative, or anticipated costs is adequate to effectuate the statutory intent.[116]

The proposed rule provides that a cost increase that has not been accrued or paid cannot

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[114] G.B.L. § 396-r(3)(c).

[115] *People v. My Service Center, Inc.*, 14 Misc. 3d 1217(A) at *3 (Sup. Ct., Westchester County 2007).

[116] *See People v. Agip Gas, LLC*, Index No. 13-11907, 2013 N.Y. Slip Op. 32805(U), at *5 (Sup. Ct., Suffolk County Oct. 18, 2013) (rejecting defendant's claimed "soft costs . . . including man-hours, which it incurred relating to gas lines, security concerns, crowd and traffic flow, uncertainty with respect to the delivery of replacement inventory . . . particularly as the respondent failed to demonstrate the extent to which those burdens and costs justified the price increase").

serve as a basis for the affirmative defense. In using the words "accrued or paid," the proposed rule uses the accrual or payment standards employed by the IRS to determine the tax year in which an expense occurs.[117] This standard was selected because it is familiar to businesses and captures the essential statutory requirement that the cost be "incurred" while allowing for businesses to use their already-established accounting systems to determine the date on which the cost is incurred. The rule expressly permits the use of either cash or accrual accounting. A business may not switch from one accounting method to another for price gouging purposes, but may continue to use whatever method it uses in the usual course of business.

In making this proposal, the Attorney General acknowledges the difficulties this formulation presents to sellers that agree to a requirements contract with a floating or open price term that binds them to make purchases on a given schedule, but at an unknown price.[118] For example, a "branded" gas station (that is, independently-owned gas stations that bear the brand of a major oil company) might agree to a contract with its oil company committing that station to purchasing between 10,000 and 20,000 gallons of gasoline each month at the Argus Index price for gasoline minus 4 cents per gallon. Under this contract, a defendant has incurred a legal obligation to incur some amount of costs, but does not know until the moment of delivery what those costs will be because they rely on knowing what the Argus index will be on that date.[119]

This problem arises because of the statutory text, which requires the costs be "imposed." Accordingly, this scenario is best resolved consistent with the statutory text and intent by applying the same performance standard as any other questionably-realized cost. If the business's own usual-course practice is to show the cost as being incurred for tax purposes on a given date and that date falls between the benchmark and scrutinized sale, that cost may be recovered if it is a statutory cost, even if the payment was not made that day or the payment was for a replacement for the essential product sold.

Replacement Costs and Cost Allocation Between Sold and Purchased Essential Products

Although, as discussed above, the price of good A1 cannot be recovered by raising the prices of a *different* good (call it B1), the cost of A2, a replacement for A1, can be recovered in sales of A1, for two reasons. First, businesses may rely on the prices charged today to generate

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[117] *See* 26 C.F.R. § 1.461-1; *see generally New York Life Ins. Co. v. United States*, 780 F. Supp. 2d 324, 327 (S.D.N.Y. 2011), *aff'd*, 724 F.3d 256 (2d Cir. 2013) (reviewing applicable caselaw).

[118] *See* N.Y.U.C.C. § 2-305 (open price terms).

[119] Argus is a media company that compiles index prices for, among other things, gasoline. *See* Argus Media, *Argus New York Harbor RBOB barge gasoline*, https://www.argusmedia.com/en/methodology/key-commodity-prices/argus-new-york-harbor-rbob-barge-gasoline (last accessed January 21, 2025).

the cash necessary to purchase replacement essential products for tomorrow.[120] As discussed above, the purpose of the statute is the prevention of profiteering—an increase in profit derived from unfair leverage created by an abnormal market disruption. A business that charges an increased price for an essential product to immediately pay for its replacement is, by definition, not profiting from those higher prices.

Second, permitting businesses to pass on replacement costs rather than the cost of purchasing the unit sold serves to encourage the purchase of additional supplies; if for example a snowstorm makes roads more difficult to navigate such that a business must pay higher delivery charges and do so in advance, a business is more likely to pay those charges if it can raise the money for doing so with the supplies the business has on hand. This supports the purpose of the affirmative defense, which is to allow businesses to pass on statutory cost increases (usually if not necessarily caused by the disruption) so as not to discourage replacement of supplies of essential products.

Replacement costs still must comply with the text of the affirmative defense that a statutory cost be "imposed." As described above, this text does not permit parties to pass on speculative costs, or future costs, by raising present prices. The text of the rule therefore provides that replacement costs are only those "costs [that] have been accrued or paid at the time of scrutinized sale or will necessarily be accrued or paid because of the scrutinized sale."[121]

The word "necessarily" is intended, as elsewhere in the rule, to convey costs that cannot be avoided for the business to practicably sell the product. A gas station must buy tomorrow's supply today or get out of the gas business; it will "necessarily" accrue or pay the sums certain it knows it must pay for tomorrow's gas. But this exception is not an invitation to speculation, and sellers must take particular care to avoid motivated reasoning driving their assessment of what costs they will necessarily assume.[122]

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[120] *See, e.g.*, *People v. Wever Petroleum*, 14 Misc. 3d 491, 495 (Sup. Ct, Albany County 2006) (considering that the price of gasoline could be raised on one day "to generate the required revenue to purchase gasoline from ExxonMobile the next business day," although the price increases there grossly exceeded that amount). *See, e.g.*, Comment of Food Industry Alliance of New York, First NPRM Comments at 29.

[121] Subdivision (a)(1) provides that the date an expense is "accrued or paid" is the same date such accrual or payment for tax purposes. *See* 26 C.F.R. § 1.461-1; *see generally New York Life Ins. Co. v. United States*, 780 F. Supp. 2d 324, 327 (S.D.N.Y. 2011), *aff'd*, 724 F.3d 256 (2d Cir. 2013) (reviewing applicable caselaw).

[122] *See People v. Wever Petroleum*, 14 Misc. 3d 491, 495 (Sup. Ct, Albany County 2006) (although the gas station "did raise prices in accordance with an increase in ExxonMobil's base cost, Wever's increase far exceeded the needed increase for Wever to maintain a similar pre-Hurricane profit or generate the required revenue to purchase gasoline from ExxonMobil in the next business day and were unconscionably excessive"); *People v. My Service Center Inc.*, 14 Misc.3d 1217(A) (Sup. Ct., Westchester County 2007) ("respondent claims it was forced to anticipate increased delivery fees and raise its market prices, or risk a shortfall of funds, rendering it unable to purcahse gasoline on the next shipment date . . . [but] respondent offers nothing other than conclusory assertions that

Suppose a gas station knows that tomorrow's price for gasoline at the rack will range from anywhere between $1 to $3. It will "necessarily" pay or accrue only $1 per gallon. For another example, consider a gas station that sells exactly the same amount of gasoline every day and picks up tomorrow's gas, every day, at 5pm. It pays its supplier $2 per gallon for gasoline at the Monday 5pm pickup. On Tuesday at 6am (before opening time), a blizzard hits and the gas station's supplier calls the station to say that at the Tuesday 5pm pickup, the price for gas will be $4 per gallon. Under subdivision (d), the gas station may sell its Monday-bought gasoline at $4 per gallon to recoup its expenses on the Tuesday 5pm pickup's gasoline. In this example, however, the Tuesday-purchased gasoline would then need to be sold at $2 per gallon, because the additional costs of the Tuesday-purchased gasoline were recovered by increasing the prices of the Monday-purchased gasoline.

The replacement cost rule also applies to essential services, where a seller will need to demonstrate that any excess in price was employed to pay for a replacement service provider. Practically, this permits a service provider to raise prices to cover additional bonus amounts paid to staff asked to work extra shifts. The OAG anticipates the rule will be particularly important to providers of ride-hail services, which may seek to raise prices for rides to induce more drivers to enter zones of high demand; that is, raising the price of one service provider (a driver) to pay for a replacement service (another driver).

Service providers, like sellers of goods, must take care when relying on this rule not to double-recover the cost of providing a service. If the ride-hail provider makes an extra $50,000 in surge pricing during the incident, drivers must be paid $50,000 or more for the entire $50,000 amount to be justified under the cost defense.

The Attorney General welcomes comment on how best to frame "necessarily accrued or paid" to capture businesses that must continue to make purchases of supplies to remain a going concern (e.g. a gas station) while not incorporating speculative or hypothesized costs (the inclusion of which would be in derogation of the statutory language). The present phrase "necessarily" is proposed as it appears the best means of striking this balance.

That replacement costs are statutory costs does not mean that a business is permitted to adopt a *hypothesized* replacement cost model as a measure of costs absent evidence that it really did incur the costs the model described. As discussed above, a business's choice to adopt a replacement value cost model standing alone is not sufficient to establish the affirmative defense. It must be shown that the business's use of this abstraction aligns with the reality of their actual accrued or paid expenses.

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its price increases were warranted . . . regardless of respondent's desire to anticipate market fluctuations to remain competitive, hiking the pump price to its consumers, notwithstanding the price at which it purchased that supply, is precisely the manipulation and unfair advantage G.B.L. § 396-r is designed to forestall").

Comingled Fungible Goods

Certain categories of goods, like gasoline, are both fungible and stored in such a manner that it is not possible to know with certainty the provenance and thus price of a particular unit (e.g. a tank of gasoline filled with shipments of varying sizes purchased at varying prices). The comingled fungible good cost issue will often not arise as a practical matter because subdivision (d) of the rule permits defendants to count expenditures on replacements as costs that can be recovered through price increases on sales of the same essential product. In such a situation, the cost issue addressed by this subdivision will be presented only when fewer replacement essential products are purchased than existing essential products are sold, such that a price increase on some number of the existing essential products cannot be justified by the cost incurred in purchasing replacements.

When the issue does arise, however, a global consensus has emerged in favor of determining the cost of fungible goods using the "first in, first out" or "FIFO" method.[123] Because commentators expressed broad support for using generally accepted accounting principles ("GAAP") and international financial reporting standards ("IFRS") where doing so is feasible, and FIFO accounting is accepted both by GAAP and IFRS, the Attorney General elected to use a FIFO standard.[124] FIFO also accurately reflects what happens with many of the most relevant fungible essential products: a supermarket typically sells its oldest food first, and many other enterprises reasonably attempt to sell their oldest stock before selling newer stock.

FIFO is also congruent with the statutory text and purposes. The statute requires the defendant show "additional" costs increased between the benchmark and scrutinized sales; FIFO appropriately looks to the earliest relevant costs and then moves forward, as goods are sold, to measure "additional" costs incurred between the first and last purchase committed to the comingled storage of the fungible good.[125]

Profit Margin Defense

Finally, the rule clarifies that defendants seeking to rebut the prima facie case "with evidence that the increase in the amount charged preserves the margin of profit that the defendant received for the same goods or services prior to the abnormal disruption of the

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[123] *See* FASB Accounting Standards Codification No. 330-10-30, https://asc.fasb.org/1943274/2147482954/330-10-30-9.

[124] *See* Robert Bloom & William J. Cenker, *The Death of LIFO?*, J. of Accountancy (Jan 1, 2009), https://www.journalofaccountancy.com/issues/2009/jan/deathoflifo.html ("Few differences between IFRS and U.S. GAAP loom larger than accounting for inventories, particularly the disallowance of the last-in, first-out (LIFO) method in IFRS.").

[125] *See* Marek Muc, *Cost Formulas for Inventories – FIFO, LIFO, and Weighted Average Cost*, IFRS COMMUNITY (Oct 5, 2023), https://ifrscommunity.com/knowledge-base/fifo-lifo-weighted-average-cost/.

market" must use a margin of profit calculation that excludes costs within the defendant's control. The alternative where the defendant's own determination of their profit margin would govern is untenable: profit is a notoriously easy figure to manipulate, and the price gouging statute would cease to function if a defendant could merely impose a cost on itself to artificially reduce its margins to then justify price increases. Instead, the rule clarifies the Legislature's intent to use profit margins as another means of arriving at the same destination: allowing businesses to raise prices to account for additional costs not within their control.

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.

The Attorney General considered the comment of small businesses expressing concern that this rule would lead to obligations on businesses to produce additional or different paperwork in response to OAG inquiries about price gouging.[126] The Attorney General believes this concern to be unfounded in the context of price gouging investigations. Even in those areas where the rule does not permit a business to use its own method of cost accounting (usually because such a method is precluded by the statutory text), it is OAG's unvarying practice in its price gouging investigations to only require the production of business records that actually exist,

[126] Comment of N.Y. Association of Convenience Stores, First NPRM Comments at 36.

rather than require the creation of additional records,[127] although investigated parties often voluntarily agree to generate summary materials as a less burdensome alternative to production of existing documents. Incremental costs or paperwork burdens of producing exiting records arise not because of this rule but as a result of a separate statutory mandate to cooperate with Attorney General investigations.[128]

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

8. Alternatives: The Attorney General considered no action but concluded that there was a broad need for guidance especially for regulated parties.

Many of the alternatives presented by commentators reviewing LAW-12-23-00007-P, a previous proposed rule on costs, concerned various ambiguities in that proposed rule's intended scope and application that have been eliminated in this revision.[129] Because neither LAW-12-23-00007-P nor this proposed rule bars the use of transfer prices, opportunity costs, or index prices—provided that such measures could be shown to in fact measure statutory costs—proposals that these be permissible measures of cost were unnecessary; to the extent necessary, they have been adopted.

The Attorney General considered a commentator's proposal to "expand" the cost defense to incorporate a defendant's use of index prices without regard to cost.[130] Such a proposal is inconsistent with the statutory text, which provides an affirmative defense for a defendant's costs, not the defendant's use of a common pricing mechanism. It is also unnecessary. For the reasons stated above, if (as almost all commentators who proposed this defense claimed) a defendant purchases an essential product at an index price and sells that essential product at the same index price, the defendant's sale price has been justified—not because it charged an index price, but because that price is the price the defendant paid.

The Attorney General considered various alternative formulations for the allocation of relevant overhead expenses, including retention of the previous draft's "directly allocable percentage" language and exclusion of overhead expenses altogether. The present formulation is

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[127] *Cf. Universal Acupuncture Pain Servs., P.C. v. State Farm Mut. Auto Ins. Co*., No. 01-cv-7677 (SAS), 2002 WL 31309232, at *4 (S.D.N.Y. Oct. 15, 2002) ("It is well established ... that courts may not compel creation of documents to comply with a discovery demand."); *accord Flaherty v. Midtown Moving & Storage, Inc*., Index No. 158612/13, 2016 WL 1701990, at *3 (Sup. Ct., N.Y. County Apr. 25, 2016).

[128] CPLR §§ 2301-2309.

[129] *See, e.g.*, Comment of Food Industry Alliance of N.Y., Inc., First NPRM Comments at 41; Comment of Independent Drivers Guild, First NPRM Comments at 45; Comment of Business Council of N.Y., First NPRM Comments at 54-55.

[130] *See* Comment of Healthcare Distribution Alliance, First NPRM Comments at 62.

superior to the available alternatives, in that it draws on pre-existing legal methods of many decades' provenance for determining wrongful profits, sets out a performance standard where doing so is consistent with the statute (a point of ambiguity in the previous draft), and recognizes that overhead costs may represent additional imposed costs in appropriate circumstances.

The Attorney General considered using "Last In First Out" ("LIFO") valuation in the guideline for determining the cost of comingled fungible goods instead of FIFO. LIFO valuation is permitted by GAAP, but is not permitted by IFRS, which considers LIFO intolerably inaccurate.[131] The Attorney General considered that it was preferable to employ a performance standard used worldwide—FIFO—not least because many of New York's goods are imported from foreign countries or sold by companies that must comply with IFRS.

A pure performance standard for fungible product accounting (i.e. using whatever method the business itself uses to value comingled fungible essential products) was rejected because doing so risked providing unfair competitive advantages to companies that were permitted to use LIFO instead of FIFO, with no discernable public benefit. FIFO is also more consistent with the statutory text and purposes than LIFO. As discussed above, FIFO more accurately reflects the typical movement of inventory and properly focuses the cost inquiry on additional costs incurred between the first purchase and last purchase.

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.

[131] *See generally* Daniel Tinkelman & Qianhua Ling, *The Rise and Decline of LIFO*, 49 ACCOUNTING HISTORIANS J. 103 (2022).

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."[132]

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

1. **Effect of Rule**. The effect of the rule is to prescribe means by which a seller that has charged a facially unconscionably excessive price for an essential product during a period of abnormal market disruption may establish the affirmative defense that "additional costs not within the control of the seller were imposed on the seller for the goods and services."[133]

The proposed rule sets out methods for determining how much of an increase in relevant overhead expenses may be used to justify price increases under the statute. The provided method proceeds in two steps: first, relevant categories of overhead expense are identified; second, those categories are divided between the goods or services produced by the seller either using the defendant's own cost allocation methods or a cost allocation method the seller establishes as fair, reasonable, and accurate.

The proposed rule also clarifies that various methods of cost measurement that abstract costs to some degree (such as a replacement value paradigm of cost, transfer prices, and so on) may be employed as a measurement of cost for purposes of the affirmative defense only to the extent that they do measure costs. The proposed rule further clarifies that the price of goods sold at a given point in time may be increased to reflect the cost of replacements for such goods already purchased by the seller.

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.

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

[133] G.B.L. § 396-r(3)(c)

2. **Compliance Requirements**. Small business will not be required to take any affirmative action to comply with this rule. At present, G.B.L. § 396-r(3)(c) obligates sellers to establish on a preponderance of the evidence that a prima facie excessive price is justified because "additional costs not within the control of the defendant were imposed on the defendant for the goods and services." The proposed rule provides further refinement and definition to these terms to enable businesses to better predict in advance whether the costs they have incurred fulfil the statutory criteria, allowing them to determine with more precision the amount they may increase the price of the relevant goods and services.

Several parts of the additional definitions provided by the statute incorporate performance standards that, by definition, do not impose additional burdens on sellers. Where sellers do not have a practice that can be incorporated into a performance standard, the rules impose no burden above and beyond the burden presented by the statute itself, as absent the seller's own course of practice it would be necessary for the seller to develop and apply an analytical framework for cost calculation anyway. Other design standards do not impose additional burdens on sellers not already imposed by the statute proper; as explained above, the rule employs design standards where a performance standard cannot satisfy the statutory language.

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

3. **Professional Services**. Neither small business nor local government is likely to need additional professional services to comply with this rule. It has no impact on local government and thus provides no cause for engagement of professional services. As for small businesses, the rule will create either the same or less demand for professional services. Legal advice may be indicated for a small business to determine the presence or absence of "additional costs not within the control of the defendant imposed on the defendant for the goods and services;" the rule provides more guidance as to each of these requirements that 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**. The 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, 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." [134]

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, the Attorney General concludes that this rule will have no distinctive adverse impact on rural businesses, and may well be beneficial by restraining price increases by suppliers of essential products to rural areas.

5. **Rural Area Participation**. 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.

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