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

February 2025

Price Gouging

Notice of Proposed Rulemaking

Proposed Rule 600.9
Geographic Scope

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 600.9—Geographic Scope

Rule Text

Proposed Action: Add New Part 600.9 of Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Clarify geographic scope of price gouging statute.

Text of proposed rule:

600.9 Application of Price Gouging Prohibition to Parties Within Chain of Distribution

(a) *Locations of Offerings for Sale for Price Gouging Statute Purposes*. The prohibition of General Business Law § 396-r shall apply to the offering for sale of an essential product by a seller if the offer for sale is made in the State.

(1) An offer for sale is made in the State if (i) the seller provides a means by which the essential product may be purchased or ordered by a person within the State (including via the Internet or by phone order) and (ii) the offer, as viewed by a reasonable person in the buyer's position, contemplates that the essential product will be delivered within the State either as a direct result of the acceptance of the offer or as an option that may be invoked between the offer and delivery of the essential product to the buyer.

(2) An offer for sale that complies with subdivision (a)(1) of this rule is made in the State even if the means of purchasing the essential product are enabled by a third party, or title to the essential product actually sold is transferred by the seller to third parties outside the State, or one or more persons providing the essential product is situated outside the State at or before the time of delivery of the essential product.

(b) *Locations of Sales of Essential Products for Price Gouging Statute Purposes*. The prohibition of General Business Law § 396-r shall apply to the sale of any essential product by any seller when:

(1) If the essential product is a good, the good is ultimately sold to a consumer or end-user in New York; or,

(2) If the essential product is a service, the service is delivered in the State or provided to a person in the State, even if at the time of the sale, offer, or delivery, one or more the person(s) providing the service is or are outside the State or one or more goods or

services associated with providing the service is or are outside the State.

(c) *No Effect on Relevant Evidence*. A sale or offering for sale not within the prohibition of General Business Law § 396-r may nonetheless constitute evidence of the price at which goods or services were sold or offered for sale by the seller in the usual course of business prior to the abnormal disruption of the market, or the price at which the same or similar goods or services were readily obtainable in the trade area, or an additional cost not within the control of the seller, or any other matter relevant to sales or offerings for sale encompassed within the prohibition of General Business Law § 396-r.

(d) *Interpretative Principles.* Nothing in this regulation should be read to conflict with the Dormant Commerce Clause or to expand, restrict, or otherwise modify the scope of personal jurisdiction over a seller as a matter of New York law.

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

[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 proposed rule provides clarity regarding the statute's statement, at G.B.L. § 396-r(2)(e), that: "This prohibition shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another when the essential product sold was located in the State prior to the sale."

The Attorney General determined that clarification was needed owing to confusion expressed by both commentators to the ANPRM and first NPRM LAW-12-23-00011-P as to the application of the statutory language in various common scenarios involving the sale of goods and services, particularly in light of recent developments in the law such as the U.S. Supreme Court's ruling in *National Council of Pork Producers v. Ross*[63] and the Appellate Division's resolution of *People v. Tyson Foods, Inc.*[64]

Both the text of the statute and its legislative history indicate that General Business Law § 396-r applies to "all such parties, including manufacturers, suppliers, wholesalers, distributors, and retailer sellers whose products are sold in the State."[65] Following review of comments on proposed rulemaking LAW-12-23-00011-P expressing concerns from both sellers and buyers regarding the application of the statute under various factual scenarios, this proposed rule explicates the effect of the text of the statute (read in light of relevant statutory and constitutional caselaw) on sales vs offerings for sale, and goods vs services.

Offerings for Sale

G.B.L. § 396-r applies to sales and offers for sale; the proposed regulation sets out the geographic scope of each of those actions in turn. An offer to sell is made in the State when the offer provides a means by which the product can be received in New York. Thus a seller offering goods for sale on the internet would offer those goods for sale in the State if it permitted the

[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] 143 S. Ct 1142 (2023).

[64] 218 A.D.3d 424 (1st Dep't 2023).

[65] Senator Stafford, New York Senate Introducer's Memo in Support (1998) S6020A.

buyer to ship the goods to New York.[66] Subdivision (a)(2) emphasizes that because it is the offer to sell that is at issue, title transfers a good is subjected to on the way to fulfil the order are irrelevant if the subject offer for sale puts the final destination of the good or service as a location within the State.

This is a common-sense definition of the geographical scope of "offer for sale" consistent with the statutory text. Of particular concern to the Attorney General are online marketplaces where sellers might violate price gouging and other State laws from without the State by sales of essential products into the State.[67] Such sellers must price their essential products consistent with the law of the state of the buyer or potential buyer.[68] And it does not appear burdensome or unreasonable to expect a business that receives an order for a good or service to be delivered to New York to comply with New York law; notably, many such businesses must already pay New York sales tax.[69]

Sales

As regards "sales," the statute imposes an additional qualification that the goods or services be "located in the State prior to the sale." As observed by the trial court in *People v. Tyson Foods*:

> [f]or many of the reasons included in the Attorney General's [submissions to the court], the plain language of the statute, the

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[66] *See generally Sanchez v. NutCo, Inc.*, No. 20-cv-10107 (JPO), 2022 WL 846896, at *4 (S.D.N.Y. Mar. 22, 2022). A business that was based within New York State that refused to sell its goods or services to anyone within New York State would also fall outside the ambit of this provision (but not, possibly, the ambit of the sale provision below).

[67] *See, e.g.*, *Consumer Alert: Attorney General James Stops Three Amazon Sellers from Price Gouging Hand Sanitizer and Recoups Funds for New Yorkers* (Nov. 17, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-stops-three-amazon-sellers-price-gouging-hand-sanitizer (price gouging essential products sold on Amazon); *see also Attorney General James Demands Baby Food Company to Stop False and Misleading Advertising* (Feb 17, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-demands-baby-food-company-stop-false-and-misleading (false advertising on Amazon listing); *A.G. Schneiderman Reaches Settlement With 30 Online Retailers That Used Amazon.Com To Sell Realistic Looking Toy Guns* (Dec 15, 2015), https://ag.ny.gov/press-release/2015/ag-schneiderman-reaches-settlement-30-online-retailers-used-amazoncom-sell (use of Amazon to sell toy guns in violation of New York law). *Cf. Greenberg v. Amazon.com*, 553 P.3d 626 (Wash. 2024) (applying Washington unfair deceptive acts and practices statute to alleged online price gouging).

[68] *See Online Merchants Guild v. Cameron*, 995 F.3d 540, 554 (6th Cir. 2021).

[69] *See South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018) (permitting such taxes under the U.S. Constitution's Commerce Clause); Tax Law §§ 1101(b)(8)(i)(E), 1101(b)(8)(iv). *See also Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988) ("proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted"); *Blockchange Ventures I GP, LLC v. Blockchange, Inc.*, No. 21-cv-891 (PAE), 2021 WL 3115437, at *6-*7 (S.D.N.Y. July 22, 2021) (reviewing cases in which websites that allow consumers to directly transact with out-of-State sellers sufficient to support personal jurisdiction in New York).

> purpose of the statute, the legislative intent and relevant case law all indicate that the statute includes essential products imported into New York from out of State manufacturers, suppliers, wholesalers, distributors or retail sellers within the chain of distribution when the essential products were sold to New York consumers. The term "sale" is not defined by the statute, but it has a common meaning. The court finds that "sale" includes the sale to retailers in New York and ultimately the sale of the essential products to New York consumers and members of the public.[70]

Consistent with this decision and the Attorney General's submissions to the *Tyson* Court, the regulation clarifies that the statutory requirement that "the sale" concern goods "located in the State" is satisfied if the ultimate sale of the goods—that is, the sale that directly affects "the public" in New York—takes place in this State.

This clarification articulates the necessary implication from the text of the statute, which "appl[ies] to all parties within the chain of distribution,"[71] for the purpose of "prevent[ing] any party within the chain of distribution of any goods from taking unfair advantage of the public."[72] The statute is expressly concerned with protecting "consumers [and] the general public" in New York from price gouging, regardless of who in the "chain of distribution" is alleged to have committed that offense.[73] The statute extends liability to the entire "chain of distribution" leading to such an in-State sale to prevent wholesale-level abuses from generating the retail abuses to which the statute is directed. This is the most natural reading of the statute's language when read as a whole and in context, because it effectuates the Legislature's express intention to cover "all parties within the chain of distribution" of essential goods sold to the New York public.

The regulation is also consistent with the Legislature's intent to expand liability to all parties in the chain of distribution—wherever located—who cause unlawful increases in the prices that New York consumers must pay for necessities during abnormal market disruptions. The sponsor of the 1998 amendment, which made the relevant statutory change, expressly stated that the purpose of extending liability "to all parties within the chain of distribution," was to "prohibit price gouging by any party within the chain of distribution" of vital goods, including "all . . .parties, including manufacturers, suppliers, wholesalers, distributors and retail sellers

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[70] *People v. Tyson Foods*, Index No. 156457/2022, NYSCEF Doc. No. 45 (Sup Ct, N.Y. County Dec 7, 2022); *aff'd* 218 A.D.3d 424 (1st Dep't 2023).

[71] G.B.L. § 396-r(2)(e).

[72] G.B.L. § 396-r(1).

[73] G.B.L. § 396-r(1)-(2).

whose essential products are sold in the State."[74] In fact, the sponsor specifically explained the Legislature's intention to cover "major oil production companies," which were not located in the State.[75]

The above discussion has focused on the sale of goods, but the statute also applies to the sale of services. In most cases, essential services are easy to situate geographically because the place the service is needed is the place affected by the disruption: if a roofer is repairing a roof in New York, they are naturally subject to the New York statute even if they transited from another state to get to the roof in need of repair. Subdivision (d) clarifies for providers of services who remain outside the State while the service is being provided—most notably telehealth providers—that the service is provided in the State if the *recipient* of the service is present in the State.

This clarification interprets the price gouging law in a manner that is consistent with other statutes,[76] as well as cases describing the situs of a wide variety of services.[77] This rule creates a rule capable of aligning consistently with the rules of other states: if the person being served is in New York while the services are being provided, the price gouging law will apply to that service.

No Limitation on Relevant Out-of-State Evidence

The proposed rule clarifies that the geographic scope of the statute's *prohibitions* does not necessarily bear on the relevance of out-of-State transactions in a statutory proceeding. Sellers seeking to defend against a prima facie case may need to point to out-of-State transactions to prove increases in costs or profit margin maintenance. Likewise, the Attorney General's investigations of price gouging may require production of evidence of out-of-State transactions for many reasons: to determine the viability of affirmative defenses proposed by the seller, to determine whether the transactions in question truly were out-of-State, or to determine pre-onset seller prices or trade area prices.

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[74] Ch. 510, § 2, 1998 N.Y. Laws at 3348 (italics omitted).

[75] *Ibid.*

[76] *See, e.g.*, New York Public Health Law §§ 2999-cc, 2999-dd (providing that telehealth services are provided at location of patient).

[77] *See, e.g. Matter of Zelinsky v. Tax Appeals Trib. Of State*, 1 N.Y.3d 85, 92 (2003) (law professor teaching law students in New York remotely from Connecticut was providing the teaching services in New York); *Gerson Lehrman Group, Inc. v. New York City Tax Appeals Trib*., 193 A.D.3d 452 (1st Dep't 2021) (consulting services provided in New York City irrespective of location of consultants providing the service electronically); *Corradi v. Kolls*, 4:22-cv-011, 2022 WL 4006928, at *5 (W.D. Va. Sept. 1, 2022) (doctor in North Carolina providing medical services to West Virginia resident via remotely directed robot was practicing medicine in West Virginia for purposes of personal jurisdiction); *Allstate Ins. Co. v. Northfield Med. Ctr., P.C.*, No. MRS-L-3228-99, 2001 WL 34779104, at *37 (N.J. Super. Ct. Law Div. Apr. 27, 2001) (providers outside New Jersey practice medicine in New Jersey when providing those services to New Jersey residents via the Internet).

Dormant Commerce Clause Caveat

Some commentators expressed concern that the regulation or statute was inconsistent with the Dormant Interstate or Foreign Commerce Clause or the State's personal jurisdiction over a given defendant or the statutory text.[78] As discussed in "Alternatives," the Attorney General does not agree with these comments. Nonetheless, for the avoidance of doubt, this subdivision emphasizes that the regulation must be interpreted consistent with these statutory and constitutional requirements.

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 because of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

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

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

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

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

8. Alternatives: The Attorney General considered no action, but concluded that action was prudent in the interests of clarifying the scope of the statute.

The Attorney General considered the proposal of commentators on a prior rulemaking that the regulation expressly limit the statute only to sales in the chain of distribution where

[78] *See* Comment of American Fuel and Petroleum Manufacturers, First NPRM Comments at 74; Comment of Consumer Brands Association, First NPRM Comments at 108; Comment of American Petroleum Institute, First NPRM Comments at 92.

buyer, seller, and good were all situated in the State at the time of the sale *and* contract for sale.[79] The Attorney General rejected this alterantive as inconsistent with the text of the statute, the statutory intent, and the Appellate Division's decision in *Tyson Foods*.

Accepting a construction of the statute that would limit it only to upstream sales wholly within the State would leave New Yorkers vulnerable to price gouging by out-of-State manufacturers, suppliers, wholesalers, and distributors. There is no basis to conclude that the Legislature intended that result. If the prohibition on price gouging does not apply to importation sales, it functionally would not apply to imported goods of any kind. A retailer can defend against a price-gouging claim by pointing to its own increased costs, so a wholly domestic transaction rule would encourage businesses to push price increases up the chain of distribution and onto sales that nominally take place out of State. The ultimate retail sales would not constitute price gouging because its price increases would be justified by increased costs, while the antecedent links in the chain of causation would be outside the State and thus the statute's ambit. Entire vital industries could thus take advantage of New Yorkers with impunity.

Worse still, such an interpretation would encourage sellers of all kinds to evade G.B.L. § 396-r by storing their goods outside the State. An online retailer could price gouge without threat of liability by shipping orders bound for New York from a facility in New Jersey or Pennsylvania. In-State retailers, meanwhile, would be at the mercy of price gouging by out-of-State manufacturers and distributors—and the increased costs would be passed on to consumers. Such an interpretation of G.B.L. § 396-r would have the perverse effect of undermining the entire regime by which the Legislature sought to prevent and to remedy price gouging. The Legislature specifically intended the opposite result.[80]

The Attorney General has considered and rejected commentators' claims that a more restrictive interpretation of the statute than that required by its text, history, and structure is compelled by the Commerce Clause of the U.S. Constitution (specifically the so-called "Dormant Commerce Clause" doctrine). The U.S. Supreme Court has rejected commentators' "almost per se rule against laws that have the practical effect of controlling extraterritorial commerce,"[81] and the cases cited by commentators to the contrary do not stand for that proposition.[82] This is particularly so with a law that provides significant noneconomic benefits in

[79] *See, e.g.*, Comment of Business Council of New York, First NPRM Comments at 55; Comment of American Petroleum Institute, First NPRM Comments at 92.

[80] L. 1998, Ch. 510, § 2, *available at* 1998 N.Y. Laws at 3348 (italics omitted).

[81] *National Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023).

[82] *Id*. at 374.

its efforts to eliminate the unfair exploitation of disasters.[83]

Instead, the Dormant Commerce Clause doctrine aims to restrain protectionism; that is, favoring in-State interests over out-of-State interests. The price gouging law does not make any distinction between in- and out-of-State businesses; every business that sells goods ultimately sold in New York must comply with the same rules. To put it another way, the price gouging law does not "erect[] an economic barrier protecting a major local industry from competition from without the State,"[84] but instead permits all businesses to sell in New York on identical terms, without reference to the prices they charge in other states. As the Sixth Circuit explained in upholding Kentucky's similar price gouging law in *Online Merchants Guild v. Cameron*, "the enforcement or threatened enforcement of [the State's] price-gouging laws would not set a national price ceiling for widgets, as a practical matter or otherwise, because any responsive pricing or limitation on availability would affect only [the State's] consumers."[85]

Statutes analogous to G.B.L. § 396-r are routinely upheld against Dormant Commerce Clause challenges. In *Freedom Holdings, Inc. v. Cuomo*, for example, cigarette importers challenged New York statutes that taxed and regulated cigarette sales.[86] The Second Circuit rejected the challenge on the ground that the statutes applied only to "cigarettes sold in New York."[87] It did not matter that the plaintiffs were importers, or that the statute applied to manufacturers who sold their cigarettes into the State indirectly through intermediaries.[88] The Dormant Commerce Clause claim failed because the statutes at issue did not expressly or through by "practical effect" "set minimum or maximum cigarette prices outside New York."[89] In the same way, the price gouging statute does not attempt to set prices on essential goods sold outside of New York, but only to rein in price gouging on goods that are ultimately sold in this

[83] *Id*. at 381 (rejecting balancing analysis when claimed economic harms are weighed against noneconomic benefits). *See generally* Julia Levitan, Note, *Price Gouging, the Amazon Marketplace, and the Dormant Commerce Clause*, 55 COLUM. J.L. & SOC. PROBS. 373 (2022) (reviewing relevant Dormant Commerce Clause caselaw).

[84] *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

[85] 995 F.3d 540, 555 (6th Cir. 2021).

[86] 624 F.3d 38, 41-42 (2d Cir. 2010).

[87] *Id*. at 66.

[88] *See id*. (collecting statutes); Public Health Law § 1399-oo(10) (statute applies to "cigarettes sold in the State . . . whether directly or through a distributor, retailer or similar intermediary").

[89] *Freedom Holdings*, 624 F.3d at 66; *see also S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 177-78 (5th Cir. 2010); *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 943-44 (8th Cir. 2009); *KT&G Corp. v. Attorney Gen. of State of Oklahoma*, 535 F.3d 1114, 1143-46 (10th Cir. 2008); *SPGGC, LLC v. Blumenthal*, 505 F.3d 32 183, 192-96 (2d Cir. 2007).

State.[90]

The Attorney General also considered the argument raised by one commentator that this regulation would implicate the Dormant Foreign Commerce Clause Doctrine.[91] Specifically, it was argued that because New York is a major entrepot for foreign imports, it followed that any State law that interfered with this role, including the price gouging statute, would violate the Foreign Commerce Clause, which, the commentator argued, imposes higher standards of scrutiny than the dormant Interstate Commerce Clause analysis, relying principally on the U.S. Supreme Court's decision in *Japan Line, Ltd. v. Los Angeles County*.[92]

The cases cited by the commentator exclusively concern *taxation* of foreign businesses by a State and not the regulation of goods or services sold to the people of that State. Even if those cases did apply to the price gouging statute, decisions after *Japan Line* confirm that there is no constitutional objection to New York enforcing New York law on companies selling goods to New Yorkers in New York. The price gouging statute is less restrictive than even the state tax upheld in *Barclays Bank PLC v. Franchise Tax Bd. of California*,[93] which imposed a comprehensive tax on foreign corporations, enforced it with a blizzard of paperwork, and did so in the largest state economy in the United States.

The U.S. Supreme Court's decision in *Pork Producers*[94] upholding California's pork rules would have come out the other way if the U.S. Supreme Court agreed that, as the commentator asserts, mere possession of a "significant termini for U.S. trade with foreign nations" meant that a state law impacting prices of goods sold in the state "dictat[ed] terms of trade with foreign nations," and was thus unconstitutional: California possesses the largest port in the United States, enforced its law against pork producers foreign and domestic, and yet was held to not breach the Commerce Clause in any respect despite extensive briefing on the foreign

[90] Multiple commentators referred in their Dormant Commerce Clause discussion to *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018)—a decision that is both nonbinding and inapposite. The Maryland statute in that case prohibited manufacturers and wholesalers from engaging in price gouging with respect to specified medications that were "'made available for sale in [Maryland].'" *Id*. at 666 (quoting Md. Code Ann., Health-Gen. § 2-801(b)(1)). The statute thus affected all "upstream" transactions executed by manufacturers and wholesalers in respect of the covered medications (most of which took place outside Maryland), regardless of whether or to what extent any given transaction resulted in particular goods (e.g., particular cartons of pills) being sold in or into Maryland. *See id*. at 671 & n.4. The statute thus had the impermissible effect of "control[ling] the price of transactions that occur wholly outside the state" and which did not have any nexus to Maryland. *Id*. at 671. Under New York's price gouging law, by contrast, only upstream sales of goods *sold in New York State* are subject to the statute.

[91] Comment of American Fuel and Petrochemical Manufacturers, First NPRM Comments at 74.

[92] 441 U.S. 434, 448 (1979).

[93] 512 U.S. 298, 312-13 (1994).

[94] *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

commerce implications of the decision.[95]

The Attorney General agrees, however, that transactions in which New York is an entrepot for out-of-state delivery rather than the final destination for the goods fall outside the ambit of the statute. The OAG has never brought proceedings under the price gouging statute against sales of products where the ultimate consumers were not New Yorkers. As the trial court in *Tyson Food* explained, it is the *New York* public (whether individuals or businesses) that the Legislature declares its intention to protect in the price gouging statute, recognizing that other jurisdictions take varying approaches to the problem of price gouging affecting their citizens.

The Attorney General further considered arguments made by trade associations in a prior version of this rule arguing it "ignored the practicality" of applying price gouging rules to New York's price gouging statute or the implementing regulations to nationwide consumer manufacturing businesses.[96] The association argued that pricing to large retailers and other customers is national and not determined on a regional basis; conversely, a large business with national operations may find it difficult to break down costs on a per-essential product basis as many large enterprises operate at such scales that the lowest level of geographic breakdown for their internal planning purposes above a retailer is regional, not State-wide. Other commentators argued that applying the price gouging law to national or international supply chains would disrupt those supply chains.[97]

Commentators did not provide substantive evidence for these assertions. In any case, "[c]ompanies that choose to sell essential products in various States must normally comply with the laws of those various States."[98] There are an immense variety of state and local price gouging laws, all with different thresholds, presumptions, exceptions, and qualifications—just as there are an immense variety of state and local laws on virtually every subject. It may well be that supply chains would be smoother without this divergent regulation, but divergent regulation was the choice democratically selected by the legislatures of the several states, not least the New York State Legislature. Compliance with nonuniform state laws, and nonuniform state regulations, is business reality older than the United States,[99] and is not meaningfully different for price gouging laws as it is for any other kind of regulation.

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[95] *See, e.g.*, Br. of the Canadian Pork Council et al, *National Pork Producers Council v. Ross*, 2022 WL 2288160 (June 17, 2022).

[96] *See* Comment of Consumer Brands Association, First NPRM Comments at 103.

[97] *See* Comment of American Fuel & Petrochemical Manufacturers, First NPRM Comments at 73.

[98] *Natl. Pork Producers Council v. Ross*, 598 U.S. 356, 364 (2023).

[99] *See* Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 558 (1994).

As compared with divergent pork production standards,[100] compliance with divergent state price gouging laws is straightforward: businesses that do not *raise* prices in the immediate aftermath of natural and human disasters except to cover additional costs not within their control (or reductions in profit margins flowing from additional costs, which amounts to the same thing) are unlikely to experience price gouging liability absent other misconduct or egregious pre-disruption prices.[101] And it appears to be the largest national and international enterprises, including the largest brick-and-mortar retailers in the United States—that is, those who commentators assert would have the *greatest* difficulty moderating their prices in this way—who are most willing to institute price freezes during disasters.[102] To take their public statements at face value, these businesses appear content to *lose* money (which no statute requires them to do) rather than raise prices during a disruption. This behavior suggests that despite commentators' fears, price gouging laws are readily implementable by larger businesses with complex supply chains.

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.

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[100] *Cf. Pork Producers*, 598 U.S. at 367–68.

[101] If a manufacturer elected to sell goods to a distributor at a single national price and that national price remained unchanged before and after the onset of an abnormal market disruption, the price gouging law would not have an impact on that manufacturer's price unless OAG were able to establish that, despite being the same as prices charged outside the disruption, the price was unconscionably extreme or the manufacturer engaged in an exercise of unfair leverage or unconscionable means. G.B.L. § 396-r(3)(a)(i). This is not impossible: if it is possible that a price might simply be "unconscionably extreme" *per se* outside the disaster and thus unconscionably excessive under the price gouging statute once it is activated with respect to that specific product. *See, e.g.*, *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 27 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119 (App. Term 1967) (excessively priced refrigerator). Likewise, if a retail store advertised the price of an essential product nationwide as $10, advertised that same product in New York as costing only $1, but then surreptitiously charged the consumer's credit card for the $10 price, even if $10 was the national uniform price and thus no "increase" had occurred, the retailer would be engaging in the use of unconscionable means and liable under the price gouging statute (in addition to violating a number of other statutes).

[102] *See, e.g.*, Jeremy Pelzer, *Major Retailers Have Frozen Prices During Coronavirus Threat, AG Dave Yost Says*, CLEVELAND.COM (Mar. 12, 2020), https://www.cleveland.com/coronavirus/2020/03/majorretailers-have-frozen-prices-during-coronavirus-threat-ag-dave-yost-says.html (discussing voluntary price freezes in Ohio by Walmart, Target, Walgreens, Rite Aid, and others); Rafi Mohammed, *Why Businesses Should Lower Prices During Natural Disasters*, HARV. BUS. REV. (Sept 11, 2017), https://hbr.org/2017/09/why-businesses-should-lower-prices-during-natural-disasters ("Instead of raising prices, JetBlue capped the price of its flights leaving Florida at $99 (between nonstop cities) and $159 (for connecting flights) and added seat capacity to help people who were escaping Hurricane Irma. These prices are far below what the market would dictate, and even less than the company's typical "few days in advance" fares. AT&T, Sprint, T-Mobile, and Verizon all waived text, phone, and data overage fees in Florida due to Irma. Airbnb created a disaster response program in Texas to help provide free lodging to those who were displaced by the wreckage caused by Hurricane Harvey."); Sarah Nassauer, *Home-Improvement Retailers Scramble to Restock in Florida*, WALL ST. J (Sept 11, 2017), https://www.wsj.com/articles/home-improvement-retailers-scramble-to-restock-in-florida-1505145492 ("Both Lowe's and Home Depot said they don't raise prices during disasters and have price-freeze policies in place").

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

Regulatory Flexibility Analysis For Small Businesses And Local Governments

The Attorney General determined that a Regulatory Flexibility Analysis for the proposed rule is not necessary because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[103]

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

1. **Effect of Rule**. The effect of the rule is to set out clarification on the geographic scope of the statute: in short, it applies only to goods sold or offered for sale in the State, and to services provided in the State. This rule does not affect local governments, which may continue to enforce their own price gouging laws as before. This clarification likewise has no impact on local governments or small businesses.

2. **Compliance Requirements**. Small business will not be required to take any affirmative action to comply with this rule. The rule serves to provide clarity on the geographic scope of the statute's enforcement. 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 as it merely elaborates on an existing statutory rule for which legal advice would be indicated without regulation.

4. **Compliance Costs**. This rule will impose no compliance costs on small businesses or local governments for the reasons stated above: insofar as any obligations are imposed on small businesses they already existed under the statute and have become more concrete because 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 principles set out in this rule.

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

6. **Minimizing Adverse Impact**. This rule has a positive impact on small business and no impact on local government. Small businesses that operate in and sell in New York State experience no change. Those that operate outside New York State but sell or makes offers for sales into New York State will now have clearer rules determining when the statute does and does not apply.

To the extent that this rule has an adverse impact on small businesses, the Attorney General has considered, and applied, the approaches prescribed in section 202-b of the State Administrative Procedure Act. The Attorney General has taken account of limited resources available to small businesses and local governments by providing guidance on the geographic scope of the statute.

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, will not now do so, and attribute this to the clarifying effect of the regulation, this adverse impact is the intentional effect of the statute in its efforts to curb profiteering during abnormal market disruptions.

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

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

Rural Area Flexibility Analysis

The Attorney General determined that a Rural Area Flexibility Analysis for the proposed rule need not be submitted because the rule will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[104]

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

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

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

5. **Rural Area Participation**. The 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.

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