Office of the New York State Attorney General Letitia James

Economic Justice Division

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Notice of Rule Adoption

13 N.Y.C.R.R. § 600.7

Price Gouging: 10% Gross Disparity Threshold

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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 is overleaf:

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 600.7 to Title 13 N.Y.C.R.R.

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

Subject: Price Gouging

Purpose: Define "gross disparity" for price gouging purposes and provide guidance on rebutting a *prima facie* "gross disparity" case.

Text of rule:

Section 600.7 Gross Disparities Between Post-Disruption and Pre-Disruption Price

(a) *Gross Disparities in Price from Pre-Disruption Price.* During a disruption, the sale of an essential product at a price that is greater than 10% of that essential product's pre-disruption price represents a gross disparity in price for purposes of General Business Law § 396-r(3)(b)(i).

(b) *Effect of Gross Disparity Threshold on Rebuttal Pursuant to General Business Law § 396-r(3)(c).* If a gross disparity in price is established pursuant to subdivision (a) of this rule for a scrutinized sale, the seller may rebut the *prima facie* case with evidence, as provided in 13 N.Y.C.R.R. § 600.9, that the amount of increase in the price of the scrutinized sale necessary to preserve the margin of profit that the defendant seller received for the same essential product, or to recover additional costs not within the control of the seller imposed on the seller for the essential product, is an amount sufficient to cause the remaining disparity between the price of the scrutinized sale and the pre-disruption price to be less than 10%.

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.

[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

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

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[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, *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).

[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

The price gouging statute is designed to ensure that market disruptions are not exploited to increase profits at the expense of vulnerable New Yorkers seeking essential products. As discussed above, G.B.L. § 396-r (3)(b)(i) allows a *prima facie* case of an unconscionably excessive price to be established with evidence that "the amount charged represents a gross disparity between the price of the goods and services which were the subject of the transaction [the "essential products" in the "scrutinized sale"] and their value measured by 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 ["the pre-disruption price"]." Subdivision (a) of the rule defines a "gross disparity" to mean that the price charged in the scrutinized sale is 10% or more than the pre-disruption price.

Subdivision (b) of the rule clarifies the necessary showing to rebut a gross disparity, as permitted by G.B.L. § 396-r(3)(c). Instead of needing to show that the entire increase in the amount charged is cost or profit justified, a seller need only show that, once justification has been taken into account, a gross disparity (that is, a >10% unjustified increase) no longer exists between the two prices.

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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.").

The rule does not touch on any of the remaining means by which an unconscionably excessive price might be proved. It does not foreclose the possibility that a scrutinized sale that is not grossly disparate from a pre-disruption price may still carry an unconscionably excessive price because there has been an exercise of unfair leverage or unconscionable means, either separately from or in combination with a price that is unconscionably extreme.[61] Nor does it foreclose the possibility that a scrutinized sale that is not grossly disparate from a pre-disruption price grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area.[62]

Sales that are close in time to sales for which an unrebutted *prima facie* case is established under this rule may be deemed to be the product of unfair leverage or unconscionable means. This is what happened in *Two Wheel*, where the Court inferred from the presence of sales with grossly disparate price increases that other sales that lacked gross disparities in price (less than 5%) were also essential products of unfair leverage.[63]

Needs and Benefits of a Numerical Threshold for "Gross Disparity"

In response to the Advance Notice of Proposed Rulemaking, the New York Association of Convenience Stores, representing 8,000 minimarts and convenience stores, submitted a comment urging the Attorney General to set forth numerical guidance in this rulemaking.[64] The Attorney General agrees with this submission. A numerical threshold will better effectuate the statutory text and purpose than leaving the standard "gross disparity" language without further clarification or definition.

Giving sellers numerical guidance on presumptive gross disparity price increases facilitates self-enforcement: a seller knows that if it increases its prices by 10% or more from the benchmark, it must be prepared to justify that increase. It levels the playing field between businesses that have the resources to engage professional advice to parse the statutory standards and those that do not, as well as those businesses sincerely trying to comply with the statute and those choosing not to do so.

Setting a numerical percentage as guidance aids tens of thousands of small retailers who are an important part of communities throughout the State. Small retailers are often perceived as being responsible for driving price increases, but may, in fact, be themselves victims of price gouging. They are significant employers, and in many areas the only sellers of essential goods and services.

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[61] G.B.L. § 396-r(3)(a).

[62] G.B.L. § 396-r(3)(b)(ii).

[63] *People v. Two Wheel*, 71 N.Y.2d 693, 698-99 (1988).

[64] New York Association of Convenience Stores, ANPRM Comments at 21-23.

A numerical percentage threshold also facilitates OAG enforcement.[65] Buyers who see such an increase during a disruption will be able to alert OAG of a presumptive case. And regulatory elaboration of the "gross disparity" standard by means other than expressing a percentage figure either leads to a numerical threshold in a less obvious way or begs the question by replacing one standard with another that is either equally capable or less capable of numerical substantiation than "gross disparity." To put it another way, a price is a number, and when trying to work out a number it is easier if one has other numbers to work with.

Needs and Benefits of 10% Threshold for Essential Products

The Attorney General is proposing a disparity greater than 10% as the gross disparity threshold rather than another percentage because of the convergence of multiple sources of evidence indicating that a "gross disparity" is more than 10% across the time period the price gouging law is most commonly enforced.[66] This evidence includes extensive pricing data from the U.S. Bureau of Labor Statistics ("BLS") and U.S. Department of Health and Human Services ("HHS") showing that >10% increases in price of essential products in short time periods are largely confined to disruptions; evidence from other enactments indicating that the Legislature considers a >10% disparity to be a gross disparity; the 10% threshold's use in harmonizing the price gouging statute with New Jersey, the only neighboring price gouging regime with which it can reasonably be harmonized, as well as other States' price gouging laws; and the on-the-ground reality that a sudden >10% price increase imposes the harms the price gouging law was enacted to prevent.

Pricing Data

The Court of Appeals has explained that 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."[67] That presumption arises because the disparity is of sufficient size that, absent a cost-based or margin-based justification, it is reasonable to conclude on the balance of probabilities that the increase was enabled by the abnormal disruption of the market (whether intentionally or not).

To determine what that size was, OAG Staff examined BLS pricing data to determine by how much prices for a wide basket of essential products fluctuate in the usual course of

[65] *See id. See also* American Economic Liberties Project, ANPRM Comments at 2-7.

[66] For brevity, this threshold will be referred to as "the 10%" threshold, but is in all cases a *greater* than 10% threshold. A price increase of precisely 10.000000000...% would not be a gross disparity.

[67] *Two Wheel*, 71 N.Y.2d at 698.

business and compare those tendencies to fluctuations coinciding with abnormal disruptions of the market over the usual time scales of OAG price gouging enforcements. According to the BLS, the price fluctuations that occur outside disruptions are almost invariably less than 10%, and those that occur during disruptions are almost invariably more than 10%. Although certain markets (such as refined petroleum products) are indeed prone to volatile prices, that is because they are prone to abnormal disruptions of the market as the statute defines that term. And, as OAG Staff Report shows, that >10% price spikes coincide with these unhappily common events indicates that these are the amount of price difference the 2020 Legislature that gave the Attorney General rulemaking power to further define gross disparities considered "gross."[68]

And not just the 2020 Legislature took this view. The Iraq invasion of Kuwait—the impetus for the 1998 amendments to the statute[69]—was the only occasion in the surrounding three years in which average gasoline price increases exceeded 10% month-on-month; immediately following the August 1990 invasion, prices increased 10.4% month-on-month; all surrounding one-month increases were less than 10%.[70] This was the "gross" disparity that impelled the Legislature to act and is powerful evidence that the Legislature has long considered a 10% disparity a gross disparity.[71]

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[68] Respecting comments comparing the rule to draft legislation advanced by then-Attorney General Elliot Spitzer in 2006, the Attorney General considers the 2020 Legislature, responding to a renewed spate of price gouging in the wake of COVID-19, to have chosen a different path that provides the Attorney General with more discretion and authority than the Spitzer proposal advocated for under the different circumstances that existed in 2006. *See* Office of the New York State Attorney General, *Spitzer Authors Bill to Strengthen Price Gouging Law* (Jan 10, 2006), https://ag.ny.gov/press-release/2006/spitzer-authors-bill-strengthen-price-gouging-law (referencing Assembly Bill No. A10722 [2005-06 Session]), *available at* https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10722&term=2005&Summary=Y&Actions=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y). Rather than replace the standard with a threshold rule itself as AG Spitzer proposed, the Legislature has here opted to retain the standard but empower the Attorney General to set a rule instantiating the standard. This is a time-honored legislative practice that permits the Attorney General to bring OAG's expertise to bear to determine, based on present facts and circumstances, thresholds or other criteria that best effectuate the Legislature's intent.

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

[70] *Gasoline (All Types) in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SETB01 (last accessed January 14, 2026); *Gasoline, Unleaded Regular in Northeast Urban, Urban Wage Earners and Clerical Workers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CWUR0100SS47014 (last accessed January 14, 2026); *Gasoline, Unleaded Regular, Per Gallon/3.785 Liters in Northeast Urban, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU010074714 (last accessed January 14, 2026).

[71] The same holds true for fuel oil, setting aside a 30% one-month jump in January 1990 responding to the Lake Erie freeze in December 1989. *See Fuel Oil #2 per Gallon (3.785 Liters) in Northeast Urban, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS. https://data.bls.gov/dataViewer/view/timeseries/APU010072511 (last accessed January 14, 2026); Thomas W. Schmidlin, *Impacts of Severe Winter Weather During December 1989 in the Lake Erie Snowbelt*, 6 J. CLIMATE 759 (1993).

Consistency with Other Measures of Gross Disparity

As explained in prior rulemaking proposal LAW-12-23-00006-P, 10% is the most employed measurement for presumptive gross disparities in price around the country, such that setting a 10% bound would maximize regulatory harmonization and reflect other States' understanding of the disparity that ought to trigger presumptive application of price gouging restrictions.

The most probative evidence comes from New York itself. New York City's price gouging law, although based on a different denominator to New York State's, employs the 10% figure, providing at least some evidence that a 10% price increase represents a "excessive price."[72]

Five states—Connecticut, Georgia, Hawaii, Louisiana, and Mississippi—use what is effectively a 0% threshold: any non-cost justified price increase of an essential product constitutes price gouging.[73] This does not put businesses in a worse-off position than prior to the disruption (i.e., they can continue to make a profit), but it forbids them from taking any advantage of the situation for covered goods by increasing their profit margins.

The 10% rule is most widely used among those states with percentage thresholds, both as a matter of population covered and as a matter of the number of jurisdictions that use it. Alaska, Arkansas, California, Delaware, Kentucky, Maryland, New Jersey, Oklahoma, Utah, Washington D.C., and West Virginia all use 10%, in addition to New York City.[74]

Outside of this group, three states—Maine, Oregon, and Wisconsin—use a 15% threshold.[75] Three states—Michigan, Minnesota, and Pennsylvania—use a 20% threshold.[76] Two states—Alabama and Kansas—use a 25% threshold.[77] Twenty states apply no numerical

[72] Rules of the City of New York, § 5-42.

[73] Conn. Gen. Stat. § 42-230; Ga. Code § 10-1-393.4; Haw. Rev. Stat. § 127A-30; La. Rev. Stat. Ann. § 29.732; Miss. Code Ann. § 75-24-25.

[74] Alaska SB 241, § 26; Ark. Code § 4-88-303; Cal. Penal Code § 396(b); Del. Declaration of a State of Emergency (2020) § 9, *available at* https://governor.delaware.gov/health-soe/state-of-emergency/; Ky. Rev. Stat. § 367.374(1)(c); Md. Exec. Order No. 20-03-23-03 (Mar. 23, 2020) (barring a price increase that would "increase the retailer's value of profit by more than 10%"), *available at* https://mbon.maryland.gov/Documents/covid-19-executive-orders/202003233-Gov-Hogan-Price-Gouging.pdf; N.J. Rev. Stat. § 56:8-108; 5 Okla. Stat. § 777.4; Utah Code Ann. § 13-41-102(4)(a)(i); D.C. Code Ann. § 28-4101 (10% for services, 0% for goods); W. Va. Code § 46A-6J-3.

[75] Me. Rev. Stat. Ann. Tit. 10, § 1105(D); Or. Rev. Stat. § 401.965(3); Wis. Admin. Code § ATCP 106.02.

[76] Mich. Comp. Laws § 445.903(z); Michigan Executive Order No. 2020-18, *available at* https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/20/executive-order-2020-18; Minnesota Emergency Executive Order 20-10, *available at* https://www.leg.mn.gov/archive/execorders/20-10.pdf; 73 Pa. Stat. Ann. § 232.4(b).

[77] Ala. Code § 8-31-4; Kan. Stat. Ann. § 50-6,106.

presumption, and instead peg price gouging to "unconscionably extreme" or "exorbitant or excessive" prices or similar formulations.[78]

Five jurisdictions—Alaska, Delaware, New York City, Louisiana, and Washington D.C.—applied either a 0% or 10% threshold against a comparatively stricter benchmark than used in the New York statute: not the price the seller previously charged for the good or service, but the price at which that good or service was available in the trade area prior to the disruption. To the extent that this weighs against comparability of these laws to New York's, it would press in the direction of a lower threshold because New York's statute will tend to prefer a higher benchmark price (or at least a benchmark price much more controllable by a seller); nonetheless 10% disparity against a benchmark of the seller's own prices best reflects the median point of the various state approaches on what constitutes a gross disparity when comparing to the seller's own pre-disruption prices.[79]

Other Reasons

Two additional reasons further supported for the 10% threshold.

First, there is regulatory harmonization value in the New York State statutory presumptive threshold being the same as the threshold applied in New Jersey. A uniform 10% rule across both States will provide an easy benchmark for judges and avoid potential cross-border price cliffs across the New York Harbor, a serious concern given the role of the container port facilities in the Port of New York and New Jersey (now situated largely in New Jersey) as an entrepot for goods sold in New York.[80] As discussed in Alternatives, below, full

[78] Colo. Rev. Stat. § 6-1-730 ("so excessive as to amount to price gouging"); Fla. Stat. § 501.160 ("gross disparity"); Ind. Code § 4-6-9.1-1 ("unconscionable amount"); Idaho Code § 48-603(19) ("exorbitant or excessive"); Ill. Admin. Code tit. 14, § 465.30 ("gross disparity"); 940 Mass. Code Regs. 3.18 ("gross disparity"); Iowa Admin. Code § 61-31.1(714) (a price "not justified by the seller's actual costs of acquiring, producing, selling, transporting, and delivering the actual product sold, plus a reasonable profit"); Mich. Comp. Laws § 445.903(z) ("grossly in excess"); Mo. Code Regs. Ann. tit. 15, § 60-8.030 ("substantially above the previous market price"); N.C. Gen. Stat. § 75-38 ("unreasonably excessive"); Ohio Rev. Code Ann. § 1345.03 ("substantially in excess"); R.I. Gen. Laws § 6-13-21 ("gross disparity"); S.C. Code Ann. § 39-5-145 ("gross disparity"); Tenn. Code Ann. § 47-18-5103 ("grossly in excess"); Tex. Business & Commerce Code Ann. § 17.46(27) ("exorbitant or excessive"); Va. Code § 59.1-527 ("unconscionable price"); Vt. Stat. Ann. tit. 9, § 2461d ("gross disparity"). *See also Greenberg v. Amazon.com, Inc.*, 553 P.3d 626, 650 (Wash. 2024), as amended (Aug. 16, 2024) (finding that price gouging was an "unfair" trade practice prohibited by Wash. Rev. Code § 19.86.020 but not opining on the price charged that would be found to be "unfair").

[79] This rule does not consider whether a 10% threshold is appropriate for purposes of the G.B.L. § 396-r(3)(b)(ii) inquiry of whether prices charged "grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area."

[80] *See* Port Authority of New York & New Jersey, *Facts and Figures*, https://www.panynj.gov/port/en/our-port/facts-and-figures.html (last accessed January 14, 2026) (noting that the Port represents 61.6% of TEUs in the North Atlantic and is the third largest port in the United States by TEU volume); Port Authority of New York & New Jersey, *Container Terminals*, https://www.panynj.gov/port/en/our-port/container-terminals.html (last accessed January 14, 2026) (maps displaying Port terminals being spread between New York and New Jersey).

regulatory harmonization between New York State's seller pre-disruption price *prima facie* case and the price gouging statutes in either New York City or Pennsylvania is impossible, owing to the different denominators used in New York City and Pennsylvania's price disparity provisions; the most harmonization that can be done is with New Jersey, and doing so requires adoption of the 10% figure.

Second, even for inexpensive goods and services, price gouging above the greater-than-10% threshold can have a dramatic effect on households. Costs add up, particularly for low-income individuals and families. For example, a 15% increase in grocery prices may manifest in small ways—22.5 cents more for a $1.50 can of beans, 33 cents more for a $2.20 bagel—but over a grocery bill for a large family such increases could lead a household to spend several hundred dollars more per month. In the same way, some New Yorkers only have funds on hand to purchase gas in $5 or $10 increments. Even if their increased gas bill might be only $0.50 or $1, when all one can spend on gas is $10, a $1 price increase looms very large. That can further add up to significant dollar values across every essential product, from cooking oil, to bread, to gasoline. A >10% increase that is not justified by costs represents the form of unconscionability the statute was designed to address.

Each of these reasons—economic data, legislative history, other enactments, regulatory harmonization, impact on ordinary New Yorkers—is in the Attorney General's judgment independently sufficient to support the 10% threshold figure. Taken together they do so decisively.

Additional Needs and Benefits of 10% Gross Disparity Threshold for Drugs

A recent amendment to the price gouging statute adds FDA drug shortages as a disruption trigger, and so it is consistent with the Legislature's intent to encompass drug prices in any regulation.[81] Available empirical evidence supports a 10% across-the-board gross disparity threshold for drug prices as well. The U.S. Department of Health and Human Services ("DHHS"), in a recent study, observed that of the 3,000 drug price increases observed between 2016 and 2022, 8% of those increases were "significant," a term which the DHHS defined as reflecting a price increase of 10% or more.[82] Adopting the same 10% threshold therefore harmonizes with the DHHS definition and the findings in the DHHS report.

[81] *See* Bill Jacket, L. 2023 ch. 725.

[82] Arielle Bosworth et al., *Price Increases for Prescription Drugs*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (Sept 30, 2022), https://aspe.hhs.gov/sites/default/files/documents/e9d5bb190056eb94483b774b53d512b4/price-tracking-brief.pdf.

That 92% of all drug price increases were less than 10% *year on year* suggests a >10% price increase is a gross disparity when measured on the more usual month-to-month basis that will be at issue in most price gouging investigations, particularly those initiated by FDA shortage reports. Even if the 8% of drugs with >10% increases were thought to be an objection to this threshold, that 8% outlier set may be a thing of the past, owing to the passage of section 139101 *et seq* of the Inflation Reduction Act,[83] which is intended to restrain drug price increases that exceed the increases in the Consumer Price Index (which, as described above, increases on a month-to-month basis far less than 10%),[84] by requiring drug manufacturers to pay back overcharges as rebates, functionally eliminating gross disparities in price at least as charged to consumers over the rebate time horizon.[85]

As the DHHS report explains, it is also industry custom to revise drug prices only once or twice per year (usually in January, sometimes in July) absent unusual circumstances.[86] This too militates in favor of the gross disparity threshold, because unless a disruption coincidentally begins in concert with this annual price adjustment, a drug price increase captured by the gross disparity calculation would be strikingly unusual in both its size and its timing—a gross disparity, in other words, from normal practice. This in turn would support the core inference of the "gross disparity" presumption: that the seller is profiteering in a time of crisis.

Even if all this were not the case, raising prices for vital and necessary drugs by more than 10% during an abnormal disruption without cost justification will almost always represent the exercise of unfair leverage: "'[y]our money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500,"[87] and when the drug is being used to treat a deadly disease there is no effective negotiating power on the part of patients. This distinctive characteristic of vital and necessary drugs renders an increase in prices that would be tolerable at other times intolerable during times of disruption. It is consistent with the statute's purposes to restrain such profiteering behavior during an

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[83] 42 U.S.C. §§ 1395m(z); 1395w-114b.

[84] The annual rate of inflation in 2023, the first year in which the Act was in effect, was 3.1%. Bureau of Labor Statistics, *Consumer prices up 3.1 percent from January 2023 to January 2024*, TED: THE ECONOMICS DAILY, https://www.bls.gov/opub/ted/2024/consumer-prices-up-3-1-percent-from-january-2023-to-january-2024.htm (Feb 22, 2024).

[85] *See* U.S. Dep't of Health and Social Services, *Inflation Reduction Act Research Series: Medicare Part B Inflation Rebates in 2023* (Dec. 14, 2023), https://aspe.hhs.gov/sites/default/files/documents/7135bf0b04310aaf69f8c5f3029c4b05/ira-medicare-part-b-rebate-factsheet.pdf.

[86] Arielle Bosworth, et al., *Price Increases for Prescription Drugs*, ASPE OFFICE OF HEALTH POLICY (Sept 30, 2022), https://aspe.hhs.gov/sites/default/files/documents/e9d5bb190056eb94483b774b53d512b4/price-tracking-brief.pdf.

[87] *National Fedn. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 582 n. 12 (2012).

abnormal disruption.

Effect of Presumptive Disparity on Rebuttal

With subdivision (a) establishing that a greater than 10% increase from the pre-disruption price creates a gross disparity, subdivision (b) of the rule clarifies how the *prima facie* case so established can be rebutted under G.B.L. § 396-r(3)(c). The most reasonable interpretation of a "rebuttal" of a gross disparity is a showing that any justified increase accounts for a sufficient quantum of the disparity that it is no longer a "gross disparity." It follows that a price increase of 20% where (for example) three-quarters of the increase is attributable to additional costs not within the control of the seller that were imposed on the seller for the goods or services would rebut the *prima facie* case, even though that rebuttal would leave one-quarter of the price increase (5%) unrebutted and unjustified.

Rebuttal of the gross disparity may be beside the point if the Attorney General establishes that there was an unconscionably extreme excess in price or exercise of unfair leverage or unconscionable means under G.B.L. § 396-r(3)(a). To take the above example, if a seller increased prices by 20% and proved that all but 5% of that increase was justified by additional costs, but coerced the buyer into agreeing to higher prices by refusing to let the buyer leave the premises until they made the sale, a violation of the statute has occurred. The violation is complete upon the establishment of the exercise of unfair leverage; the presence or absence of a gross disparity is immaterial.

This subdivision underscores that the 10% threshold is just that: a threshold. Once the threshold is breached and the "gross disparity" established is not rebutted, the 10% threshold and cost justifications both leave the scene. Thus in *Two Wheel*, once it was established that the scrutinized sales' prices were unlawful, the Court of Appeals held "the lower courts properly . . . ordered restitution to all consumers who paid in excess of the pre-disruption price" without any allowances for additional costs or generators whose prices lacked a gross disparity.[88]

Costs

a. Costs to regulated parties: OAG does not anticipate any additional costs to regulated parties because the rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations. Insofar as the rule provides a greater measure of certainty as to acceptable cost increases, OAG anticipates a reduction in compliance costs (including professional service costs), though these cost reductions are not susceptible to quantification.

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[88] 71 N.Y.2d 693, 700 (1988).

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 conflict with federal law.

Alternatives

The Attorney General considered alternatives to the rule.

No Action

The Attorney General considered taking no action. However, for the reasons given above, a quantitative threshold for gross disparities would better effectuate the statutory purpose than leaving the present standard with no additional definition. A quantitative threshold simplifies self-enforcement and post-violation enforcement alike.

Rebuttable Presumption

The Attorney General considered making the 10% threshold a rebuttable presumption of a gross disparity, and either leave the question of how the presumption might be rebutted to case-by-case development or provide that the presumption could be rebutted by showing that the essential product in question's prices regularly fluctuate by more than 10% over the same amount of time as elapsed between the pre-disruption price transaction and scrutinized transaction, letting the peak of that "normal fluctuation" serve as the gross disparity threshold instead. So a defendant whose sale of a generator at a price 20% higher than the price they charged six days before might show that the generator

market as a whole regularly experienced price fluctuations of at least 21% over 6 day periods outside of disruptions.

The Attorney General rejected this proposal because creating such a rebuttal structure would excessively complicate compliance for businesses and enforcement for regulators. To determine whether a given essential product *market's* prices exhibited a >10% variance, it would be necessary not only to determine what essential products would go into the pricing average—in other words, market definition—but also to find appropriate market data specific to that market alone (and set a standard as to what market data was appropriate), an exercise fraught with difficulty even in the most transparent and well-defined markets.[89] The price of gasoline in New York, for example, is measured by at least three major government agencies (the U.S. Energy Information Administration, the Bureau of Labor Statistics, and the New York State Energy Research and Development Authority), as well as at least three major private indices, all using subtly different methodologies that generate, or risk generating, different results.[90]

These difficulties are compounded by the disjunctions in markets and market reporting that might accompany an abnormal disruption's triggering event,[91] and

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[89] There are instances in which market definition of at least some kind is necessary for the enforcement of other parts of the price gouging statute. For example, G.B.L. § 396-r(3)(b)(ii) which links prices of essential products to "the price at which the same or similar goods or services were readily obtainable in the trade area" calls for something that largely resembles market definition to give content to the phrase "or similar." *Cf. Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 52-53 (2d Cir. 2016). Rule 13 N.Y.C.R.R. § 600.5, dealing with unfair leverage of market position, addresses the distinctive danger of price gouging in by possessors of pricing power in highly concentrated markets, a concern that cannot be addressed except by engaging in market definition. Here, however, market definition adds *unnecessary* complexity to a calculation in a context where it is important that compliance be simple.

[90] *See Beyond the Numbers: Measures of Gasoline Price Change*, BUREAU OF LAB. STATS. (Sept. 2013), https://www.bls.gov/opub/btn/volume-2/pdf/measures-of-gasoline-price-change.pdf; *see also Platts Angers Market with Delivered Dated*, ARGUS MEDIA GROUP (Mar. 3, 2021), https://www.argusmedia.com/en/news-and-insights/latest-market-news/2191408-platts-angers-market-with-delivered-dated (detailing criticism by one major reporter of methodological decisions taken by different reporter). *Compare Americas Refined Oil Products*, S&P GLOBAL (June 2024), https://www.spglobal.com/commodityinsights/en/our-methodology/methodology-specifications/oil/americas-refined-oil-essential products, *with Argus US Essential products Methodology*, ARGUS MEDIA GROUP (June 2024), https://www.argusmedia.com/en/-/media/project/argusmedia/mainsite/english/documents-and-files/methodology/argus-us-essential products.pdf?rev=aff9614462b746ffa0dcb117123521ff&hash=0F7C6B4CCF11ED2713685FB3859699D7 (last accessed July 23, 2024), *and OPIS Methodology*, OIL PRICE INFORMATION SERVICE, https://www.opisnet.com/about/methodology/ (last accessed January 14, 2026).

[91] For example, the U.S. Commodities Futures Trading Commission has authority to "direct the registered entity [defined as designated contract markets, derivatives clearing organizations, boards of trade, swap execution facilities and swap data repositories, among others, *see* 7 U.S.C. § 1a(40)], whenever it has reason to believe that an emergency exists, to take such action as in the Commission's judgment is necessary to maintain or restore orderly trading in or liquidation of any futures contract, including, but not limited to, the setting of temporary emergency margin levels on any futures contract, and the fixing of limits that may apply to a market

vulnerability of even widely accepted industry indices to fraud and manipulation.[92] These difficulties cannot be addressed by confining the inquiry to the seller's own pricing practices—permitting the seller's own pricing fluctuations to serve as the basis for a gross disparity threshold would create a perverse incentive to implement outside-of-disruption price hikes.

These problems may also be thought to implicate OAG Staff Report's analysis of varying sectors' price fluctuations, but that analysis is aimed at a different target: taking the best pricing data available (that collected by the BLS), looking across as many sectors as possible, and determining what figure is most appropriate for a cross-sector cross-substantive gross disparity threshold. An analysis that sought to *rebut* that background presumption must necessarily be specific where the presumption-setting exercise is general, such that the problems of specific measurement become far more acute.

The great advantage a flat 10% rule provides in enforcing the statute is giving everyone a quantitative threshold against which they can operate during a disruption. That advantage disappears if the 10% threshold is made a presumption rebuttable by economic data likely only accessible long after the disruption has passed. The Attorney General was mindful that "[u]nder settled principles of administrative law, a regulation adopted in a legislative rule-making proceeding can indeed foreclose litigation of issues in later statutorily required individual adjudicatory proceedings . . . 'Indeed, this may be the single most important effect of legislative rules.'"[93] Given the time-sensitive circumstances in which price gouging laws are invoked, such foreclosure is especially warranted here. In other words, the advantages to buyers and sellers alike of a flat and easily understood rule outweighed the advantages that might be gained by creating a "presumption and rebuttal" structure in this instance.

Inherent in this decision is recognition that there may be some products that do regularly exhibit price fluctuations above 10%, although OAG's Staff Report suggests the

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position acquired in good faith prior to the effective date of the Commission's action. The term 'emergency' as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity." 7 U.S.C. § 12a(9).

[92] *See, e.g.*, *Harry v. Total Gas & Power N. Am., Inc*., 244 F. Supp. 3d 402, 409 (S.D.N.Y. 2017), *aff'd as modified*, 889 F.3d 104 (2d Cir. 2018) (reviewing federal agency findings of manipulation of natural gas indices); *U.S. Commodity Futures Trading Comm'n v. Parnon Energy Inc*., 875 F. Supp. 2d 233, 238-241 (S.D.N.Y. 2012) (reviewing federal agency findings of manipulation of crude oil indicies); *Gelboim v. Bank of Am. Corp*., 823 F.3d 759, 765–67 (2d Cir. 2016) (reviewing federal agency findings of manipulation of LIBOR); *In re Nat. Gas Commodity Litig*., 337 F. Supp. 2d 498, 503 (S.D.N.Y. 2004) (reviewing federal agency findings of a different set of manipulations of natural gas indices).

[93] *Matter of Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 390-91 (1995) (quoting 1 Davis and Pierce, Administrative Law § 6.5, at 250 (3d ed)).

great majority of essential products do not.[94] The Attorney General determined that this potential drawback was outweighed by the benefits both of a determinate price and of the 10% figure more generally, considering all of the other reasons to adopt the 10% figure, ranging from legislative history to the experience of other jurisdictions to harmonization benefits with New Jersey to the equitable impact of greater than 10% price increases. This is an area where perfection is impossible but a numerical 10% threshold is the best of the available alternatives.

Setting the Threshold Higher than 10%

The Attorney General also considered setting the percentage increase at which a gross disparity in pricing would be presumed at a higher percentage than 10%. The Attorney General chose not to set a higher percentage for several reasons.

First, as discussed above, the Attorney General's analysis of a wide basket of goods and services that are indisputably vital and necessary—food, energy, and housing, all items notorious for their relative volatility in price[95]—indicated that, absent an abnormal market disruption, average prices of essential products almost always fluctuate by less than 10% over the short time periods relevant to price gouging statute enforcement. If a gross disparity in price is one that is abnormal and extraordinary such that one might infer the exploitation of the abnormal market disruption, 10% is the appropriate threshold at which such an inference may be made, recognizing that this is a generalization. Setting a higher percentage would effectively sanction non-enforcement of the statute in situations where a gross disparity exists. Such a threshold would not effectuate the statute.

Second, the Attorney General was not persuaded by submissions to the effect that setting a 20% threshold would be superior because it would provide the benefit of harmonizing New York with Pennsylvania.[96] It is not possible to harmonize the New York statute with the statutes of both New Jersey and Pennsylvania.[97] Of those two, harmonizing with New Jersey makes more economic sense as both states share the same major port facilities. Even were this not so, the 10% threshold is, for reasons described above, better reflective of the legislative intent, relevant economic data, and jurisdictional harmonization as to a "gross disparity."

Third, setting a higher threshold would represent a greater redistribution from

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[94] OAG Staff Report at 21-37.

[95] *See* Bureau of Labor Statistics, *Consumer Price Index Frequently Asked Questions*, https://www.bls.gov/cpi/questions-and-answers.htm (discussing "core" CPI) (last accessed January 14, 2026).

[96] *See* Business Council of New York, First NPRM Comments at 53; BCNY, Second NPRM Comments at 28.

[97] *Compare* N.J. Rev. Stat. § 56:8-108 *with* 73 Pa. Stat. Ann. § 232.4(b).

consumers to firms exercising the pricing power created by an abnormal market disruption. Because a seller can continue to earn at least the same profit margin per good or service as prior to the disruption, any price increase above and beyond that justified by cost—and certainly one that is greater than 10% above prior prices plus increased costs—takes advantage of the pricing power created by an abnormal market disruption to create a windfall for the seller.[98]

Higher Threshold for Pharmaceuticals

The Attorney General considered a proposal from a trade group representing pharmaceutical distribution firms for a 20% threshold for branded medications and a 25% threshold for generic medications.[99] This commentator did not point to evidence to suggest that branded or generic price fluctuations differ materially from the fluctuations in the basket of essential products; nor did the commentator address the DHHS drug price report discussed in Needs and Benefits. As discussed in that section, authoritative studies from the relevant federal agencies indicate that >10% drug price increases fit the "gross disparity" definition.

Fortunately for the distributors, if their comment is correct that wholesalers do not control the prices of the drugs they sell, then the threshold question is academic. If wholesalers simply pass on price increases imposed on them by manufacturers, dollar for dollar, any *prima facie* case created by the gross disparity in price would be rebutted as a matter of course. This submission underscores the centrality of the rebuttal to the gross disparity case. A price increase justified by additional costs outside of the seller's control is not price gouging under G.B.L. § 396-r(3)(c).

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[98] Suggestions from commentators for higher percentage figures (30%, 100%) were rejected for these reasons, as well as the other reasons for setting the 10% threshold set out in this Regulatory Impact Statement. As for comments referencing the Appellate Division's decision in *Matter of People v. Quality King Distribs., Inc.*, 209 A.D.3d 62 (1st Dep't 2022) although the *Quality King* court held that an increase in price of 33.79% on the pre-disruption benchmark was a gross disparity, *id*. at 80-81 (describing increase of price charged to Jack's American Outlet), it refrained from opining on any lower bound to the definition of "gross disparity." This regulation sets out a reasoned determination, based on analysis of data and comparable jurisdictions, for selecting 10% as that lower bound.

[99] This commentator also proposed that the Attorney General excise from coverage of the price gouging statute all pharmaceutical essential products notwithstanding the statutory text defining "goods and services" as "essential medical supplies and services used for the care, cure, mitigation, treatment, or prevention of any illness or disease." G.B.L. § 396-r(2)(d)(ii). *See also* 21 U.S.C. § 321(g)(1)(B) (Food, Drugs, and Cosmetics Act defining "drug" to be "articles intended for use in the diagnosis, *cure, mitigation, treatment, or prevention* of disease," language identical to the price gouging statute and supplemented in the price gouging statute with "care"). The Attorney General is bound by the statutory text and legislative intent and must effectuate the law as written. As pharmaceuticals are within the scope of the statute, they must be within the scope of the regulations.

Higher Threshold for For-Hire Ground Transportation

The Attorney General considered a proposal from Uber to permit an increase of between 100% to 400% in prices during abnormal market disruptions by instantiating an "algorithmic multiplier cap," arguing that their prices normally fluctuate by this amount thus making any lesser disparity, by definition, not a "gross disparity." The Attorney General rejected this proposal.

Uber's principal justification for its proposal is that "[in] the for-hire transportation industry in general, and in two-sided marketplace[s] with dynamically priced transportation services in particular, a 10% deviation from the median price (however defined) is not a gross disparity."[100] This comment responds both to this rule and a different rulemaking proposal, LAW-06-25-00005-P, which proposed determining the benchmark against which a scrutinized price would be examined would be "the median price per mile of all rides of the same type of service sold by the seller to all buyers within any part of New York State 20 miles of any point of the route of the scrutinized ride, on the same day of the week as the scrutinized ride, within one hour of the time of day at which the scrutinized ride took place, for each of the four weeks preceding the benchmark date [the "median distance benchmark"]".

At outset, the Attorney General agrees that the median distance benchmark is not the best means of identifying the pre-disruption price for a ride and has accordingly withdrawn the rule proposed in LAW-06-25-00005-P. The pre-disruption price is the price charged in the usual course of business; if "scrutiny of the individual relevant transactions is feasible and will yield the most accurate results[, then] there is no need to consider median or mean statistics regarding the transactions."[101] In New York City, all for-hire ground transportation services report the price of each ride to the Taxicab and Limousine Commission, and so in New York City at least it is feasible to consider individual transactions.

To test Uber's assertion, OAG began by examining the data applicable to yellow cab taxis. Around 90% of taxi trips are charged using the standard New York City rate, which broadly amounts to a base fare of $3 plus 70 cents per 1/5 mile when traveling above 12mph or per 60 seconds in slow traffic or when the vehicle is stopped, along with surcharges for overnight trips and a rush hour surcharge.[102] Using the method set out in the Staff Report, OAG reviewed the taxi trips taken before and after Hurricane Ida in 2021 by

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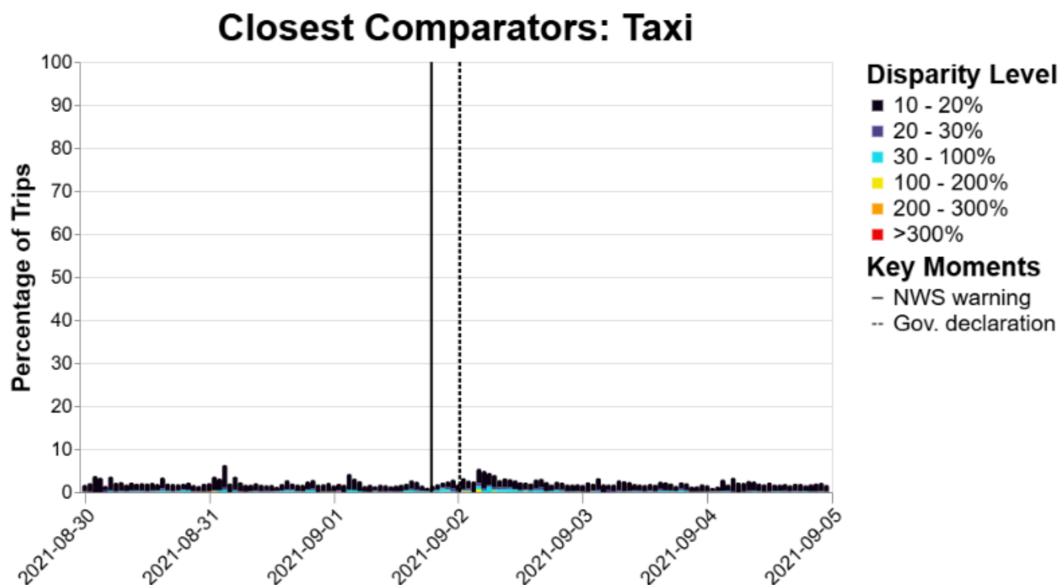
[100] Uber, Second NPRM Comments at 145.

[101] *People by James v. Quality King Distributors, Inc.*, 209 A.D.3d 62, 80 (1st Dep't 2022).

[102] NYC Taxi & Limousine Commission, *Taxi Fare*, https://www.nyc.gov/site/tlc/passengers/taxi-fare.page (last accessed Sept. 30, 2025).

comparing each post-disruption trip to the pre-disruption trip taking place in the 30 days prior that most nearly matched that trip in terms of duration of trip, distance of trip, time of day, and day of week.

Once taxi rides are properly compared to the "usual course" price charged, on more than 94% of trips (rising to 98% at certain points) post-disruption rides do not exhibit a pre-disruption price disparity of greater than 10%. These results are set out below for the period immediately before and after Ida:[103]



Thus when taxi rides are put in their proper context against the correct comparator rides, taxi rides exhibit the same price stability as the vast generality of goods and services for which 10% is an appropriate benchmark.

Once taxis are excluded, the only market participants of any size left are Uber and Lyft. Here, OAG faced the challenge that unlike taxis, whose pricing "algorithm" is a matter of public record, the factors that make up Uber and Lyft prices are not published at a sufficient level of precision as to enable OAG to identify a closest comparator using public

[103] Hurricane Ida was chosen because it was *per se* an abnormal disruption of the market as it shared a cause with a declaration of emergency issued by the governor, *see* G.B.L. § 396-r(2)(b), and it was sufficiently recent that full ride data as well as full meteorological data was readily available. *Post Tropical Depression Ida: Summary of Ida, September 1st-2nd, 2021*, NAT'L WEATHER SERVICE, https://storymaps.arcgis.com/stories/2bb3162ec37e43e791020d9d8f093bbf.

data.[104] Neither Uber nor Lyft provided a closest comparator analysis of their pre- and post-disruption prices.

The central issue Uber and Lyft identify is not so much the application of the 10% rule itself but the issue of the pre-disruption price to which the 10% rule is to be applied. Because the statute directs that the price of each post-disruption ride must be measured by the price the seller charged for the service "in the usual course of business immediately prior to the onset of the disruption," the pre-disruption price must take into account the independent variables applicable to a ride that go into making up that ride's price.

This analysis is surely possible for Uber and Lyft but the necessary data, both about the characteristics of the relevant rides and the factors that make up Uber and Lyfts' pricing algorithms, are not matters of public record at least at the necessary level of precision to permit a closest comparator analysis by OAG for purposes of this rulemaking. That Uber and Lyft have business practices outside of disruptions that leads to price variability may lead to more complex factual analysis in any investigation or enforcement action but does not provide support for exempting Uber and Lyft from the 10% threshold. In other words, Uber and Lyft have not shown that *when the proper benchmark is employed* the presumptions that undergird the 10% rule for every other industry and for taxis do not apply with equal force to the entire for-hire ground transportation market.

The Attorney General reviewed the other jurisdictions to which Uber pointed that have adopted a scheme that uses a "surge cap" model set well above the 10% threshold.[105] These examples do not support Uber's proposed alternative. To begin with, it is notable that even the most permissive jurisdiction imposes a cap of 250%; 50 points less than Uber's proposed rate.[106] But more important is that, contrary to Uber's representations, none of these statutes cited are price gouging statutes as New York law defines that term. In each case, these jurisdictions cap Uber prices altogether by using an algorithmic multiplier standard. New York's statute does not cap prices; it constrains profiteering during disruptions.

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[104] For example, both Uber and Lyft offer various tiers of rides (promising a lower rate if the customer is prepared to wait, for example, or a higher rate if the customer requires a larger vehicle, an "Uber XL"), but these tiers are not set out in the Taxi and Limousine Commission data. It is common ground that an Uber XL ride post-disruption cannot be fairly compared to an Uber XL ride pre-disruption, but without knowing the types of the rides reported, OAG cannot implement this distinction in its analysis.

[105] Uber, Second NPRM Comments at 143 (referencing Conn. Gen. Stat § 13b-118; 31 DCMR § 705.12; Mass. Gen. Laws ch. 159A½ § 2; Neb. Rev. Stat. § 75-327; Nev. Admin. Code § 706A.290; 66 Pa. Stat and Cons. Stat. Ann. § 2607; R.I. Gen. Laws § 39-14.2-3; Wash. Rev. Code Ann. § 46.72B.050; Burlington VT Ordinances, ch. 30, art 9., § 30-24(b)).

[106] Conn. Gen. Stat. § 13b-118 ("No transportation network company shall increase the price of a prearranged ride to more than two and one-half times the usual price charged for such prearranged ride in [the relevant] area").

Uber also argues that its accounting does not readily allow it to measure profits and costs consistent with the regulation such as, for example, justifying any "surge" increase by making a corresponding increase to driver pay.[107] But whether or not Uber tracks how much of its "surge" is properly categorized as costs exempt from the price gouging rule is irrelevant to the legal analysis. Moreover, Uber's statement appears inconsistent with the facts on the ground. For example, in 2015, Uber identified "all proceeds" from surge pricing during Hurricane Sandy that it was able to give to the American Red Cross.[108] And Lyft, despite operating a very similar service, does not articulate the same difficulty in using either margin or cost defenses provided the relevant terms are sufficiently explicated. OAG has made non-substantive clarifying revisions related to these issues throughout the rules to help facilitate compliance.[109]

More broadly, Uber's assertion that it is unable to channel price increases into driver pay is not supported by the available evidence.[110] It is unclear why a pricing method that "relies on balancing demand and supply" is incompatible with a statutory scheme that, in essence, requires the allocation of price increases to measures that increase supply rather than profits.[111] Moreover, as explained in detail in the regulatory impact statement to rule 600.9, increased driver pay is outside Uber's control (at least under some circumstances) once the nature of contractual contingent pay increases to non-controllers is properly understood.[112]

Because the 10% increase applies only to profits and not prices—and, if Uber or Lyft does what they say they do, almost all surge or Prime Time prices will satisfy the requirements of the defense because the increased amounts will be paid to drivers. Thus Uber is free to apply surge prices that, in its words, "*do* boost and reposition supply. And they do so quickly, which may be especially important during emergencies."[113]

De Minimis Increase

The Attorney General also considered including a nominal dollar increase defense,

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[107] Uber, Second NPRM Comments at 153-55 ("Uber does not measure its profit margin on a per-trip basis . . . the rebuttal ground for [costs] also does not fit or rationally relate to ridesharing services that rely on dynamic pricing").

[108] Ryan Lawler & Jordan Crook, *Uber Will Cap Surge Pricing During Northeast Snowstorm*, TECHCRUNCH (Jan. 26, 2015), https://techcrunch.com/2015/01/26/uber-will-cap-surge-pricing-during-northeast-snow-storm/

[109] Lyft, Second NPRM Comments at 125-28.

[110] Uber, Second NPRM Comments at 154-55.

[111] Uber, Second NPRM Comments at 154.

[112] Regulatory Impact Statement to Proposed Rule 600.9 at 31-33.

[113] Uber, Second NPRM Comments at 164 (emphases in original).

such as one that allowed for small price increases (pennies) that might nonetheless be greater than 10%. The Attorney General concluded that such a defense is not consistent with the statutory purpose.[114] The statutory gross disparity language is relative: it asks how large an increase is as compared to the "value" of the essential product "measured by the price" it bore before the disruption. If that price is low in absolute terms, then a gross increase will also be low in absolute terms. Requiring some dollar amount threshold as well would cause the comparison not to be against the value of the pre-disruption essential product but against the value of the pre-disruption essential product *and* a specified dollar amount. That is not what the statute says. It also detracts from enforcement, as application of a specific dollar amount would require defining the unit against which the dollar amount is to be compared, a circular inquiry that would unduly complicate compliance efforts with no apparent benefit.[115]

And as low-income New Yorkers know all too well, even price increases in the pennies can represent a serious drain on family budgets. Although wealthy New Yorkers may be able to stockpile essentials when prices are lower, poor New Yorkers must follow the price of the day for bread, meat, and toiletries. The poorest New Yorkers, whom the statute is designed to protect, would be subject to exploitative pricing even if wealthier New Yorkers did not perceive an injury. For instance, the per capita income in Clinton County is roughly $37,388 per year, corresponding to a little over $3,000 a month or $700 a week.[116] This level of income does not leave a lot of room for increases for essentials. Since price gouging may happen in multiple industries at once that are simultaneously in periods of abnormal market disruption (e.g., cell phone service, internet provider, gasoline, bread, meat, toiletries) a *de minimis* defense expressed in dollar terms would permit public harms far greater in scale than might be apparent from a price increase in isolation. Both statutory text and purpose strongly militate against such a threshold.

0% Threshold

The Attorney General considered setting a 0% threshold (i.e., a presumption that any price increase not justified by costs was a gross disparity). Several jurisdictions already take this approach. In addition, one of the comments received by the Attorney General argued

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[114] *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988) (finding violations of the price gouging statute even for "sales marked by lesser increases").

[115] A relative disparity measure (i.e. 10% increase from benchmark) does not require unit definition, because if (for example) a six-pack of peanut butter jars that experienced a 10% price increase were to be divided into its constituent jars, each jar would also have a 10% price increase when compared to the proper benchmark of the value of that jar as expressed by the price-per-jar pre-disruption. An absolute disparity measure (e.g. increase of $1 or more), on the other hand, could be circumvented by such a strategy.

[116] *QuikFacts Clinton County, New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/clintoncountynewyork/INC910220 (last accessed July 23, 2024).

that, because a price increase represents a transfer of wealth from the consumer to the firm increasing the price, any price increase during a market disruption above the increase in cost should be considered unconscionably extreme.[117]

The Attorney General rejected this proposal. The statutory text being interpreted in this rule requires not a "disparity" but a "gross" disparity. A 10% threshold best effectuates this "gross disparity" language. To the extent the commentator believes this is undesirable, it is a problem of statutory text that cannot be addressed by rule. At the same time, the 10% rule does not foreclose the possibility that a price increase that was less than 10% greater than the pre-disruption benchmark may still violate the statute. Even a sub-10% increase that was procured by exercise of unfair leverage makes a price increase "unconscionably excessive."[118]

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.[119] 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.

[117] *See* Prof. Ramsi Woodcock, ANPRM Comments at 216-19.

[118] G.B.L. § 396-r(3)(a)(ii).

[119] *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 statutory requirement 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."[120]

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

1. **Effect of Rule**. The effect of this rule is to provide that, during a statutorily-defined abnormal market disruption, an increase in price of >10% from pre-disruption price for an essential product is a "gross disparity" in price under G.B.L. § 396-r(3)(b)(i), and must be justified, pursuant to G.B.L. § 396-r(3)(c) of the statute, by increased costs or maintenance of pre-disruption profit margins.

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

Because the law and this rule are statewide in effect, to the extent it affects them at all, this rule affects all small businesses and all local governments in the State.

2. **Compliance Requirements**. Small business will not be required to take any affirmative action to comply with this rule. The rule, like the statute, is best complied with by doing nothing: a business that does not increase its prices during an abnormal market disruption except to accommodate bona fide cost increases necessarily does not violate the statute absent an unconscionably extreme price or exercise of unfair leverage or unconscionable means. For such a business, the 10% price increase threshold serves as a margin of safety in the event that cost increases are not correctly applied to the goods or services in question.

If businesses do decide to raise prices, the rule will give small businesses greater certainty as to the level of increase that will require cost-based or margin-based justification. In other words, the actions small businesses already take to comply with the statute (by

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

avoiding price increases that are not gross disparities from benchmark) will continue to be taken under this rule, but with more confidence given the presence of a numeric threshold.

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 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. Where under the status quo legal advice might be needed to determine the meaning of "gross disparity," it is possible for every small business to apply the 10% rule in the manner described above.

4. **Compliance Costs**. The rule will impose no compliance costs on small businesses or local governments for the reasons stated above: insofar as any obligations are imposed on small businesses they already existed under the statute and have become more concrete as a result of this rule.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 calculation called for in the rule.

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

To the extent that this rule has an adverse impact on small businesses, the Attorney General has considered, and applied, the approaches prescribed in section 202-b of the State Administrative Procedure Act. The Attorney General has taken account of limited resources available to small businesses and local governments by applying a simple numerical rule to price increases that can be implemented and followed with nothing more than a pocket calculator rather than a standard whose precise contours would be uncertain.

Insofar as businesses would have previously considered it appropriate to raise prices greater than 10% without cost-justification such that crystallization of the "gross disparity" standard reduces their profitability, this adverse impact is the intentional effect of the statute in its efforts to curb profiteering during abnormal market disruptions. This rule does not derogate a small business's statutory defense of increased costs or profit margin maintenance.

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

The application of a numerical price increase threshold does not necessarily implicate performance standards over design standards, but to the extent that small businesses routinely examine prices in relative terms, it employs a performance rather than design standard.

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**. OAG has actively solicited the participation of small businesses and local government in the rulemaking by 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."[121]

Nonetheless, the Attorney General has 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 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**. 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.

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