January 28, 2026

Notice of Proposed Rulemaking

Price Gouging

Weather-Related Disruptions

Contents

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

Proposed Action: Add New Part 600.3 to Title 13 N.Y.C.R.R.

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

Subject: Price Gouging

Purpose: Set default criteria for abnormal disruptions of the market arising from "stress of weather" and "convulsions of nature."

Text of proposed rule:

Section 600.3 Commencement and Termination of Abnormal Disruptions of the Market from Stress of Weather or Convulsion of Nature

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

(1) "Effective territory," with respect to a warning, alert, or declaration, means the areas to which the warning, alert, or declaration indicates it applies, or, if no such indication is made, the entirety of New York State;

(2) "Stress of weather or convulsion of nature" means a blizzard, winter storm, ice storm, freeze, extreme cold, extreme wind, severe thunderstorm, tornado, flood, excessive heat, wildfire, tropical storm, hurricane, tsunami, storm surge, hazardous air quality decline, space weather, or an earthquake of at least magnitude 6.0;

(3) "Hazardous air quality decline" means the air quality has been degraded by pollutants to such an extent that the risk of health effects from poor air quality is increased for all persons rather than specific vulnerable subpopulations;

(4) "Severe weather event warning" means a statement that a stress of weather or convulsion of nature is occurring, imminent or likely and that the conditions pose a threat to life or property; and,

(5) "Competent governmental authority" means the President of the United States, the Governor, or a chief executive as defined by Executive Law § 20(2)(f).

(b) *Presumptive Commencement of Disruption from Stress of Weather or Convulsion of Nature*. An abnormal disruption resulting from stress of weather or convulsion of nature is presumed to begin, for the effective territory, upon the first of the following occurrences:

(1) the National Weather Service or U.S. Geological Service issues, for some or all of New York State, a severe weather event warning; or,

(2) a declaration of emergency is issued by a competent governmental authority regarding a stress of weather or convulsion of nature.

(c) *Presumptive Termination of Disruption from Stress of Weather or Convulsion of Nature*. An abnormal disruption resulting from stress of weather or convulsion of nature is presumed to cease, for the effective territory, 30 days following the latest warning, alert, or declaration concerning the stress of weather or convulsion of nature.

(d) *Rebuttal of Presumptions.* The Attorney General or a seller may rebut the presumption of subdivision (b) or (c) of this rule with evidence that the change in the market, whether actual or imminently threatened, resulting from the stress of weather or convulsion of nature began before or after the presumed commencement date or stopped before or after the presumptive cessation date.

(e) *Failure to Receive or Consult Declarations Not a Defense*. Lack of notification of any of the above declarations, or failure to receive notification of any of the above declarations, shall not be a defense with respect to any violation of General Business Law § 396-r.

Regulatory Impact Statement

Statutory Authority

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

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[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

[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

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

[24] Press Release, *Attorney General James’ Price Gouging Authority Strengthened After Governor Cuomo Signs New Bill into Law*, Office of the New York State Attorney General (June 6, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-price-gouging-authority-strengthened-after-governor-cuomo.

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

[26] *Ibid*.

[27] *Ibid*.

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

[29] N.Y. Const, art V, § 4.

[30] *See, e.g.*, G.B.L. § 340, 343 (Donnelly Act, New York’s general antitrust statute); G.B.L. § 349 (general deceptive business practices statute). Over 200 statutes regulating business, ranging from regulations on

enforcing this statute for 43 years, complimenting over a century of experience in the enforcement of cross-sector economic regulations.[31] Like the FTC, its federal counterpart in this area, OAG employs a staff of economists, data scientists, and other experts to aid tis enforcement efforts. In 2011, OAG conducted a statewide investigation leading to a major report examining gasoline prices.[32] OAG regularly issues guidance regarding price gouging and provides technical advice to the Legislature when amendments to the law are proposed.[33] The Attorney General has also engaged in multiple enforcement actions.[34] Over nearly five decades, OAG has received and processed thousands of price gouging complaints, sent thousands of cease-and-desist letters, negotiated settlements, and worked with retailers and advocacy groups to ensure that New Yorkers are protected from price gouging.[35]

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purveyors of Torah scrolls, G.B.L. § 863, to prize boxes, G.B.L. § 369-eee, to dangerous clothing articles, G.B.L. § 391-b, are entrusted to the attorney general's enforcement. This wide collection of laws is entrusted to OAG because of its expertise in cross-sector enforcement of economic regulations.

[31] Indeed, many major cross-sector business laws now enforceable in private rights of action were initially entrusted exclusively to the Attorney General. *See, e.g.*, L. 1899, ch. 690 (first enactment of Donnelly antitrust laws designating Attorney General sole enforcement agency); L. 1970, ch. 43 § 2 (first enactment of G.B.L. § 349, providing only for OAG enforcement).

[32] *See* Press Release, *Report on New York Gasoline Prices*, Office of the New York State Attorney General (December 11, 2011), https://ag.ny.gov/sites/default/files/pdfs/bureaus/consumer_fraud/REPORT-ON-NEW-YORK-GASOLINE-PRICES.pdf.

[33] *See, e.g.*, Press Release, *Consumer Alert: Attorney General James Warns Against Price Gouging During Winter Storm*, Office of the New York State Attorney General (Dec. 23, 2022), https://ag.ny.gov/press-release/2022/consumer-alert-attorney-general-james-warns-against-price-gouging-during-winter; Press Release, *Consumer Alert: Attorney General James Warns About Price Gouging in Aftermath of Hurricane Henri*, Office of the New York State Attorney General (Aug. 23, 2021), https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-warns-about-price-gouging-aftermath; Press Release, *Consumer Alert: Attorney General James Issues Warnings to More than 30 Retailers to Stop Overcharging for Baby Formula*, Office of the New York State Attorney General (May 27, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-issues-warnings-more-30-retailers-stop-overcharging-baby.

[34] *See, e.g.*, *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988); *People v. Chazy Hardware, Inc.*, 176 Misc. 2d 960 (Sup. Ct., Clinton County 1998); *People v. Beach Boys Equipment Co*, 273 A.D.2d 850 (4th Dep't 2000).

[35] *See, e.g.*, Press Release, *Attorney General James Delivers 1.2 Million Eggs to New Yorkers*, Office of the New York State Attorney General (Apr. 1, 2021), https://ag.ny.gov/press-release/2021/attorney-general-jam L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.es-delivers-12-million-eggs-new-yorkers; Press Release, *Attorney General James Sues Wholesaler for Price Gouging During the Coronavirus Pandemic*, Office of the New York State Attorney General (May 27, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-wholesaler-price-gouging-during-coronavirus-pandemic; Press Release, *Ice Storm Price Gouging Victims to Receive Refunds*, Office of the New York State Attorney General (Dec. 11, 2000), https://ag.ny.gov/press-release/2000/ice-storm-price-gouging-victims-receive-refunds; Press Release, *Fifteen Gas Stations Fined In Hurricane Price Gouging Probe*, Office of the New York State Attorney General(Dec. 19, 2005), https://ag.ny.gov/press-release/2005/fifteen-gas-stations-fined-hurricane-price-gouging-probe; Press Release, *A.G. Schneiderman Announces Agreement with Uber to Cap Pricing During Emergencies and Natural Disasters*, Office of the New York State Attorney General (July 8, 2014), https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and.

Current Statutory Terms

General Business Law § 396-r(2)(a) sets out the central prohibition of the price gouging statute. Much of the rest of the statute is given over to defining the underlined terms in this sentence:

> During any abnormal disruption of the market for goods and services vital and necessary for the health, safety and welfare of consumers or the general public, no party within the chain of distribution of such goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.[36]

An "abnormal disruption of the market" is defined in G.B.L. § 396-r(2)(b) as "any change in the market, whether actual or imminently threatened, resulting from" two sets of enumerated events: (1) "stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, drug shortage"; or (2) any cause of an abnormal disruption of the market that results in the Governor declaring a state of emergency.[37] The word "disruption" used in this Regulatory Impact Statement should be taken to mean this statutory definition, rather than the broader colloquial meaning of the word "disruption."

The "goods and services" covered by the statute are defined in G.B.L. § 396-r(2)(d) and (e) as "(i) consumer goods and services used, bought or rendered primarily for personal, family, or household purposes, (ii) essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease, . . . (iii) any other essential goods and services used to promote the health or welfare of the public,"[38] and "any repairs made by any party within the chain of distribution of goods on an emergency basis as a result of such abnormal disruption of the market."[39] A "party within the chain of distribution" includes "any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another when the product sold was located in the state prior to the sale."[40] For brevity, throughout this rule vital and necessary goods and services are called "essential products."

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

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

[38] G.B.L. § 396-r(2)(d).

[39] G.B.L. § 396-r(2)(e).

[40] G.B.L. § 396-r(2)(e).

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

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

Although the statute prefaces these definitions with the phrase "whether a price is unconscionably excessive is a question of law for the court," this language does not prevent the Attorney General from making regulations effectuating the definitions (nor could it, given the express rulemaking authority granted in G.B.L. § 396-r(5)). The phrase "question of law for the court" when applied to the element of a civil offense is a term of art that has invariably been read by the Court of Appeals to mean that a judge and not jury decides the issue, and that the determination can be appealed to the Court of Appeals, as that Court's jurisdiction is limited to "questions of law."[43]

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[41] G.B.L. § 396-r(3)(a).

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

[43] NY Const, art VI § 3(a). *See, e.g., White v. Cont. Cas. Co*., 9 N.Y.3d 264, 267 (2007) ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court"); *Silsdorf v. Levine*, 59 N.Y.2d 8, 13 (1983) ("Whether [allegedly defamatory] statements constitute fact or opinion is a question of law for the court to decide"); *Hedges v. Hudson R.R. Co*., 49 N.Y. 223, 223 (1872) ("the question as to what is reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court. A submission of the question to the jury is error, and, in case the jury finds different from what the law determines, it is ground for reversal"). *Contrast* Statute Law § 77 ("construction of

G.B.L. § 396-r(3)(b) provides that "*prima facie* proof that a violation of this section has occurred"—that is, that an unconscionably excessive price has been charged—shall include evidence that "a gross disparity" between the price at which a good or service was sold or offered for sale during the disruption and "the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market."[44] Alternatively, a *prima facie* case may be established with evidence that the price of the goods or services in question sold or offered for sale during the disruption "grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area."[45]

A *prima facie* case may be rebutted by a seller employing the affirmative defense provided in G.B.L. § 396-r(3)(c) by showing that the price increase "preserves the margin of profit that the [seller] received for the same goods or services prior to the abnormal disruption," or that "additional costs not within the control of the [seller] were imposed on the [seller] for the goods or services."[46] Not every cost can be used to rebut a *prima facie* case; G.B.L. § 396-r(3)(c) requires any cost used as a defense must be additional, out of the seller's control, imposed on the seller, and be associated with the specific essential product at issue in the *prima facie* case.[47] This language underscores that even if a business were to account for an item as a "cost," unless that item satisfies the statutory criteria it is not relevant to the rebuttal.

Statutory Economic and Policy Framework

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

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

[44] G.B.L. § 396-r(3)(b)(i). Although the Appellate Division characterized this showing of a gross disparity to establish *prima facie* that the unconscionably extreme/unconscionable means factors in G.B.L. § 396-r(3)(a) were satisfied, *see Matter of People v. Quality King Distribs., Inc.*, 209 A.D.3d 62, 79 (1st Dep't 2022), this additional step in the analysis is academic. For clarity of analysis, given that the (3)(a) factors are capable of being proven directly without a *prima facie* case, in addition to being proven through the burden-shifting (3)(b) *prima facie* case procedure, this rulemaking and the rule treats these showings as separate evidentiary paths to the same "unconscionably excessive" destination.

[45] G.B.L. § 396-r(3)(b)(ii).

[46] G.B.L. § 396-r(3)(c).

[47] *Id.*

[48] G.B.L. § 396-r(1).

repertoire of legitimate business practices."[49] By focusing on fairness, the statutory text and legislative intent pay special attention to buyers' vulnerabilities and to sellers' power, and especially to their interaction.[50]

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

The price gouging law protects the most vulnerable people. Poor and working-class New Yorkers are the most likely to be harmed by price increases in essential items and the

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

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

New York's price gouging statute does not, by design, require the issuance of an declaration of emergency by the Governor to come into effect: instead, it is effective *either* upon issuance of such a declaration by the Governor *or* upon "any change in the market, whether actual or imminently threatened, resulting from 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, [or] drug shortage."[61]

Thus, for example, the Appellate Division found that the prohibitions in the price gouging statute applicable to the COVID-19 pandemic came into effect not upon the issuance of the Governor's declaration of emergency on March 7, 2020, but two weeks prior: "[b]y the time of the [U.S. Centers for Disease Control's] February 26, 2020 warnings, which were preceded by various governmental warnings and advisories and significant novel coronavirus media coverage, there was a change in the market for the Lysol product resulting from a national public health emergency."[62]

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

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

[61] G.B.L. § 396-r(2).

[62] *Matter of People v. Quality King Distributors, Inc*, 209 A.D.3d 62, 76 (1st Dep't 2022).

Nonetheless, many of those who submitted comments in response to the seven notices of proposed rulemakings published in the State Register by the Attorney General on March 22, 2023 ("First NPRM Comments"),[63] as well as comments submitted in response to the revised rules ("Second NPRM Comments"),[64] expressed the view that regulated parties would be assisted by guidance as to the existence of a statutorily-defined abnormal market disruption and the time that a disruption begins and ends—above all, for weather-related disruptions.

To summarize commentators' concerns: markets for essential products experience many weather-related abnormal disruptions, but the statute provides that only those disruptions arising from the "stress of weather [or] convulsion of nature" trigger the statute. And the phrase "stress of weather [or] convulsion of nature," which descends from older State emergency statutes which in turn drew on language common to maritime insurance policies in the late 19th and early 20th centuries,[65] have become archaic and difficult for modern readers to parse. Rulemaking is indicated to explain, especially to laypersons, what these terms of art mean in contemporary parlance.

The precise beginning and end of a disruption also may not be clear even if its existence is indisputable. For example, Hurricane Gloria, the disruption at issue in *People v. Two Wheel*, struck Long Island on September 27, but all parties and the Court agreed that the disruption began September 26 or earlier, as by September 26 the hurricane was imminently threatened even though at that point it was still centered around North Carolina.[66]

It is straightforward to devise regulations respecting extreme weather events because much of the necessary infrastructure for determining whether a weather event rises to the statutory level of "stress of weather [or] convulsion of nature" already exists

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[63] *See, e.g.*, NY Association of Convenience Stores, First NPRM Comments at 23; Business Council of New York, First NPRM Comments at 49-51; Uber Inc., First NPRM Comments at 113; Lyft Inc., First NPRM Comments at 118.

[64] *See* Greenberg Traurig, Second NPRM Comments at 19-20; BCNY, Second NPRM Comments at 23-25; NFIB, Second NPRM Comments at 31; FIA, Second NPRM Comments at 34; HDA, Second NPRM Comments at 63; NYSHTA, Second NPRM Comments at 67.

[65] *See, e.g.*, General Municipal Law § 120-u(1)(e) (defining "emergency" in the context of water supply to mean "a temporary condition of failure or inadequacy of the supply of water resulting from stress of weather, convulsion of nature, fire, failure of power, mechanical breakdown, breakage or stoppage of mains and other portions of the waterworks system either from accident, malice, acts of war or civil commotion, or other generally unforeseeable events"); *Frank McWilliams, Inc., v. Am. Ins. Co*., 236 N.Y. 551 (1923) ("stress of weather"); *The Majestic*, 60 F. 624, 628 (2d Cir. 1894) ("convulsion of nature").

[66] 71 N.Y.2d 693, 696 n.1 (1988). *See* U.S. Dep't of Commerce, Atlantic Oceanographic & Meteorological Laboratory, *30th Anniversary of Hurricane Gloria*, https://www.aoml.noaa.gov/hurricane_blog/30th-anniversary-of-hurricane-gloria/ (review of Hurricane Gloria's course day by day and collecting sources) (last accessed January 14, 2026).

thanks to the development of weather emergency regulation and response in recent decades. More generally, self-enforcement becomes easier when businesses are told when the price gouging law “switches on.” Conversely, claims of ignorance or lack of due process lose their force in the face of a notice prominently posted online accompanied by extensive media coverage and warnings pushed to New Yorkers’ phones with a deafening alert tone.[67]

Accordingly, the regulation provides that a disruption triggered by “stress of weather or convulsion of nature” is presumed to commence when the National Weather Service (“NWS”) or a competent government authority such as the Governor or a local mayor issues a warning that a specified set of severe weather events is occurring, imminent or likely and that weather conditions pose a threat to life or property. This phraseology is taken from NWS protocols and describes the very highest alert that body issues to alert residents about oncoming natural disasters, which NWS calls a “warning.”[68] OAG chose a more descriptive phraseology to both adapt the NWS terminology to the declarations of executive officials and avoid confusion with the vernacular meaning of “warning,” which conveys less urgency and importance than the NWS’s idiosyncratic use of that word.

The Attorney General reviewed all warnings that may be issued by the NWS and selected those warnings that reflected stresses of weather and convulsions of nature that have, over the last two hundred years, created abnormal market disruptions for vital and necessary goods and services in New York State. Red flag warnings were omitted because although they identify a very serious fire risk, they also do not necessarily cause an abnormal market disruption in any vital and necessary goods or services.

NWS warnings are well fitted to the statutory definition of “stress of weather” or “convulsion of nature” that is “imminently threatened.”[69] The NWS warning itself may trigger an abnormal market disruption for many vital and necessary goods even if the warned-of weather does not eventuate; this too would fit the statutory definition because a disruption would result from an imminent threat of stress of weather even if that threat was not realized.

The NWS does not issue “warnings,” as it defines that term, to identify serious deterioration in air quality; instead it employs “air quality alerts” classified in their severity by the projected Air Quality Index. Rather than incorporate an AQI threshold, the regulation uses the descriptors employed by the U.S. Environmental Protection Agency for air quality declines that trigger serious health effects, the analogous standard to that used for a NWS

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[67] *See* Nat’l Weather Service, *Weather Warnings on the Go!*, https://www.weather.gov/wrn/wea (last accessed January 14, 2026).

[68] National Weather Service, *Glossary*, https://forecast.weather.gov/glossary.php?letter=w

[69] *See also* Haw Stat § 127A-30(a) (employing NWS warnings as trigger for enforcement).

warning. Much of this may be redundant; an AQI >200 day, as New Yorkers observed recently, is ominously visible to consumers and businesses alike without any need for government declarations.[70]

Earthquakes present a special problem because they are exceptionally difficult to predict. New York is susceptible to earthquakes, although it has not experienced a major quake in some decades.[71] Because the abnormal market disruption visited by an earthquake begins when the earthquake occurs, it is appropriate to set the declaration to be when the earthquake is reported (usually within moments of occurrence). A magnitude of 6.0 was selected as this is the conventional line at which an earthquake usually becomes especially serious.[72]

In examining past disasters to hit New York State, particularly blizzards, OAG noted that it is often the case that an official state of emergency declaration relating to a weather event preceded the NWS warning as state officials reasonably concluded that a "watch" (for example) is sufficiently likely to give way to a warning that emergency preparedness responses should be triggered immediately. As the statute provides expressly that "national or local emergency" and Gubernatorial declarations are also statutory triggers, a weather-related rule was incomplete without integrating these declarations into the scheme. So if an executive's declaration of emergency concerning a severe weather event occurs before the NWS warning, the disruption will be deemed to have begun as of the date of that executive declaration.

The Attorney General elected to use the phrase "declaration of a state of emergency" without qualification when describing Presidential, gubernatorial, and local declarations. There are different kinds of emergency declarations that these authorities are empowered to issue, but it is unreasonable to expect businesses or others to parse declaration types especially when these distinctions have much more to do with the complexities of federal-state-local government emergency coordination than they do demonstrating whether a statutory triggering event has in fact occurred.

The rule provides only presumptive start and end dates for weather-related disruptions: the date of the earliest declaration or warning is the start date, and the end date is presumptively 30 days after the latest declaration or warning regarding the weather

[70] *See* Jenny Gross, *What Happens When the Air Quality Index Surpasses 500?*, N.Y. TIMES (June 9, 2023), https://www.nytimes.com/2023/06/09/climate/air-quality-index-500.html.

[71] *See* Northeast States Emergency Consortium, *New York Earthquakes*, https://nesec.org/new-york-earthquakes/.

[72] *See* U.S. Geological Service, *Earthquake Magnitude, Energy Release, and Shaking Intensity*, https://www.usgs.gov/programs/earthquake-hazards/earthquake-magnitude-energy-release-and-shaking-intensity (last accessed January 14, 2026).

event. The 30-day presumption was set as that is the default effective date of gubernatorial emergency declarations. Either presumption can be rebutted by either the Attorney General or the seller based on the circumstances of the weather event. Departures from the presumption will usually be obvious: Hurricane Sandy's disruption lasted far longer than 30 days for many key essential products, for example.[73]

The presumption may also be rebutted with evidence that a comparatively mild weather event had untoward but serious circumstances—or the converse. Suppose a "severe thunderstorm" were to hit downtown Brooklyn. Ordinarily, the subway is designed to be resilient to such weather events, and NWS does not issue a warning. Nonetheless, owing to a freak series of accidents, various tunnel seals fail and all tunnels connecting Brookyln and Manhattan are flooded. Under those facts, OAG could show that despite a lack of NWS warning, an abnormal disruption of the ground transportation market occurred as a result of that severe thunderstorm. Conversely, if NWS issued a warning of a hurricane that fortunately did no damage of any kind and did not disrupt the market, a seller could show there was no abnormal disruption of the market notwithstanding the presumption.

The rule also sets out a presumption that if a warning or declaration does not specify a territory, it applies to the whole of New York State. This presumption will be applied in vanishingly rare circumstances, as all of the relevant warnings and declarations invariably describe their geographic scope (the point of a warning is defeated if the warning does not describe the area where the risk lies).

Finally, a possible perverse consequence of adopting what amounts to a declaratory regime for application of a price gouging statute in weather emergencies is that defendants may arrange to remain ignorant of declarations of emergency in the hopes of defending against any claim of price gouging, blunting the effect of emergency declarations and undermining the enforcement of the statute, which conspicuously omits any requirement that a defendant know that a disruption exists. All the relevant declarations are designed, at considerable taxpayer expense, to be as accessible and broadly communicated as it is possible for a government declaration to be.[74] If there are any government notices the law could fairly presume persons to have read, they are these.

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[73] *See, e.g.*, Sabrina Zawadski & Anna Louie Sussman, *Six Months After Sandy, New York Fuel Supply Chain Still Vulnerable*, Reuters (Apr. 30, 2013), https://www.reuters.com/article/world/uk/six-months-after-sandy-new-york-fuel-supply-chain-still-vulnerable-idUSBRE93T0DJ/.

[74] The Attorney General has advocated for still further investment in wireless emergency alerts to make them still more readily accessible to all members of the public. *See* Press Release, *Attorney General James Leads Coalition to Expand Language Access for Severe Weather Emergency Alerts* (July 24, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-leads-coalition-expand-language-access-severe-weather.

Costs

The Attorney General anticipates that the only cost associated with this rule that will be imposed on regulated parties is the cost of checking appropriate government websites. Even this cost appears negligible, as many of the appropriate warnings will be triggered from sources businesses consult anyway (such as NWS-generated emergency alerts) or, in the case of FDA shortage reports, originate from the business's own report to the FDA.

The Attorney General's aspiration for this rule is for the selected warnings to come from the same sources as warnings regularly consulted by businesses in the usual course, and the Attorney General welcomes comments on how the rule may be still better tailored to better achieve this aspiration. The Attorney General also welcomes comments regarding any recurring costs of implementing the proposed rule.

The Attorney General foresees no additional costs to any other state or local government agencies, as the rule draws from emergency declaration activities those agencies already engage in. 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 proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district. Existing declarations of emergency would trigger the regulation without any need for modification by localities.

Paperwork

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

Duplication

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

Alternatives

Various alternative rules to the rule were considered.

The Attorney General considered no action, but given the benefits of providing additional notice to regulated parties and the prospect that rule would reduce uncertainty for businesses concluded that action was merited.

Government Declarations

Gubernatorial Declarations. The Attorney General considered proposals to solely enforce the statute in respect to sales or offerings for sale during periods of gubernatorially-declared emergencies.[75] The Attorney General rejected those proposals. "A declaration of a state of emergency by the Governor . . . is not a precondition to the onset of an abnormal disruption of a market under the statute."[76]

Because the statutory language requires the Attorney General to enforce the statute in situations beyond those that result in a gubernatorial emergency declaration, it is essential that any rule limiting penalized transactions to periods demarcated by government declarations include, at a bare minimum, weather warnings used by the NWS that themselves serve as the primary basis for business and consumer decision-making.

Presidential Declarations. The Attorney General considered omitting Presidential declarations of emergency as a declaration triggering enforcement of the statute because inclusion of these declarations would be redundant in many cases. For example, during the COVID-19 disruption, the Governor issued a declaration of emergency on March 7, 2020, while the President issued a similar declaration only on March 13, 2020.

Nonetheless, the Attorney General has concluded that certain national weather emergencies may lead to a Presidential emergency declaration in advance of or as an alterantive to a gubernatorial one, and that such declarations when they apply to New York are so prominent and well-advertised that most regulated parties would assume, even absent a rule, that they triggered application of the statute. About half the states with declaration regimes also include Presidential declarations as a recognized declaration; including presidential declarations therefore provides a harmonization benefit to businesses with interstate operations.[77]

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[75] *See* Greenberg Traurig, Second NPRM Comments at 19-20; BCNY, Second NPRM Comments at 23-25; NFIB, Second NPRM Comments at 31; FIA, Second NPRM Comments at 34; HDA, Second NPRM Comments at 63; NYSHTA, Second NPRM Comments at 67.

[76] *People v. Quality King Distributors, Inc*., 209 A.D.3d 62, 75 (1st Dep't 2022); *see also People v. Wever Petroleum, Inc.*, 14 Misc. 3d 491, 494 (Sup. Ct, Albany County 2006) ("a declaration from the Governor of the State of New York is unnecessary to invoke the price gouging statute in this case, and in fact is only one of a variety of instances where price gouging is invoked, as dictated by statute").

[77] *See, e.g.*, AR Code § 4-88-303 (presidential and gubernatorial declarations); Cal. Penal Code § 396(b) (presidential, gubernatorial, and local declarations); Colo. Rev. Stat. § 6-1-730 (presidential and gubernatorial declarations); Conn Gen. Stat. § 42-230 (presidential and gubernatorial declarations); Idaho Code § 48-603(19) (presidential and gubernatorial declarations); Kan. Stat. Ann. § 50-6,106 (presidential and gubernatorial declarations); N.J. Rev. Stat. § 56:8-108 (presidential, gubernatorial, and local declarations); N.C. Gen. Stat. § 75-38 (presidential, Department of Homeland Security, and gubernatorial declarations); 15 Okla. Stat. § 777.4 (presidential and gubernatorial declarations); R.I. Gen. Laws § 6-13-21 (presidential and

Local Declarations. The Attorney General considered omitting declarations of emergency from local officials as a declaration triggering enforcement of the statute but elected to include them. Given the diversity of the State and the existing statutory language describing "local emergencies," a local declaration is an appropriately prominent indicia of a localized abnormal market disruption, particularly when one considers the expertise local governments possess in identifying local emergencies that may not be apparent to statewide officers.

In particular, it is the "policy of the state that . . . local government and emergency service organizations continue their essential role as the first line of defense in times of disaster, and . . . local chief executives take an active and personal role in the development and implementation of disaster preparedness programs."[78] It is consistent with this statutory mandate and the broader structure of disaster response in State law to recognize local disaster declarations as authoritative.

The Attorney General welcomes comments from local governments and others discussing the practical effect of inclusion of these declarations and efficient ways to bring these declarations to the attention of regulated parties.

National Weather Service and U.S. Geological Survey Warnings

The Attorney General considered omitting warnings from the NWS from the regulation. The Attorney General concluded that inclusion of these warnings was helpful and appropriate. One of the subsidiary objectives of this rule is to facilitate compliance with the price gouging law by drawing on warnings consumers and businesses see and use in the usual course (that is, a "performance standard" rather than a "design standard"). Everyone—consumers, businesses, and government officials alike—relies on the NWS to provide timely warning of major natural disasters; often the "imminently threatened . . . stress[es] of weather" are only "imminently threatened" when the threat is crystallized in an NWS warning.[79] NWS warnings provide clear notice to everyone, and help ensure the statute

gubernatorial declarations); S.C. Code Ann. § 39-5-145 (presidential and gubernatorial declarations); Tex. Business & Commerce Code Ann. § 17.46(27) (presidential and gubernatorial declarations); Utah Code Ann. § 13-41-201 (presidential and gubernatorial declarations); Va. Code § 59.1-526 (presidential and gubernatorial declarations).

[78] Executive Law § 20(1).

[79] *See, e.g.*, *Lord & Taylor LLC v. Zim Integrated Shipping Services, Ltd*., 108 F. Supp. 3d 197, 202-13 (S.D.N.Y. 2015) (bench trial ruling discussing at length, in the context of an insurance coverage dispute, the use of NWS warnings by businesses and governments prior to the arrival in New York of Hurricane Sandy). For a comprehensive discussion of the National Weather Service's role contrasted with private sector weather information services, *see* National Research Council, *Fair Weather: Effective Partnership in Weather and Climate Services* (2003), https://doi.org/10.17226/10610. One commentator on prior price gouging NPRMs

is enforced at the very moment the abnormal market disruption becomes imminently threatened and not merely from the moment executive officials (likely themselves relying on the NWS) say so.

Further definition of non-weather triggering events

Many commentators in previous rounds of rulemaking expressed a strong preference for an entirely "declaratory" statutory scheme, where the price gouging law would apply only when a Gubernatorial declaration was issued and only on the terms of that declaration. As discussed above, whatever the merits of such a policy, the Legislature has made a considered decision not to adopt it in New York's statute.

The Attorney General considered, however, whether it would be appropriate to engage in rulemaking to define other statutory triggers with more precision, or with reference to additional government declarations. The Attorney General concluded that additional rulemaking was not prudent at this juncture. The main reason to define the weather-related and drug shortage disruptions is that these disruptions are *invariably* predicted and warned about by an identified set of government authorities in a manner that is easy for everyone to access and that align with the market disruption they cause.

That is not true of the remaining disruptions, particularly strike, civil disorder, war, military action, and national or local emergency. In some cases, a blanket rule that all executive declarations of disruption activated the price gouging statute would be over-inclusive: New York City has been under a declared "housing emergency" since 1943.[80] In others, it would be under-inclusive: the Appellate Division found that the COVID-19 disruption to the disinfectant wipe market commenced on February 26, 2020, despite the Governor's related declaration of emergency being issued only on March 7.[81]

And in unusual circumstances, it may be possible that the abnormal disruption occurs substantially after the date of the triggering event. For example, the used car market experienced a disruption resulting from the COVID-19 national emergency but that disruption manifested more than a year after the triggering date of the emergency because it was a direct result of a shutdown in new car production, resulting from the emergency,

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asserted that the Attorney General should avoid sanctioning persons who relied on the "wrong meteorologist," API, First NPRM Comments at 82. This regulation eliminates that possibility by identifying the right one: the NWS.

[80] *See* N.Y.U. Furman Center, *Rent Control*, https://furmancenter.org/coredata/directory/entry/rent-control (last accessed January 14, 2026).

[81] *Quality King*, 209 A.D.3d at 76-77.

that took a year to flow into the used car market.[82]

More generally, in keeping with the general permission extended to agencies to proceed with rulemaking incrementally,[83] the Attorney General thought it appropriate to begin the project of defining abnormal disruptions with the disruptions that are by far the most frequent basis of price gouging statute enforcements and the easiest disruptions to link to authoritative public data. The Attorney General is open to further rulemaking in this area following review of the effectiveness of this rule in the medium term.

Inclusion of Specific Products in Governmental Declarations

The Attorney General considered requiring that specific products be listed in the declaration as subject to coverage by the statute. The Attorney General rejected this alternative as unnecessary and unworkable.

The alternative is unworkable because the Attorney General cannot dictate the form or content of other officials' declarations and lacks the capacity to replicate every existing warning or declaration with OAG's own subsidiary declaration listing markets that are disrupted. This is outstandingly true of the NWS, which is a federal agency overseen by a different sovereign.

It is also unnecessary. The claimed ambiguity of the "abnormal disruption of the market" definition arises, according to commentators, out of a lack of clarity as to what events qualify as triggering events under the statute and time and location of the disruption given that some but not all abnormal market disruptions are statutory abnormal market disruptions. This ambiguity does not arise for products for which the market is disrupted because the statutory "vital and necessary" definition employs well-understood definitions of consumer goods and medical supplies; the "personal, family, or household purposes" formulation has been construed in more than 5,000 reported cases, including over 100 decisions from New York State courts.

More to the point, if the seller believes that the declared weather event would lead to a jump in demand (and thus potential price) for a good or service, it is almost certainly a vital and necessary good or service—because it if were not, it would not be the subject of increased demand in a time of weather-related emergency. The Devil may wear Prada, but

[82] Brian Finkelmeyer, *Why are Prices So High? The Used-Car Factory Was Shut Down*, COX AUTO. (May 3, 2023), https://www.coxautoinc.com/market-insights/why-are-prices-so-high-the-used-car-factory-was-shut-down/ (describing the relevant market dynamics).

[83] *See National Ass'n of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("agencies ... need not deal in one fell swoop with the entire breadth of a novel development; instead, reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the regulatory mind" (cleaned up)).

does not seek to stock up on Prada when a hurricane hits.[84]

The simplicity of these directions may be why even those price gouging statutes in other states that are triggered only on a declared state of emergency seldom require the Governor or local executive to set out the products to which the price gouging statute would be applicable in the declaration of emergency.[85] As the COVID-19 emergency demonstrated, the list of vital and necessary goods in which unjustified pricing behavior occurred and whose markets were disrupted by the emergency ranged well beyond products specifically designed to fight the disease to used cars, toilet paper, and various foodstuffs. This insight—that disasters have the potential to upend *every* market in vital and necessary goods—undergirds the statute, and it would derogate the statute's purposes to artificially limit enforcement in such a fashion.

Default Time Period

The Attorney General considered excluding a default time period, or selecting default expiration dates other than 30 days. Because the Attorney General cannot prescribe the form or content of other recognized declarations, a default time period was felt to be a necessary concomitant of recognition of weather-related declarations. The Attorney General concluded that 30 days is an appropriate default sunset date, based on the Attorney General's experience in enforcement of the statute over the past decades.

There is no one-size-fits-all duration for an abnormal market disruption resulting from a weather event: the disruption of a sudden winter storm may last a matter of hours, while the disruption visited by Hurricane Sandy lasted months in some places. But in the most common statutory abnormal market disruptions—namely, serious destructive weather events—the observed abnormal market disruption period either concluded within 30 days of the triggering event or the period was extended by a subsequent emergency proclamation. Thirty days is also the most common default period among the states that possess them, permitting businesses that operate nationally to harmonize their procedures for responding

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[84] *See The Devil Wears Prada* (20th Century Fox 2006) ("oh, please… it's just—I don't know—drizzling.")

[85] *See, e.g.*, Ala. Code §§ 8-31-2, 8-31-3 (extending price gouging law to "any goods, services . . . or other articles of commerce" sold "during a state of emergency declared by the Governor"); Conn Gen. Stat. § 42-230 (extending price gouging law to "any item . . . in the chain of distribution"); Fla. Stat. § 501.160 (extending price gouging law to "any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce"); Haw. Rev. Stat. § 127A-30 (extending price gouging law to "any commodity, whether at the retail or wholesale level"); Miss. Code Ann. § 75-24-25 (extending price gouging law to "all goods and services"); *but see* Ga Code Ann § 10-1-393.4 (requiring Governor to specify goods and services in proclamation).

to declarations.[86]

The Attorney General welcomes comments as to the appropriate length of the proposed default period, and in particular comments that present economic data on the endurance of abnormal disruptions of the market following statutory triggering events that might inform a general default rule.

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.[87] It is incorporated herein by reference.

Federal Standards

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

Compliance Schedule

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

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[86] *See, e.g.*, A.R. Code § 4-88-303(a)(1); Cal. Penal Code § 396(b); Kan. Stat. Ann. § 50-6,106; Minn. Stat. Ann. § 325E.80; N.J. Rev. Stat. § 56:8-109; 15 Okla. Stat. § 777.4; Or. Rev. Stat. § 401.965; Utah Code Ann. § 13-41-201; Vt. Stat. Ann. tit. 9, § 2461d; Va. Code § 59.1-526; W. Va. Code § 46A-6J-3. *Contrast* Haw. Rev. Stat. § 127A-30 (24 hours); Ky. Rev. Stat. § 367.374 (15 days); Tenn. Code Ann. § 47-18-5103 (15 days); Ill. Admin. Code tit. 14, § 465.30 (45 days); N.C. Gen. Stat. § 75-38 (45 days); Fla. Stat. § 501.160 (60 days); Me. Rev. Stat. Ann. tit. 10, § 1105 (60 days); Nev. Rev. Stat. Ann. § 598.09235 (75 days); Colo. Rev. Stat. § 6-1-730 (180 days).

[87] *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 need not be submitted 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 an existing statutory standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[88]

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 more precise start and end dates for abnormal disruptions of the market arising from "stress of weather [or] convulsion of nature." It clarifies that such disruptions begin upon a warning of the imminence of a specified set of extreme weather events and presumptively end 30 days after such a warning is issued.

This rule affects small businesses as it serves to provide more clarity on when the price gouging statute is activated. It implicates but does not affect local governments because it conditions the practical operation of the price gouging law on, among other things, declarations of emergency made by local officials, but does not recommend any alterations to existing declaration formats and procedures.

Because the law and this rule are statewide in effect, 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. At present, small businesses must ascertain for themselves whether a statutory abnormal market disruption arising from stress of weather or convulsion of nature has occurred (such that the statute is in effect), referring not only to government declarations but to other information as well.

Under the proposed rule, a small business knows that the price gouging law "switches on" in extreme weather events with the issuance of a government emergency declaration or NWS warning. Almost all small businesses already rely on such alerts for their

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

usual course operations, such that effective statutory compliance costs fall to negligible levels if this rule is adopted.

Local government would not be required to take any affirmative action to comply with this rule; the rule applies to local emergency declarations a legal effect they largely already had under the statute. The Attorney General has deliberately refrained from making any prescription as to the format or content of local declarations.

3. **Professional Services**. Neither small business nor local government is likely to need professional services of any kind to comply with this rule, as the rule requires consultation solely of publicly-accessible warnings specifically designed to be understood by everyone.

4. **Compliance Costs**. The Attorney General has determined that this rule will impose no compliance costs on small businesses or local governments for the reasons stated above: enterprises use the listed warnings already in their ordinary operations.

5. **Economic and Technological Feasibility**. The Attorney General has determined that compliance with this rule requires no new investment or technology that does not presently exist, as the declarations listed are already broadly distributed to the public via all forms of media.

6. **Minimizing Adverse Impact**. This proposed rule, which was requested by every trade association representing small businesses that commented on past price gouging rulemakings, has a positive impact on small business and local government.

To the extent that this rule has an adverse impact on such entities, the Attorney General has considered, and applied, the approaches prescribed in section 202-b of the State Administrative Procedures Act. The Attorney General has taken account of limited resources available to small businesses and local governments by linking enforcement of the price gouging law to declarations these entities use in their ordinary operations, such that no special effort need be taken to determine whether the statute is in effect during weather emergencies. This represents a substantial improvement for small businesses from the current regime.

The use of declarations already employed by small business and local government to signal application of the price gouging statute in weather emergencies functions to impose a performance standard rather than design standard; although businesses may not formally pick and choose the declarations on which they rely, the rule is based upon the Attorney General's understanding of the tools such businesses and governments *have* chosen.

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 providing direct notification of the notice of proposed rulemaking to local governments and associations representing small businesses. The Attorney General has relaxed all applicable rules of comment format, instead permitting comments be sent in any form to the email address stopillegalprofiteering@ag.ny.gov.

Rural Area Flexibility Analysis

The Attorney General determined that a Rural Area Flexibility Analysis for the rule need not be submitted because the rule will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[89]

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

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

2. **Reporting, recordkeeping, and other compliance requirements and professional services**. As described in the regulatory flexibility analysis above, no affirmative reporting, recordkeeping, or other compliance requirements are imposed on rural areas as a result of this rule; the effect of the rule will be to decrease reliance on professional services.

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

4. **Minimizing Adverse Impact**. As discussed above, the Attorney General designed the rule to employ warnings and declarations already employed in rural areas such that it was not necessary to provide exemptions or differential timetables.[90] The Attorney General particularly welcomes comments from rural businesses and enterprises respecting the use of National Weather Service warnings, and whether any additional warnings (or alternative weather warning mechanisms) should be included based on their use in rural areas.

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

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

[90] S.A.P.A. § 202-bb(1)(b).