January 28, 2026

# Notice of Rule Adoption

## *13 N.Y.C.R.R. §§ 600.1, 600.2, 600.10*

Price Gouging: Definitions, Roadmap, Severability

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## 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.

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

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

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 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").[4] The Notices of Proposed Rulemaking were published in the State Register on March 22, 2023.[5]

The Attorney General received approximately 40 comments on the first round of proposals during the comment period.[6] Following consideration of the comments made in the First NPRMs, the Attorney General elected to issue seven new Notices of Proposed Rulemaking ("Second NPRMs") on largely the same topics as the First NPRMs, subject to the standard 60-day comment period for new Notices of Proposed Rulemaking.[7] The Second NPRMs attracted 32 comments, of which 20 were comments from or on behalf of various businesses or groups representing businesses, 11 were submitted by ride-hail drivers, and one was submitted by an academic economist.[8]

Following consideration of the comments, set out in the Assessment of Public Comment appended to this rulemaking, the Attorney General elected to make substantial revisions to the rule concerning the determination of pre-disruption prices, withdraw the rule concerning geographic scope and pre-disruption prices, propose a new rule concerning commencement of weather-related disruptions, and adopt the remaining rules with non-substantial changes. The Attorney General intends to undertake a fresh rulemaking on pre-

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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] Office of the Attorney General, Notice of Proposed Rulemaking – Price Gouging, https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf ("First NPRMs")

[5] N.Y. 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, linked to in footnote 4, in the format First NPRMs at XX.

[6] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/rulemaking-laws-price-gouging). For ease of reference, citations to the comments received on the First NPRMs will include a pincite to this document in the form First NPRM Comments at XX.

[7] N.Y. St. Reg., Feb. 12, 2025 at 2-15, *available at* https://dos.ny.gov/system/files/documents/2025/02/021225.pdf.

[8] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/rulemaking-laws-price-gouging). For ease of reference, citations to the comments received on the Second NPRMs will include a pincite to this document in the form Second NPRM Comments at XX.

disruption prices in the near future, but will submit that rulemaking as a standard notice of proposed rulemaking rather than a revision of the previous notice.

A table of actions follows:

| Action | Rule | Second NPRM | First NPRM |
|---|---|---|---|
| Adopted | 600.1, 600.2 & 600.10: Definitions, Roadmap, Severability | LAW-06-25-00008-P | *None, includes definitions common to all rules* |
| Proposed New Rule | 600.3: Weather-Related Disruptions | *None, new rule* | *None, new rule* |
| Adopted | 600.4: Unfair Leverage Examples | LAW-06-25-00007-P | Rule 4 (LAW-12-23-0009-P) |
| Adopted | 600.5: Unfair Leverage of Market Position | LAW-06-25-00006-P | Rule 5 (LAW-12-23-0010-P) |
| Withdrawn, new proposal soon | 600.6: Pre-Disruption Price Determination/Dynamic Pricing | LAW-06-25-00005-P | Rule 7 (LAW-12-23-0012-P) |
| Adopted | 600.7: 10% Gross Disparity Threshold | LAW-06-25-00010-P | Rule 1 (LAW-12-23-0006-P) |
| Adopted | 600.8: New Essential Products | LAW-06-25-00009-P | Rule 3 (LAW-12-23-0008-P) |
| Adopted | 600.9: Cost Definition and Allocation Methods | LAW-06-25-00012-P | Rule 2 (LAW-12-23-0007-P) |
| Withdrawn | 600.9: Geographic Scope | LAW-06-25-00011-P | Rule 6 (LAW-12-23-0011-P) |

Each one of these adoptions, proposals, and revisions 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 Text

**Action:** Add New Part 600.1, 600.2, and 600.10 of Title 13 N.Y.C.R.R.

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

**Subject:** Price Gouging

**Purpose**: To provide common price gouging definitions and for severability of price gouging rules.

**Text of rule:**

**Section 600.1. Definitions.**

For the purposes of this Part:

(a) (1) "Abnormal disruption of the market," "abnormal disruption," or "disruption" mean any change in the market for an essential product, whether actual or imminently threatened, resulting from a triggering event.

(2) "Triggering event" means one or more of the events listed in General Business Law § 396-r(2)(b), namely: (i) stress of weather, (ii) convulsion of nature, (iii) failure or shortage of electric power or other source of energy, (iv) strike, (v) civil disorder, (vi) war, (vi) military action, (vii) national or local emergency, (viii) drug shortage, or (ix) other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the Governor.

(3) "Drug shortage" means, with respect to any drug or medical product intended for human use, that such drug or medical product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration pursuant to 21 U.S.C. § 356c or any other provision of federal law.

(b) "Benchmark sale" means a sale or offering for sale whose price is used as a basis to conclude that the price in the scrutinized sale is *prima facie* proof of a violation of General Business Law § 396-r pursuant to General Business Law § 396-r(3)(b)(i) or General Business Law § 396-r(3)(b)(ii).

(c) "Buyer" means the person to whom the scrutinized sale or offer for sale is made. References to any particular buyer include any entities controlled by the buyer (or entities controlled by the same person as the buyer), and any successor in interest to that buyer.

(d) "Consumer" means an individual or small business.

(e) “Essential products” means goods or services a reasonable person in the buyer’s position at the time of the sale would believe are vital and necessary for the health, safety, and welfare of consumers or the general public.

(f) “Goods and services” means consumer goods and services used, bought or rendered primarily for personal, family or household purposes; essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease; any other essential goods and services used to promote the health or welfare of the public; and any repairs made by any party within the chain of distribution of goods on an emergency basis as a result of an abnormal market disruption.

(g) “New essential product” means an essential product that did not exist prior to an abnormal disruption of the market for that new essential product.

(h) “Pre-disruption price” means the price at which the goods or services at issue in the scrutinized sale were sold or offered for sale by the defendant in the usual course of business immediately prior to the abnormal disruption of the market.

(i) “Price” means the maximum total of all fees or charges a buyer must pay for an essential product, including but not limited to any mandatory additional goods or services offered to a buyer as part of the same transaction, but excluding taxes, tolls, or fees imposed on the sale (or prospective sale) by a Federal, State, or local government.

(j) “Price gouging statute,” without additional context, means General Business Law § 396-r.

(k) “Sale,” without additional context, means a sale and offering for sale. A seller that contracts or offers to contract with a buyer to sell multiple goods (or a volume of fungible goods) on multiple dates or in multiple locations, whether for a fixed or variable price, engages in a separate sale or offer for sale on each such date or location. The sale or offering for sale of a good or service by one party to another where both buyer and seller are under common ownership or control, or where the sale or offering for sale is not an arms-length transaction, does not constitute a sale or offering for sale.

(l) “Scrutinized sale” means the sale or offering for sale made during an abnormal disruption of the market being examined for compliance with the price gouging statute.

(m) “Seller” means the party making the scrutinized sale, including a subsidiary, parent company, affiliate, agent, or representative thereof.

(n) “Small business” means a person other than an individual that is independently owned and operated, not dominant in its field, and employs 100 or fewer persons.

(o) “Third party” means a person not owned or controlled by a seller.

(p) Methods or practices used or prices charged in "the usual course of business" means methods employed or prices charged as part of the seller's normal routine. A method, practice, or price (i) implemented when a seller knew or had reason to know a disruption would occur, (ii) implemented prior to a disruption that has the purpose or effect of altering prices during a disruption, or (iii) that a reasonable person would conclude was implemented for the sole or dominant purpose of enabling the seller to increase prices or alter the seller's accounting of costs or profits during a disruption or immediately prior to a disruption, is not a method or practice used in the usual course of business.

## Section 600.2. Unconscionably Excessive Prices.

The price in a scrutinized sale is unconscionably excessive if there is sufficient evidence of any one of the following:

(a) The amount of the excess in price is unconscionably extreme; or,

(b) There is an exercise of unfair leverage or unconscionable means, including but not limited to practices identified in 13 N.Y.C.R.R. § 600.4; or,

(c) There is a combination of an unconscionably extreme price and unfair leverage or unconscionable means; or,

(d) There is a gross disparity, as defined by 13 N.Y.C.R.R. § 600.7, between the price of the essential product in the scrutinized sale and its pre-disruption price, and the seller does not provide sufficient evidence, as provided in 13 N.Y.C.R.R. § 600.9, that the increase in the amount charged preserves the margin of profit that the defendant received for the same essential product prior to the abnormal disruption of the market or additional costs not within the control of the seller were imposed on the seller for the essential product; or

(e) The amount charged in the scrutinized sale grossly exceeded the price at which the same or similar essential products were readily obtainable in the trade area, and the seller does not provide sufficient evidence, as provided in 13 N.Y.C.R.R. § 600.9, that the increase in the amount charged preserves the margin of profit that the defendant received for the same essential products prior to the abnormal disruption of the market or additional costs not within the control of the seller were imposed on the seller for the essential products; or,

(f) If the scrutinized sale is for a new essential product, the amount charged for the new essential product in the scrutinized sale grossly exceeds the trade area price defined in 13 N.Y.C.R.R. § 600.8(c)(1), and the seller does not rebut this *prima facie* case with evidence described in 13 N.Y.C.R.R. § 600.8(c)(2).

## Section 600.10. Severability.

The provisions of this Part shall be severable, and if any item, subclause, clause, sentence, subparagraph, paragraph, subdivision, section, or subpart of this Part, or the applicability thereof to any person or circumstances, shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, nor the application thereof, but shall be confined in its operation to the item, subclause, clause, sentence, subparagraph, paragraph, subdivision, section, or subpart thereof, or to the person or circumstance directly involved in the controversy in which such judgment shall have been rendered.

# Regulatory Impact Statement

## Statutory Authority

G.B.L. § 396-r(5) authorizes the Attorney General to promulgate rules to effectuate and enforce the price gouging statute.

## 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. The objectives of the rules are to ensure the public, business, and enforcers have guideposts of behavior that constitutes price gouging and clarify the grounds for the affirmative defense in a *prima facie* case.

The Attorney General has concluded that the 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.[9] G.B.L. § 396-r was enacted in response to price spikes following heating oil shortages in the winter of 1978–1979.[10] The Legislature imposed civil penalties on merchants charging unconscionably excessive prices for essential goods during an abnormal disruption of the market.[11]

The statute originally 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 available in the trade area, and the amount charged was not attributable to additional costs imposed on the merchant by its suppliers.[12] 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

[9] L. 1979, ch. 730 § 1, eff. Nov. 5, 1979.

[10] *Id.*

[11] L. 1979, ch. 730 §§ 2, 4, eff. Nov. 5, 1979.

[12] L. 1979, ch. 730 § 3, eff. Nov. 5, 1979.

vital and necessary for their health, safety, and welfare.[13]

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. 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.[14]

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.[15]

***Second***, the Legislature added military action as one of the enumerated examples of an abnormal market disruption.[16] 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.[17]

***Third***, 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*.[18] 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."[19] The Court went on:

> the term "unconscionably excessive" does not limit the statute's

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[13] L. 1979, ch. 730 § 1, eff. Nov. 5, 1979.

[14] L. 1995, ch. 400, §§ 2, 4, eff. Aug. 2, 1995.

[15] L. 1998, ch. 510, § 2, eff. July 29, 1998.

[16] L. 1998, ch. 510, § 2, eff. July 29, 1998.

[17] Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[18] 71 N.Y.2d 693 (1988); *see* Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[19] 71 N.Y.2d at 698.

> prohibition to "extremely large price increases", as respondents would have it. The doctrine of unconscionability, as developed in 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.[20]

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.[21]

***Fourth,*** 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.[22]

***Fifth,*** 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.

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[20] *Id*. at 698-99 (citations omitted).

[21] L. 1998, ch. 510, § 3, eff. July 29, 1998.

[22] *Ibid*.

Setting aside a 2008 amendment increasing maximum penalties from $10,000 to $25,000,[23] 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 of the COVID-19 market disruption.[24] 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.[25]

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.[26] Finally, these amendments gave the Attorney General the rulemaking authority being exercised here to effectuate and enforce the statute.[27]

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."[28]

The Department of Law (better known as the Office of the Attorney General or "OAG"), of which the Attorney General is the head,[29] 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.[30] OAG has been the agency responsible for administering and

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[23] L. 2008, ch. 224, eff. July 7, 2008.

[24] 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.

[25] L. 2020, ch. 90, eff. June 6, 2020.

[26] *Ibid*.

[27] *Ibid*.

[28] L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.

[29] N.Y. Const, art V, § 4.

[30] *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

enforcing this statute for 43 years, complimenting over a century of experience in the enforcement of cross-sector economic regulations.[31] Like the FTC, its federal counterpart in this area, OAG employs a staff of economists, data scientists, and other experts to aid tis enforcement efforts. In 2011, OAG conducted a statewide investigation leading to a major report examining gasoline prices.[32] OAG regularly issues guidance regarding price gouging and provides technical advice to the Legislature when amendments to the law are proposed.[33] The Attorney General has also engaged in multiple enforcement actions.[34] 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.[35]

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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.

[31] 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).

[32] *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.

[33] *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.

[34] *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).

[35] *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.

### *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:

> 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.[36]

An "abnormal disruption of the market" is 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.[37] 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,"[38] 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."[39] 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."[40] For brevity, throughout this rule vital and necessary goods and services are called "essential products."

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

[37] A "drug shortage" is defined by G.B.L. § 396-r(2)(c) to arise when "such drug or medical product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration."

[38] G.B.L. § 396-r(2)(d).

[39] G.B.L. § 396-r(2)(e).

[40] G.B.L. § 396-r(2)(e).

G.B.L. § 396-r(3) sets out several means by which OAG may provide evidence that the defendant has charged an "unconscionably excessive price."

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]

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."[43]

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[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.

[43] 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 N.Y.2d 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"). *Contrast* Statute Law § 77 ("construction of

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 the abnormal disruption of the market."[44] 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."[45]

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 [seller] for the goods or services."[46] 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.[47] 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 forbids sellers "from taking unfair advantage of the public during abnormal disruptions of the market" by "charging grossly excessive prices for essential goods and services."[48] The statute "excises the use of such advantage from the

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a statute is a question of law for the court") *with Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 391 (1995) ("[t]he general administrative law principle is that a regulation adopted in a legislative rule-making proceeding . . . can apply to foreclose litigation of issues in any individual adjudicatory proceeding provided for under the enabling legislation.").

[44] 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, *see Matter of People v. Quality King Distribs., Inc.*, 209 A.D.3d 62, 79 (1st Dep't 2022), 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.

[45] G.B.L. § 396-r(3)(b)(ii).

[46] G.B.L. § 396-r(3)(c).

[47] *Id.*

[48] G.B.L. § 396-r(1).

repertoire of legitimate business practices."[49] 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.[50]

The price gouging statute represents a decision by the Legislature 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

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

[50] *See* Professor Luke Herrine, ANPRM Comments at 193-204. For a broader discussion of fairness considerations underlying price gouging laws, s*ee 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, s*ee, 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).

[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).

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]

OAG has conducted an analysis of economic data and scholarship relevant to these rules and has compiled these analyses in a separate document ("OAG Staff Report") alongside this rulemaking. In the Staff 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. 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. A special section of the Staff Report considers data pertaining to for-hire ground transportation service providers, and also concludes that once two market participants who design their systems to increase prices during periods of high demand are excluded, that market too exhibits striking price stability.

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

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[54] *See* Press Release, *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. DEP'T OF CONSUMER & 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 financially vulnerable and [that], 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 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 rules treating many of the same subjects as the present rule (the "First NPRMs"), and three additional considerations:

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 overall gross profit by increasing sale volume. None of the rules limits 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 they were in prior to the disruption.

Second, the rules are designed to encompass upstream price gouging, and not merely the retail-level price gouging that may be more noticeable to consumers. New York's retailers employ over 800,000 workers and are central to communities around the State as providers of essential products, participants in local affairs, and significant taxpayers.[58] Yet although many if not most retailers are price takers, not makers, 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.

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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] *See* New York Dep't of Labor, *Current Employment Statistics*, https://dol.ny.gov/current-employment-statistics-0 (last accessed January 14, 2026); *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.

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 the OAG Staff Report, that identified multiple ways in which corporate concentration can encourage price gouging.[59] 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 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.[60]

## Needs and Benefits

This rulemaking adds new sections in a new price gouging article of the New York Regulations. The first section, 600.1, sets out several defined terms that will be used throughout other rules concerning the price gouging statute.

The second section, 600.2, restates the text of G.B.L. § 396-r(3) with cross-references to the other rules. This section 600.2 has two benefits. First, it will improve comprehensibility and ease of reference for all the price gouging rules by situating the remaining rules in the context of the statute. Second, it clarifies that the statute does not require a showing of common-law unconscionability to establish a violation of the price gouging statute if the Attorney General provides evidence of gross disparity in price from pre-disruption price or the trade area, as permitted by G.B.L. § 396-r(3)(b), and the defendant does not provide a satisfactory rebuttal under G.B.L. § 396-r(3)(c).[61]

The third section, 600.10, clarifies that all parts of the rules are severable from all other parts of the rules.

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

[60] *See* 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.").

[61] *See Matter of People v. Quality King Distribs., Inc.*, 209 A.D.3d 62, 79 (1st Dep't 2022).

## *Definitions*

In almost all cases, the defined terms in rule 600.1 are non-substantive and specified solely for the sake of brevity and convenience: phrases like "sale or offering for sale" or "abnormal disruption of the market" describe concepts that are more conveniently referred to by a shorthand term. A few definitions merit further discussion.

*Essential Product*

The phrase "essential product" is a shorthand for the goods or services with which the statute is concerned; the regulatory definition here simply collects into a single phrase the various definitions for "vital and necessary goods and services" set out in G.B.L. § 396-r(2). It also adds a clarification from case law that the determination of whether a product is vital and necessary is made from the perspective of the average reasonable person in the position of the buyer at the time of sale.

This point arose in *People v. Quality King Distributors, Inc*., where the defendant argued that the product under scrutiny—Lysol disinfectant wipes—was not "vital and necessary" because subsequent research showed such wipes were of minimal assistance in combating COVID-19. The Appellate Division disagreed:

> Regardless of which party is correct in its assessment of the danger COVID-19 presented when lingering on surfaces and Lysol's effectiveness in eliminating or reducing that danger, consumers in the first several months of 2020 had good reason to believe that the virus could be killed if a surface were treated with a disinfectant. The Lysol essential product was, at least in the eyes of consumers, of the utmost importance and absolutely needed to address the terrible danger posed by COVID-19. Whatever wisdom hindsight might have to offer regarding the efficacy of Lysol in combatting the coronavirus, we put ourselves in the shoes of the consumer facing the emerging pandemic.[62]

This holding is incorporated into the present definition.

*Price*

"Price" is defined as the total of all fees or charges a buyer must pay for an essential product. It appears to be uncontroversial that a generator sold for $1,000 is the same "price" as a generator sold for $500 where the consumer must pay an extra $500 added as

[62] 209 A.D.3d 62, 78–79 (1st Dep't 2022).

a “convenience fee” at checkout. This definition does *not* prescribe any manner of presentation of prices or “hidden fees,” but merely clarifies that when determining the price a buyer pays for an essential product in the scrutinized sale, the statute looks to the entire amount a buyer pays for an essential product.

With one exception. In response to feedback from commentators, the Attorney General elected to remove from the “price” calculation those charges that federal, state, or local governments impose on the sale. Sales tax is the most obvious of these, but this formulation is intended to encompass things like tolls, congestion charges, mandatory recycling deposits, and so on. This non-substantial change was made because it is undisputed (and indisputable) that per-sale charges of this kind are unavoidable costs that, if increased, can be recovered by price increases; indeed, sales tax, in particular, may not even be a “price” charged by the seller given that the sums paid are (or ought to be) remitted directly to the government and are set by the government itself.

Taxes and tolls on sales must be distinguished from taxes and tolls on the seller at large. For example, a seller that increases prices to account for an increase in their payable New York City Business Corporation Tax cannot exclude such price increases from the “price” side of the equation but *can* justify such price increases under the cost side of the equation. The reason for this different treatment is that the seller has a choice as to how to apportion general taxes between the products they sell (they are a “relevant overhead expense” in the parlance of the relevant rule), while a seller is forbidden from—for example—charging a 4% sales tax on an item subject to an 8% sales tax and recovering that taxable gross by charging a 12% sales tax on a different item subject to the same 8% rate. To ensure sellers do not use selective apportionment of general tax burdens to disguise gouging, it is appropriate to place only those taxes that must be charged *on the specific sale* beyond the “price” definition with the remaining taxes forming part of the cost defense.

*Sale*

The rule clarifies that the transfer of goods and services between different legal persons under common ownership or control is not within the scope of the statute. This is most relevant to enterprises that distribute goods through state or regional subsidiaries (such that for example a procurement entity buys the goods, and then “sells” the goods to the subsidiary to then sell to third party buyers). This clarification ensures that businesses that structure themselves in this way are not put at a competitive advantage or disadvantage to businesses that transfer goods wholly within a single legal person. A party cannot cleanse itself of price gouging liability by constructing a transaction with itself or a

straw purchaser to fabricate "costs" it then passes on down the supply chain.[63]

The definition of "sale" also clarifies that a contract for sale may incorporate many different "sales," each of which would be a separate "sale" for price gouging statute purposes.[64] Thus if a seller of gasoline contracted with a gas station in New York to provide between 10,000 and 20,000 gallons of gasoline at a rack in New York once a week, at an index-linked price, for the course of a year, the contract would encompass 52 sales, with each sale occurring on the date the gas station lifted the contracted-for gas, the quantity of the sale being the amount of gasoline the gas station lifted, and the price the actual price paid on that date.

This result is congruent with the Uniform Commercial Code definition of "sale" (in contrast to a "contract for sale") and is also consistent with the statutory purposes. Sellers cannot evade the price gouging statute by contracting with a buyer, before a disruption, to supply the buyer for $1 per unit during non-disruptions and $10 per unit during disruptions and claim that the price gouging statute does not apply because the "sale" took place outside the disruption. Sellers of commodities that elect to price supply contracts using an open or floating pricing term (e.g. index prices) must ensure that those supply contracts provide for a modification of floating price during disruptions such that the sales that take place during disruptions do not cause sales to be made at an unlawful price.[65]

The Association for Affordable Medicines commented that the definition collapses "sale" and "offer for sale" in a manner that unduly extends the geographic scope of the statute.[66] This is not the intention of the section. The collapse of "sale" and "offer for sale" as a matter of definition is intended as a helpful shorthand, given that the statute uses "sale" and "offer for sale" together in every context in which they appear bar one. It is not intended to collapse that distinction when the distinction is relevant to the analysis. Clarifying non-substantial amendments have been made to remedy any confusion on this point.

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[63] *See People v. Beach Boys Equipment Co*, 273 A.D.2d 850, 851 (4th Dep't 2000) (affirming exclusion of evidence of such "costs" attributable to a collusive transaction).

[64] *See* N.Y.U.C.C. § 2-106(1) (defining "contract for sale" which "includes both a present sale of goods and a contract to sell goods at a future time" in contrast to "sale" which consists "in the passing of title from the seller to the buyer for a price").

[65] G.B.L. § 396-r(2)(a). As discussed in the Regulatory Impact Statement to rule rule 13 N.Y.C.R.R. § 600.9, index prices *are* highly relevant to the *cost* inquiry if the seller is buying their product at an index price and then selling at that same index price plus a consistent margin of profit, as the rise in the price of purchases via the index may naturally be matched by increasing the price of sales by the same index. This rule, by contrast, is concerned with substantive price gouging liability rather than a price gouging defense; for liability purposes, what matters is what price was charged, and not why the price was as it was.

[66] AAM, Second NPRM Comments at 50-60.

*Small Business*

The definition of small business used in this regulation was derived by combining section 102(8) of the State Administrative Procedure Act with section 131 of the Economic Development Law, which sets out the leading statutory definition of "small business." It omits the qualifier in both statutes that the small businesses be within the State to avoid any implication that the law will be applied differentially based on state of residence, as by its terms the statute's application does not turn on the location of the seller.[67]

*Usual Course of Business*

The regulation implements the "usual course of business" qualifier by applying the common-sense definition of those prices charged as part of the seller's normal routine and clarifying that the "usual course of business" ends not when the disruption occurs but when seller "knew or had reason to know that the disruption would occur." To use both literally and metaphorically a phrase used in commercial litigation, the benchmark date is the last "clear day" before the disruption becomes threatened.[68]

This definition has been insubstantially amended in response to comments to clarify its application to situations where a seller engages in promotional pricing in the immediate run-up to a disruption. Suppose a hardware store typically sells generators for $500. Having not sold many generators in some months, and desirous to reclaim the storage space they occupy, it decides, on a clear day, to hold a one-off sale on generators starting January 1 and running to February 15 where all generators are 50% off. A blizzard hits the area on January 15. Against what benchmark price should the sale of generators on January 16 be counted: the sale price of $250 or the "regular" price of $500?

The correct answer to this question turns on whether the 50% off promotion was part of the seller's usual course of business, as it is "the price at which [the generator was sold] by the defendant *in the usual course of business* immediately prior to the onset [date]" that the statute requires be the benchmark price.[69] The Attorney General agrees that the previously proposed rule's definition of "usual course of business" required further clarification to better answer this question.

In the prior proposed version of rule 600.1, the definition of usual course of business was susceptible to a reading that whatever prices or practices were in place on the day before the seller knew or had reason to know of the disruption was, *per se*, the price set in

[67] G.B.L. § 396-r(2)(e).

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

[69] G.B.L. § 396-r(3)(b)(i).

the usual course of business. This was not the intended meaning. Any price charged in a departure from the usual course of business would, by definition, render the price charged under that departure from the usual course of business to *not* a usual course of business price. Rule 600.1 therefore specifies that the usual course of business bears its customary meaning such that a change to the business's "normal routine" will cause the price charged as a result to fall outside of the usual course of business.

This means that in the hypothetical above, the one-off sale of the generators would cause the benchmark price to be $500, not $250, because the seller's routine price for the generators was $500 but for the one-off sale. This answer is easy to give under the rule because the hypothetical stipulates that the sale is "one-off." If the seller's routine was to employ promotional prices for generators, it would be open to the Attorney General to argue that the lower promotional price truly was the price charged in the usual course of business.[70]

Similarly, if a seller pays a credit card company a 2% fee on any credit card transactions, but in the usual course of business elects not to pass on that fee to consumers via higher prices,[71] a seller may not use the hypothesized higher price it ought to have charged consumers to recover credit card fees as the benchmark for prices it charges during the disruption, because the benchmark is and must be measured from the prices charged during its usual course of business.

### *Unconscionably Excessive Price*

Section 600.2 sets out a roadmap for the remaining rules, restating the statutory text of G.B.L. § 396-r while adding cross-references to the other rules to illustrate in one place how the rules fit into the price gouging statute. This section has been added to improve the comprehensibility of the rules and identify areas where rulemaking has not been attempted at present—such as defining "unconscionably extreme" prices.

Section 600.2 also addresses a longstanding point of confusion that has arisen in the course of OAG's discussions with regulated parties: whether common-law unconscionability must be proven *in addition to* an unrebutted gross disparity in price from the pre-disruption price or gross excess in price compared to trade area prices. For example, suppose a seller of cases of Lysol disinfectant wipes with a pre-disruption price of $60 per case sells them at $88 per case following the onset of the COVID-19 emergency. Does this

[70] Recall that because this definition is being used to set the *pre*-disruption price, it is to the advantage of defendants for that benchmark price to be *higher*, not lower.

[71] It is separately unlawful to impose such a surcharge by means of a supplemental fee at the time of payment rather than displaying the fee-inclusive dollars-and-cents price on the product's price tag or listing. *See* G.B.L. § 518.

establish a *prima facie* violation of the price gouging statute, or must the Attorney General also show that the seller's price was unconscionable at common law?

The statutory text and relevant caselaw says "no." G.B.L. § 396-r(3)(b) provides that "in any proceeding" brought by the Attorney General under the statute, "*prima facie* proof that a violation *of this section* has occurred shall include evidence" of an unrebutted gross disparity.[72] "This section" means the entire G.B.L. § 396-r.[73] Similarly, in *Matter of People v. Quality King Distribs., Inc.*, the Appellate Division explained that the

> third element of a price-gouging claim that the AG must establish is that the good was sold (or offered for sale) for an unconscionably excessive price, which must be demonstrated by an unconscionably extreme amount of excess in price, an exercise of unfair leverage or unconscionable means, or both. *To make a* prima facie *showing of this element*, the AG must submit evidence establishing that the amount charged during the period of market disruption represents a gross disparity between the prices of the Lysol product and the price at which the product was sold or offered for sale by Quality King in the usual course of business immediately prior to the onset of the abnormal disruption of the market.[74]

Consistent with the statutory text, the Appellate Division held that evidence of gross disparities in price—without anything more—was sufficient to "demonstrate[], *prima facie*, that [the seller] sold the Lysol product at unconscionably excessive prices on at least several occasions."[75]

Despite the clear text and judicial application of the same, OAG has repeatedly encountered the argument that some form of common-law unconscionability is necessary to violate the statute even if a *prima facie* case has been made and not rebutted. This regulation, restating the statutory requirement that no such showing is needed, dispels such

[72] G.B.L. § 396-r(3)(b).

[73] *Ibid. See Matter of People v. Quality King Distribs., Inc.*., 209 A.D.3d 62, 73 (1st Dep't 2022) (explaining that G.B.L. § 396-r(3)(b) outlines what is needed "to establish a *prima facie* showing of price gouging").

[74] *Id.* (emphasis added).

[75] *Quality King*, 209 A.D.3d at 81.

confusion.[76]

### *Severability*

Finally, a new section 600.10 clarifies that all sections in this Part (both those added in this rulemaking and those added in any other or subsequent rulemaking) are severable both from each other and individually. Although the rules contain cross-references for the convenience of the reader, they have been designed to work equally well separately or together, such that if any of the rules is held invalid, the remaining rules would continue to fulfil the purposes for which they were adopted.

## Costs

**a. Costs to regulated parties:** OAG does not anticipate any additional costs to regulated parties because the rule merely sets out largely non-substantial definitions.

**b. Costs to agency, the State, and local governments:** OAG does not anticipate that it will incur any additional costs as a result of this rule. 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.

## Local Government Mandates

The 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.

## Paperwork

No paperwork requirements will be imposed upon regulated parties under the rule.

## Duplication

There is no federal price gouging statute. None of the provisions of the rule conflicts with federal law.

[76] *See also F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 244 (3d Cir. 2015) (refusing to imply additional requirements on statutory definition of "unfairness"); *Fed. Trade Comm'n v. Walmart Inc.*, 664 F. Supp. 3d 808, 834 (N.D. Ill. 2023) (same).

## Alternatives

The Attorney General considered no action, but concluded that action was prudent in the interests of clarifying other regulations. Definitions sections are a commonly used part of regulations and both assist the drafter by standardizing various expressions and aid the reader by simplifying the regulations themselves. Likewise, severability sections are standard practice in regulatory regimes that, like this one, contain multiple independent regulatory provisions.

Specific alternative proposals suggested by commentators are discussed in the Assessment of Public Comment, which is available on the Attorney General's website and on file with the Department of State.[77] It is incorporated herein by reference.

## Federal Standards

The 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.

## Compliance Schedule

The rule will go into effect 60 days after the publication of a Notice of Adoption in the New York State Register.

[77] *See* Office of the New York State Attorney General, *Rulemaking on laws governing price gouging in New York*, https://ag.ny.gov/rulemaking-laws-price-gouging.

## Regulatory Flexibility Analysis for Small Businesses And Local Governments

The Attorney General determined that a Regulatory Flexibility Analysis for the 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 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."[78]

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 various common definitions. It has limited, if any, substantive effect. This rule does not affect local governments, which may continue to enforce their own price gouging laws as before.

2. Compliance Requirements. Small business will not be required to take any affirmative action to comply with this rule. 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 local government 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 meaning of various statutory terms defined in this rule, but the rule provides guidance for understanding those terms that will either clarify the application of the term (thus leading to less need for professional services) or require comparable legal services to those required to advise on the meaning of the statutory terms themselves.

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 merely become easier to understand because of this rule, and 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

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

apply the principles set out in this rule.

6. **Minimizing Adverse Impact**. 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 various shorthand definitions.

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. Given that these provisions mostly contain non-substantial definitions, an "exemption" from the provisions of this rule would not serve to reduce regulatory burdens.

7. **Small Business and Local Government Participation**. 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 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."[79]

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

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

2. **Reporting, Recordkeeping, and Other Compliance Requirements and Professional Services.** As described in the regulatory flexibility analysis above, no affirmative reporting, recordkeeping, or other compliance requirements are imposed on rural areas as a result of this rule; the effect of the rule will be either to maintain reliance on professional services at present levels or to decrease reliance on professional services.

3. **Costs.** None; see regulatory flexibility analysis above.

4. **Minimizing Adverse Impact.** As discussed above, this rule has no adverse impact on businesses, including rural businesses.

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.

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