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Economic Justice Division

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Price Gouging Economics and Price Volatility

OAG Staff Report

Contents

Introduction

The Office of the New York Attorney General ("OAG") is charged with the enforcement of New York's price gouging statute, General Business Law § 396-r. It is also charged with the promulgation of "such rules and regulations as are necessary to effectuate and enforce" the provisions of G.B.L. § 396-r.[1]

"Price gouging" generally means "the action or practice of increasing prices sharply, esp. to take advantage of high demand,"[2] but has a much more limited meaning in New York law; a better term for what New York outlaws might be "disaster profiteering." In New York, price gouging occurs only when, during an abnormal disruption of the market for an essential product,[3] triggered by an enumerated list of causes ("triggering events"), a seller charges an unconscionably excessive price for that product. An unconscionably excessive price could be one that is (i) unconscionably extreme, or (ii) set using an exercise of unfair leverage or unconscionable means, or (iii) grossly disparate from either prices charged by the same seller before the disruption or prices charged by other sellers in the trade area without a justified increase in the seller's costs.

The purpose of OAG's regulations is to effectuate the statutory goal of "prevent[ing] any party within the chain of distribution of any goods from taking unfair advantage of the public during abnormal disruptions of the market" by creating clearer, and where possible quantitative, guidelines on how the statute is to be applied. Reflecting that almost all proceedings brought by OAG have concerned prices deemed unconscionably excessive because of their gross disparity from prices charged pre-disruption, OAG has focused its attention on regulations that would clarify exactly how and under what circumstances prices will be deemed grossly disparate, and how a business can show that the gross disparity is justified by its costs.

In the course of proposing these rules, OAG deemed it appropriate to consider economic evidence when selecting from the alternatives the Legislature has permitted it to consider in effectuating and enforcing the law.[4] This Report consolidates and analyzes the studies and much of the other evidence OAG considered; it has been collected separately

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[1] G.B.L. § 396-r(5).

[2] Oxford English Dictionary, s.v. "price-gouging (n.)," March 2024, https://doi.org/10.1093/OED/5824492720.

[3] "Essential products" in this Report is a shorthand term for "goods or services vital and necessary for the health, safety, and welfare of consumers or the general public;" in this definition, "goods and services" means consumer goods and services used, bought or rendered primarily for personal, family or household purposes; essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease; any other essential goods and services used to promote the health or welfare of the public; and any repairs made by any party within the chain of distribution of goods on an emergency basis as a result of an abnormal market disruption. *See* G.B.L. § 396-r(2)(a)-(e).

[4] *See Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 611-12 (2018).

from the formal rulemaking proposal because it is somewhat voluminous such that doing so allows it to be more readily reviewed by the public.

After a brief background section reviewing the literature on the economics of price gouging laws, underscoring the distinctive features of New York law designed to incentivize supply by controlling profit margins rather than simply capping prices, the Report considers a contention raised in past rulemaking proceedings concerning the extent to which prices for essential products fluctuate outside of market disruptions. Reviewing Bureau of Labor Statistics price data, this Part concludes that price fluctuations for a diverse basket of essential products do not usually exceed 10% over the time periods comparable to the time periods in which the price gouging statute is enforced—except during abnormal market disruptions caused by triggering events.

Next, the Report considers the apparently special case of ride-hail vehicle services, specifically taxis. After a careful review of the relevant data, this Part concludes that non-dynamically priced ground transportation exhibits the same price stability as other essential products once the correct benchmark is identified. The identification of the correct benchmark is nontrivial; this Part lays out in detail how OAG arrived at the benchmark proposed and provides a basis to replicate its work.

The principal contributors to this report were former OAG Chief Economist and current Professor of Professional Practice at Columbia Business School Paola Valenti, Assistant Attorney General Alec Webley, and OAG Data Analyst James Wood. The Office expresses its appreciation for the many past and present members of the Office who assisted in the preparation of this report or materials used in this report, including Jane Azia, Anushua Choudhury, Tal Elmatad, Jack Figura, Ben Fishman, Elinor Hoffman, Liam Kim, Laura Levine, Casey Marescot, Jasmine McAllister, Amy McFarlane, Sarah Mihm, Noah Popp, Anthony Potts, Michael Schwartz, Elliot Setzer, Gautam Sisodia, Emily Smith, and Zephyr Teachout from OAG, and Pradeepthi Mallappa, Meredith McCarron, and Lacey Keller from MK Analytics, Inc. We record with particular affection and sorrow the considerable contributions of Jonathan Werberg, Director of Research and Analysis for OAG, who passed away while this report was being drafted. May his memory be a blessing.

Background: Price Gouging Laws as Time-Limited Anti-Profiteering Measures

OAG Staff reviewed the literature on the connection between price gouging laws and supply dynamics in abnormal market disruptions. An abnormal market disruption, as the statute defines that term, is characterized by an abnormal increase in demand or a decrease in supply (or both) of an essential product. The changed circumstances give existing sellers the power to raise prices on the essential products they already have in their inventory.[5]

If, for example, the local electricity grid goes down, in the absence of a price gouging rule sellers will raise the price of diesel generators because of increased demand for the existing supply.[6] If a heavy snowstorm shuts down the highways for days, the cost of essential goods will shoot up because of constricted supply.[7] In economic terms, an abnormal market disruption is characterized by short term demand that cannot be met by short term supply—in other words, a shortage.

The typical economic framework provides that in the event of a shortage, an increased price acts on both demand and supply by serving as a "signal" to buyers and sellers. On one hand, the increased price encourages sellers to procure additional supplies.[8] On the other hand, it discourages buyers from buying large quantities of product.[9] It is the combination of both effects that return supply and demand to equilibrium.

"Abnormal disruptions," the New York law shorthand for natural and human disasters,[10] undermine the effectiveness of this price signal for essential products. These events cause demand for those products to spike so suddenly that there is often no time for supply to rise no matter how high prices go. In other words, the supply of these essential

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[5] DAVID SHAPIRO, DAVID MACDONALD, STEVEN GREENLAW ET AL., PRINCIPLES OF MACROECONOMICS 3.2 (3d ed., 2022), https://openstax.org/books/principles-macroeconomics-3e/pages/3-2-shifts-in-demand-and-supply-for-goods-and-services.

[6] *See id.* For a real-life application of this example and resulting enforcement under the price gouging statute, see *People v. Two Wheel Corp.*, 71 N.Y.2d 693 (1988).

[7] *Ibid*.

[8] DAVID SHAPIRO, DAVID MACDONALD, STEVEN GREENLAW ET AL., PRINCIPLES OF MACROECONOMICS 4.3 (3d ed., 2022), https://openstax.org/books/principles-macroeconomics-3e/pages/4-3-the-market-system-as-an-efficient-mechanism-for-information.

[9] *Ibid*.

[10] Specifically, New York's price gouging law defines "abnormal disruptions" as changes in the market resulting from specific triggering events: "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 other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor." GBL § 396-r(2)(b).

products is "inelastic" because there is simply no way to get more essential product in the short run to meet the sudden spike in demand, the price being charged cannot spur additional production.

Supply elasticity measures the sensitivity of supply to changes in price and it is calculated as the ratio of the percentage change in quantity supplied and the percentage change in the price.[11] A ratio smaller than 1 indicates that supply is inelastic, that is, it does not react easily in response to changes in price.[12] For individual dairy farms, studies have found that supply elasticity in the short run was as low as 0.2,[13] and farm essential products more generally had a short-run elasticity of only 0.25.[14] Studies of wool found short-run supply elasticity of a miniscule 0.07;[15] of cotton, 0.3.[16] For housing, one study found supply elasticity varying between 0.24 and 1.0 in the short-run.[17]

Natural and human disasters further diminish supply elasticity, as was vividly demonstrated by the recent COVID-19 emergency.[18] Even essential products that would seem relatively easy to produce and transport at scale, such as face masks, only barely cleared the elasticity threshold in the aftermath of the pandemic with an elasticity of 1.2[19]—and that was only after significant government interventions in the market because existing market forces were not providing sufficient incentive for upscaling production.[20]

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[11] DAVID SHAPIRO, DAVID MACDONALD, STEVEN GREENLAW ET AL., PRINCIPLES OF MACROECONOMICS 5.1 (3d ed., 2022), https://openstax.org/books/principles-macroeconomics-3e/pages/5-1-price-elasticity-of-demand-and-price-elasticity-of-supply.

[12] *Ibid*. Many of the examples that follow were taken from Steve Parsons, *An Examination of Anti Price Gouging Laws and Shortages During Covid-19*, 22 LOY. J. PUB. INT. L. 37, 61-62 (2020).

[13] Loren W. Tauer, *Estimates of Individual Dairy Farm Supply Elasticities* (Cornell U. Dep't Agric. Res. & Managerial Econ., Working Paper, WP98-08, 1998), https://core.ac.uk/download/pdf/6429492.pdf.

[14] Luther G. Tweeten & C. Leroy Quance, *Positivistic Measures of Aggregate Supply Elasticities: Some New Approaches*, 59 AM. ECON. REV. 175 (1969).

[15] J. M. Malecky, *Price Elasticity of Wool Supply*, 28 Q. REV. AGRIC. ECON. 240 (1975).

[16] Daniel B. Suits, *Agriculture*, *in* THE STRUCTURE OF AMERICAN INDUSTRY 1-34 (Walter Adams, 1990).

[17] Denise DiPasquale, *Why Don't We Know More About Housing Supply?*, 18 J. REAL EST. FIN. & ECON. 9, 15, 19 (1999); *see generally* Knut Are Aastveit et al, *Changing Supply Elasticities and Regional Housing Booms* (Ctr. for Applied Macroeconomics and Commodity Prices, Working Paper No. 4/2019, 2019), https://biopen.bi.no/bi-xmlui/bitstream/handle/11250/2601599/working_camp_04-2019.pdf (reviewing literature concerning declining supply inelasticities in housing).

[18] *See, e.g.*, G. Cornelis van Kooten & Andrew Schmitz, *COVID-19 Impacts on U.S. Lumber Markets*, 135 FOREST POL'Y & ECON. 1 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8646330/pdf/main.pdf (discussing inelasticity of supply for softwood induced by the COVID-19 pandemic and observing that much of the surplus value from the spike in lumber prices was diverted in the form of profits to vertically-integrated companies).

[19] Evan Suave & Jeannie Shearer, *Elasticity of Supply of Face Masks*, ECON EYE (Apr. 14, 2020), https://econeye.blog/2020/04/14/elasticity-of-supply-of-face-masks/.

[20] *See Many Economists Defend Disaster Profiteers. They Are Wrong.*, THE ECONOMIST (Apr 11, 2020), https://www.economist.com/finance-and-economics/2020/04/11/many-economists-defend-disaster-

The 2023 amendments to the price gouging statute addressed the inadequacy of the price signal in the specific context of drugs by adding a specific triggering event—an FDA-reported drug shortage.[21] Many drug shortages result from either safety-related plant shutdowns where existing demand and supply are in equilibrium pre-shutdown and will return to equilibrium post-shutdown without exemplary prices,[22] or deliberate and despicable efforts to restrain supply so as to unjustifiably raise prices, where the price signal will not lead to an increase in supply.[23] The FDA declares drug shortages because price signals are not effectively spurring increased supply.[24]

Although commentators on past OAG rulemakings recounted anecdotes in which a small handful of individuals respond to news of a natural disaster by buying a pickup-truck-sized load of essential products, hopping in their vehicles, and driving considerable distances to sell those products at unconscionably extreme prices,[25] there is no evidence any of these price gougers (who, in sharp contrast to commentators' speculation, appear to have been entirely undeterred by price gouging laws) would have ameliorated any shortages—beyond a trivially small number of generators, masks, or water bottles—even if their predatory behavior was not stopped. Unsurprisingly: this mode of business is extremely inefficient. It illustrates, rather than undermines, the conclusion that supply for essential products is often inelastic such that production or transportation cannot be scaled up quickly.

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profiteers-they-are-wrong ("Price signaling alone would have been inadequate to the challenge of ensuring vast increases in supply [of face masks during the pandemic]. . . . Upfront costs would be hard to justify if the virus were quickly snuffed out. . . . It took government action to change that.").

[21] G.B.L. § 396-r(2)(c).

[22] *See The Latest in Drug Shortages*, U.S. FOOD & DRUG (Mar. 13, 2023), https://www.fda.gov/drugs/cder-conversations/latest-drug-shortages ("Manufacturing quality issues are the major reason for drug shortages.").

[23] *See* Andrew Pollack, *Drug Goes from $13.50 a Tablet to $750, Overnight*, N.Y. TIMES (Sept 20, 2015), https://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html (discussing actions of now-convicted-felon Martin Shkreli to induce artificial restriction in supply of drugs).

[24] *See generally* COMM' SEC. AM.'S MED. PROD. SUPPLY CHAIN, NAT'L ACADS. SCI. ENG'G & MED., BUILDING RESILIENCE INTO THE NATION'S MEDICAL ESSENTIAL PRODUCT SUPPLY CHAINS (Mar. 2, 2023), https://www.ncbi.nlm.nih.gov/books/NBK583744/ ("[F]ocus on price alone . . . can lead to fewer suppliers, which in turn can weaken the resilience of the supply chain . . . ."); C. Lee Ventola, *The Drug Shortage Crisis in the United States*, 36 PHARM. & THERAPEUTICS 740, 750 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3278171/ (explaining how when a drug shortage is impending "distributors buy up the remaining stock and then aggressively market it . . . at 10 to 1,000 times the usual price").

[25] *See* Comment of American Fuel Manufacturers Association, First NPRM Comments at 56 (citing Rafi Mohammed, *The Problem with Price Gouging Laws*, HARV. BUS. REV. (Jul 23, 2013) (describing the case of John Shepperson, who "bought 19 generators, rented a U-Haul truck, and drove 600 miles from Kentucky and Mississippi")). Other cases include a Long Island man who charged 1,000% markup on masks and a Florida man who drove 200 miles to sell bottles of water for 100% of the local price. Steve Parsons, *An Examination of Anti Price Gouging Laws and Shortages During Covid-19*, 22 LOY. J. PUB. INT. L. 37, 62-63 (2020).

Supply elasticity generally increases with time, so that as time passes and supply chains are able to ramp up, *if* demand for the essential product is still sustained, price will return to its function as a signaling mechanism.[26] But that is when the price gouging law generally stops applying, such that prices are allowed to rise again; the abnormal market disruption has become the "new normal."

In the moment of an abnormal disruption, businesses may be disinclined to increase supply for two reasons. First, it may simply be physically impossible to increase supply to benefit from higher prices during the brief periods of price spikes; there are only so many oil pipelines with so much capacity available, for example. Second, it does not make business sense to expend what may be immense resources on supply expansion unless the prospect of *sustained* increased profitability presents itself—that is, when the abnormal market disruption becomes the "new normal."[27] For example, many analysts have argued that oil and gas companies limited investment in new exploration and drilling or in scaling up refinement capacity despite significantly higher short-term prices in part because of concerns about the long-term profitability of those investments.[28]

The extraordinary pure-profit price spikes that accompany the immediate onset of a natural or human disaster—as opposed to the more gradual changes in price that accompany moderate changes in supply and demand—provide little benefit in terms of increased production but are acutely harmful to economic stability. On a microeconomic level, sellers may overestimate the market impact of the disaster and set "sticky" prices well above the necessary equilibrium point even after their miscalculation becomes apparent.[29]

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[26] *See, e.g.*, HUGH STRETTON, ECONOMICS: A NEW INTRODUCTION 486-90 (1999) (illustrating how shifts supply and demand affect price).

[27] *See generally* François Gourio, *Disasters Risk and Business Cycles* (Nat'l Bureau of Econ. Rsch., Working Paper 15399, 2009), https://www.nber.org/system/files/working_papers/w15399/w15399.pdf (describing effect on asset prices and business investment of increased disaster risk). *See* San Sau Fung & Simon Roberts, *Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*, 12 J. EUR. COMPETITION L. & PRAC. 734, 737 n.16 (2021) ("If demand is actually expected to fall right back [such as for toilet paper and food] then suppliers will not expect higher future prices and there is no incentive to increase supply, regardless of the short-term price spike. It also means current market capacity—without relying on high prices to provide an incentive for expansion—is sufficient to satisfy demand once panic buying is over.").

[28] *See* Kevin Crowley & Laura Hurst, *Big Oil Spends on Investors, Not Output, Prolonging Crude Crunch*, BLOOMBERG (May 7, 2022), https://www.bloomberg.com/news/articles/2022-05-07/big-oil-spends-on-investors-not-output-prolonging-crude-crunch; Goldman Sachs, *Why Oil Prices Are Surging but Investment Is Drying Up*, BRIEFINGS (Jan. 20, 2022), https://www.goldmansachs.com/insights/pages/from-briefings-20-january-2022.html; Evan Halper, *Oil Refineries Are Making a Windfall. Why Do They Keep Closing?*, WASH. POST (June 20, 2022), https://www.washingtonpost.com/business/2022/06/20/refineries-profit-gas-prices/; Christopher Helman, *As ConocoPhillips Spins off Refining Assets, Think Twice Before Buying the New Phillips 66*, FORBES (Apr. 30, 2012), https://www.forbes.com/sites/christopherhelman/2012/04/30/as-conocophillips-spins-off-refining-assets-should-you-own-the-new-phillips-66/?sh=69ea68084eb7.

[29] Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 558 (2006); *see also* Michael A. Salinger, Dir., Bureau of Econ., FTC,

In other words, immediate post-disaster pricing may overreact to the disaster, setting prices above the level predicted by classical economics and creating other losses—such as people becoming ill after foregoing medical treatment owing to cost.[30] Price gouging laws address this specific problem by serving as a counterweight to overreaction, allowing prices to move more rapidly towards their sustainable level in the medium term by temporarily limiting suppliers' ability to engage in demand-based pricing rather than cost-based pricing.[31]

This is an important distinction between price gouging laws that restrain only profits and only in the moments immediately before and after a disruption, and price controls, which simply impose a flat limit on prices (without regard to profit) and do so indefinitely. If, as economists David Shapiro, David MacDonald, and Steven Greenlaw et al put it, "price controls are trying to kill the messenger—or at least to stifle an unwelcome message that prices are bringing about the equilibrium level of price and quantity," price *gouging* laws instead ask the messenger to hold for a moment to so that the message being delivered is the right one.[32]

At a higher level, price gouging statutes counteract inflationary tendencies in a way that other policy tools do not.[33] The public's inflation-fighting toolkit traditionally consists of

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Address to Antitrust Committee of Boston Bar Association: Moneyball and Price Gouging 6 (Feb. 27, 2006), https://www.ftc.gov/sites/default/files/documents/public_statements/moneyball-and-price-gouging/060227moneyballandpricegouging_0.pdf (describing "sticky" price phenomenon).

[30] Rapp, *Gouging*, 94 KY. L.J. at 558.

[31] *Ibid*. Even economists who accept that low elasticity of supply is the "strongest argument for [anti-price gouging laws] and their enforcement" argue that implementation of a price gouging law risks "lead[ing] to deadweight loss to society," albeit "smaller vis-à-vis more elastic supply." Steve Parsons, *An Examination of Anti Price Gouging Laws and Shortages During Covid-19*, 22 LOY. J. PUB. INT. L. 37, 59-62 (2020). But this view of deadweight losses is not unanimous; other economists have criticized it for not taking account of the complexities of actual firm behavior during disasters. *See, e.g.*, Kaitlin Ainsworth Caruso, *Price Gouging, the Pandemic, and What Comes Next*, 64 B.C. L. REV. 1797, 1843 (2023) (describing actual firm behavior); Rafi Mohammed, *Why Businesses Should Lower Prices During Natural Disasters*, HARV. BUS. REV. (Sept. 11, 2017), https://hbr.org/2017/09/why-businesses-should-lower-prices-during-natural-disasters; Luis Cabral & Lei Xu, *Seller reputation and price gouging: Evidence from the COVID-19 pandemic*, 59 ECON INQ. 867 (2021) (finding that seller reputation at least partially restrains price increases even without price gouging laws).

[32] DAVID SHAPIRO, DAVID MACDONALD, STEVEN GREENLAW ET AL., PRINCIPLES OF MACROECONOMICS 4.3 (3d ed., 2022), https://openstax.org/books/principles-macroeconomics-3e/pages/4-3-the-market-system-as-an-efficient-mechanism-for-information.

[33] *See* Comment of Prof. Luke Herrine, ANPRM Comments at 201, https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf ("[I]ntervening to prevent opportunistic increases in profit margins can be a way to dampen inflationary dynamics. If firms are taking advantage of unhinged price expectations to increase their own prices, that can create a profit-price spiral or "profit-push inflation," in Gardiner Means's terminology."); Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, 11 REV. KEYNESIAN ECON. 183, 207 (2023) ("If sellers' inflation is tackled by inducing a recession using tools designed for aggregate excess demand, it can aggravate the institutional conditions that gave rise to it in the first place.").

interest rate adjustments and fiscal austerity measures.[34] The mechanism by which these monetary and fiscal policy tools work is by cooling off aggregate expenditure, thereby lowering upward pressure on prices.[35] Outside of abnormal disruptions, these measures should accomplish their intended effect (even though they come at the cost of higher unemployment).[36]

But they may not be as effective in an abnormal disruption, when firms can capitalize on their temporarily enhanced market power to hike prices, not necessarily because the firms are facing higher costs, but rather because consumers have fewer alternatives in their local markets and have been conditioned to expect higher prices.[37] This behavior drives inflation higher, harming the most vulnerable and contributing to a less stable economy. When a firm lifts prices based purely on consumer inflation expectations, rather than on cost, contributing to an upward price spiral, the price-gouging regulation can effectively and promptly pump the brakes on inflation.

To be sure, the benefits of price gouging statutes depend in some measure on the statute distinguishing between price increases driven by costs (which are permitted) and driven by profits (which are not). If businesses were not able to raise prices at all, even for higher costs, there would be a disincentive for businesses to increase what supply may be available to them notwithstanding a lack of supply elasticity.[38]

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[34] *See* FED. RSRV. SYS., THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 34-39 (11th ed. 2021), https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf (explaining how the Federal Reserve's monetary policy toolkit works to keep prices stable).

[35] *See id.* at 24-27 (outlining how changes in monetary policy affects the economy).

[36] *See* Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, 11 REV. KEYNESIAN ECON. 183, 207 (2003) ("[H]iking interest rates is meant to increase unemployment, which hurts workers who have already been in a defensive position in this inflation.").

[37] *See id.* at 186 ("Publicly reported supply-chain bottlenecks and cost shocks can . . . serve to create legitimacy for price hikes and create acceptance on the part of consumers to pay higher prices, thus rendering demand less elastic.").

[38] *See, e.g.*, Daniel Scheitrum, et al., *Retailer Response to Price Gouging Litigation and Consumer Food Prices*, 45 APP ECON PERSPECTIVES & POL'Y 2127 (2023). In this article, the authors use a theoretical model of price gouging law that appears to cause shortages, but do not in fact use what New York State would consider a price gouging law to do this modelling: their "price gouging law" (in fact a price ceiling) provides that "no transactions may take place . . . above the reference price which is P_0, the equilibrium price before the shock" *without* respect to cost increases. The authors then go on to use an unspecified egg price data set to argue that retailers induced egg shortages in response to price gouging litigation, but do not appear to account for verified accounts of egg price-fixing, *see, e.g.*, Letter from Basel Musharbash, Legal Counsel, Farm Action, to Lina Khan, Chair, Fed. Trade Comm'n (Jan 19, 2023), https://farmaction.us/wp-content/uploads/2023/01/Farm-Action-Letter-to-FTC-Chair-Lina-Khan.pdf; *In re Processed Egg Essential products Antitrust Litig.*, 312 F.R.D. 171, 176 (E.D. Pa. 2015) (describing alleged conspiracy); *Kraft Foods Global v. United Egg Producers*, No. 1:11-cv-08808, Doc. #688 (N.D. Ill., Dec. 22, 2023) (closing brief discussing jury finding that there was an antitrust conspiracy), which would have profound distortionary effects along the supply chain, or BLS statistics indicating that egg prices indeed rose dramatically if the authors are correct that input costs rose as well, *Eggs, U.S. city average, all urban consumers, not seasonally adjusted*,

But New York's price gouging statute *is not a price ceiling* akin to the limits on gasoline imposed by the federal government in the 1970s, or for that matter the commodity price ceilings imposed by Emperor Diocletian in 301 C.E. referenced by one commentator on a prior OAG rulemaking.[39] So long as they do not employ unfair leverage or unconscionable means (such as fraud or abusive business practices), businesses may raise their prices during a disaster provided doing so is justified by costs outside of that business's control. That is, businesses may continue to sell essential products at higher prices—and at a profit—so long as they do not *increase* their profits during the disaster.

This distinctive feature of New York's price gouging law is one OAG has underscored in the rulemaking proposals. Everyone wants supply to increase during disasters, and it is therefore important to provide sellers with a clear pathway towards properly accounting for permissible supply-increase-related costs to ensure the statute is targeted, as the Legislature intended, to profiteering specifically.

Indeed, even if none of the stabilizing benefits of price gouging laws existed, the *profit* increases in the *immediate* aftermath of a disaster that New York's price gouging statute restrains serve little economically beneficial purpose: sellers merely take advantage of the coincidence of a spike in demand with an absence of additional supply, with no effect on alleviating supply shortages until the abnormal disruption is over and the market either returns to its pre-disruption state or enters a new normal where price increases are once again permitted.[40]

During a market disruption that might be upending their lives, consumers lack the information and ability to evaluate whether such increases are pretextual and are not able to comparison shop,[41] allowing sellers to generate pure profit that does not come from superior business acumen, insightful planning, or efficient risk-taking. It is this unproductive and unfair extraction of profits from disasters that the price gouging statutes target.

The risk of firms taking unfair advantage of an abnormal disruption may be greater where certain characteristics still further reduce the supply elasticity—such as where high

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BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFH (last accessed January 14, 2026). Nonetheless, even if taken on its face, this article does not attack New York's price gouging law so much as it underscores the importance of clarity for sellers as to costs able to be passed on, a central concern of the rules.

[39] *See* Comment of Am. Fuel & Petrochemical Mfgrs, First NPRM Comments at 69.

[40] *See generally* Max N. Helveston, *Regulating Economic Opportunism in Post-Disaster Markets*, 102 N.C. L. REV. 811 (2024); Behrang Kianzad, *The Giant Awakens: Law and Economics of Excessive Pricing During the COVID-19 Crisis*, in LAW AND ECONOMICS OF THE CORONAVIRUS CRISIS 123, 138 (Klaus Mathis & Avishalom Tor eds., 2022);

[41] *See* Lindsay R. L. Larson & Jyunju Shin, *Fear During Natural Disaster: Its Impact on Perceptions of Shopping Convenience and Shopping Behavior*, 39 SERVICES MARKETING Q. 293 (2018).

concentration makes investment less attractive in a particular market.[42] During abnormal market disruptions in concentrated markets, incumbents may be insulated from the credible threat of new competition to increase supply and discipline prices.[43] And in a concentrated market for essential goods or services, other factors found to restrain price increases after a disaster—most prominently consumer anger,[44] but also information costs in determining competitor prices[45]—lose their force and thus enhance the need for legal enforcement. Consumers with no alternative but a monopoly cannot punish the monopolist for price increases, a fact temporary monopolists appreciate all too well.[46] Limited price information diffusion in a competitive market loses its price-restraining force in a concentrated one.[47]

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[42] *See, e.g.,* Jonathan B. Baker, *Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 8-13 (summarizing economic evidence that entry by new competitors will not correct instances of durable market power); JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 83 (2019) (noting that "[t]heoretical literature agrees that the exercise of monopoly power need not be transitory or corrected by new rivals attracted by supracompetitive prices"); Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting*, 5 J. COMPETITION L. & ECON. 249, 255 (2009) (explaining how high prices alone are not enough to encourage new firms to enter a concentrated market).

[43] *See* Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, 11 REV. KEYNESIAN ECON. 183, 191 (2023) ("[F]irms [in a concentrated market] facing input shortages due to a supply-side bottleneck can be more aggressive about raising prices and thus may not only protect profit margins but expand them."); Piero Sraffa, *The Laws of Returns Under Competitive Conditions*, 36 ECON. J., 535, 545 (1926) ("[W]ithin its own market and under the protection of its own barrier each [firm] enjoys a privileged position whereby it obtains advantages which—if not in extent, at least in their nature—are equal to those enjoyed by the ordinary monopolist.").

[44] *See* Eric T. Anderson & Duncan I. Simester, *Price Stickiness and Customer Antagonism*, 125 Q. J. ECON 729, 763 (2010) (finding robust evidence that consumers punish firms for price increases if the same firm then lowers prices on that good in the future); *see generally* SARAH MAXWELL, THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING (2007).

[45] *See* Bill Dupor et al., *Integrating Sticky Prices and Sticky Information*, 92 REV. ECON. & STAT. 657 (2010) (observing that when setting prices firms look to both past prices and prior information about competitor behavoir); N. Gregory Mankiw & Ricardo Reis, *Sticky Information Versus Sticky Prices: A Proposal to Replace the New Keynesian Phillips Curve*, 117 Q J OF ECON 1295 (2002) (describing limitations on information diffusion as a reason for price "stickiness").

[46] *See e.g.*, Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, 11 REV. KEYNESIAN ECON. 183, 207 (2023) (noting how during and after the COVID-19 pandemic a variety of firms were able to increase prices as a result of "price pressures enabled by a form of temporary monopoly granted by . . . shortages"); *Corporate Profits are Soaring as Prices Rise: Are Corporate Greed and Profiteering Fueling Inflation?: Hearing Before S. Comm. on the Budget*, 117th Cong. 4 (2022) (statement of Robert B. Reich, Chancellor's Professor of Public Policy, University of California at Berkeley) (explaining how during the COVID-19 pandemic firms could "raise prices and rake in more money" because they "face[d] very little competition").

[47] *See Pandemic Profiteers: Legislation to Stop Corporate Price Gouging: Hearing Before the Subcomm. on Consumer Protection and Com. of the H. Comm. on Energy*, 117th Cong. 9 (2022) (statement of Rakeen Mabud, Managing Director of Policy and Research and Chief Economist, Groundwork Collaborative) ("It is clear that corporate consolidation has helped facilitate the pandemic profiteering we are seeing today."); *The Inflation Equation: Corporate Profiteering, Supply Chain Bottlenecks, and COVID-19: Hearing Before the H. Comm. on Fin. Servs*, 117th Cong. 6 (2022) (statement of Sandeep Vaheesan, Legal Director, Open Markets Institute) ("In highly concentrated markets, firms do not even need to conspire . . . to collusively raise prices. Instead, they can engage in tacit forms of collusion, in which one firm initiates a price increase and expects or

Indeed, price gouging laws have a special role to play in concentrated markets because they assume to some degree the role that reputation plays in restraining prices in competitive markets. In competitive markets, many enterprises elect not to raise their prices (price gouging laws or no) because the reputational costs of doing so outweigh any potential profits.[48] That reputational price is manifested in lost customers who turn to competitors owing to their revulsion at disaster profiteering. Because businesses are aware of this phenomenon, they essentially invest in their reputations by restraining prices (without regard to raising costs) during disasters, a major component of what is often called price "stickiness."[49]

But reputation is far less important to businesses in highly concentrated markets given the lack of consumer choice. The earnings calls of some of the largest multinational corporations highlighted these dynamics during the pandemic, as executives reported their companies' abilities to raise prices because consumers were displaying less sticker shock amid economy-wide inflation.[50] It is this category of actor for whom the price gouging statute provides important marginal restraint, essentially preventing further distortion of an already distorted market during times of crisis.

The available economic research provides two instructive points for OAG's rulemaking efforts. First, it underscores the centrality of the cost defense to the price gouging enforcement model. By permitting costs to be passed along, existing supply incentives are preserved while enforcement is concentrated on the unfair profiteering that is at the heart of the statute's prohibitions. As will be seen, in numerous places the Attorney

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encourages others to follow."); Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135, 153–55 (2002) (reviewing literature on relationship between concentration and collusion).

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

[49] *See* Eric T. Anderson & Duncan I. Simester, *Price Stickiness and Customer Antagonism*, 125 Q. J. ECON 729, 763 (2010); Josh Hendrickson, *Why Price Gouging Laws Aren't So Bad*, ECON. FORCES, https://www.economicforces.xyz/p/why-price-gouging-laws-arent-so-bad (Nov 12, 2020).

[50] *See* Baker, 77 N.Y.U. L. Rev. at 201–07 (discussing large firms who protected and grew profit margins during the COVID-19 pandemic).

General has adopted regulations elaborating in more detail on the statutory cost defense, reflecting the overall statutory intent to curb profits in times of abnormal disruption but not legitimate cost recoupment.

Second, and relatedly, available research highlights the benefit of defining with much more precision how costs outside the control of the seller are determined and allocated to products on a per-unit basis, as well as how the cost-justification inquiry is triggered. Detail here encourages self-enforcement and profit restraint in the critical early moments of a disruption.

Observed Price Fluctuations During and Outside Abnormal Market Disruptions

Overview

The price gouging statute provides that an essential product sold or offered for sale during an abnormal disruption ("the scrutinized sale") is sold at a presumptively unconscionably excessive price if there is a "gross disparity" between the price in the scrutinized sale and that essential product's price "in the usual course of business immediately prior to the onset of the abnormal disruption of the market" ("the pre-disruption price"). that the adopted rule provides that a 10% difference between pre-disruption price and scrutinized sale price represented such a "gross disparity."

In response, several parties submitted comments resting on the premise that increases in price of 10% or more over very short time periods was a characteristic of normal market behavior outside of disruptions.[51] This being so, commentators argued, such a disparity could not "raise[] a presumption that the merchant used the leverage provided by the market disruption to extract a higher price."[52]

The first edition of this report noted that commentators had hitherto not provided data to substantiate this premise. The Attorney General appreciates the response from commentators, specifically Uber and Lyft, that did provide appropriate data in the specific context of ride-hailing vehicles. That data is discussed in the next part of this report and is not discussed in this part. No other new data were received respecting specific products.

OAG Staff reviewed available public data to determine by how much prices for essential products varied under normal competitive market conditions over the same time frames as those stretching between the pre-disruption price and the scrutinized sale in a price gouging analysis. If, over these standard time frames, prices across the market did indeed vary by more than 10% under normal competitive market conditions, it would suggest that the presumptive threshold should be higher than the 10% proposal.[53] If they did not, it would suggest that the presumptive threshold should remain at 10% or be set even lower than that amount.

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[51] *See, e.g.*, BCNY, First NPRM Comments at 53; API, First NPRM Comments at 86-87; BCNY, Second NPRM Comments at 28; API, Second NPRM Comments at 78.

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

[53] As noted by commentators, the caveat "competitive" is important here as the 10% threshold applies to competitive markets under the rules; as discussed in the relevant rules, prices charged in concentrated markets more likely to be the product of unfair leverage, which the statute separately forbids. The purpose of this exercise is to identify the proper pricing threshold for essential products in non-concentrated markets.

Methodology and Data

OAG Staff chose to review Consumer Price Index ("CPI") price change data and average price data collected by the U.S. Bureau of Labor Statistics ("BLS") for paradigmatic vital and necessary goods from 1998 to the present to examine month to month price disparities in essential products inside and outside abnormal market disruptions. CPI is a measure of average price fluctuation in the U.S. economy recorded every month by the BLS,[54] and is routinely used by the Legislature as the statutory basis for measuring changes in price.[55]

CPI measures purchase price changes month to month, and is a more useful measure for purposes of an analysis of consumer prices than its cousin the Producer Price Index, which measures the change over time in *selling* prices received by domestic producers of goods and services.[56] OAG Staff elected to use Consumer Price Index for All Urban Consumers ("CPI-U") in this analysis as the most suitable of the available CPI alternatives, employing where possible CPI-U figures restricted to the Northeast census region (or, where available, the NY-NJ-CT conurbation). The Attorney General also did not take account of the retroactive series (R-CPI-U-RS), which adjusts historical CPI-U values for methodological changes, because such a series is useful only to compare price changes over a long period of time; the analysis here is confined to one-to-three month changes.

CPI-U is superior to "chained CPI" for these purposes because the purpose of chained CPI is to measure shifts in demand from product to product as prices rise—but it is the movement of prices, and not the movement of demand or affordability, that OAG Staff are attempting to measure.[57] For instance, consumers might shift from beef to chicken

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[54] *Handbook of Methods: Consumer Price Index*, BUREAU OF LAB. STATS. (Sept. 6, 2023), https://www.bls.gov/opub/hom/cpi/home.htm; Darren Rippy, *The First Hundred Years of the Consumer Price Index: A Methodological and Political History*, BUREAU OF LAB. STATS. (Apr. 2014), https://www.bls.gov/opub/mlr/2014/article/the-first-hundred-years-of-the-consumer-price-index.htm.

[55] *See, e.g.*, Real Property Law § 211(7) (the "inflation index" for purposes of calculating acceptable rent increases is CPI); Tax Law § 601-a(c) (CPI used as basis for cost of living adjustment factor in personal income tax calculations); Education Law § 1608(7) (CPI used as basis for school district budget reports).

[56] *Producer Price Index*, BUREAU OF LAB. STATS. (Mar. 16, 2023), https://www.bls.gov/ppi/overview.htm. Because PPI exists primarily "to deflate revenue streams in order to measure real growth in output," by design it does not necessarily measure the actual change in prices paid by buyers for essential products. *How Does the Producer Price Index Differ from the Consumer Price Index? Comparing the Personal Consumption PPI with the CPI*, BUREAU OF LAB. STATS. (Mar 10, 2023), https://www.bls.gov/ppi/methodology-reports/comparing-the-producer-price-index-for-personal-consumption-with-the-us-all-items-cpi-for-all-urban-consumers.htm. Worse, PPI excludes imports, a hugely significant sector in an economy as globalized and trade-dependent as New York's. *Id.* Because the purpose of this exercise is to understand the factual content of the word "gross disparity" in the context of price gouging, CPI's measure of prices downstream purchasers pay is more suitable than PPI as a measure. *Handbook of Methods: Consumer Price Index*, BUREAU OF LAB. STATS. (Sept. 6, 2023), https://www.bls.gov/opub/hom/cpi/home.htm.

[57] *Handbook of Methods: Consumer Price Index*, BUREAU OF LAB. STATS. (Sept. 6, 2023), https://www.bls.gov/opub/hom/cpi/home.htm.

when prices rise for beef. Although the CPI-U measure would be pulled higher because chicken prices increased, the Chained-CPI-U would reflect a lower level of inflation because consumers were avoiding some of the inflation caused by higher chicken prices with their shift to beef, which was experiencing less inflation. For purposes of identifying a "gross disparity," it is the price increase associated with chicken that is at issue, regardless of whether consumers responded by moving to beef; chaining CPI defeats the purpose of the analysis.

Because the CPI-U is designed to measure price change and not average prices, it is published as an index rather than a dollar value.[58] The index is built around a base period and aggregates the individual index values calculated for each individual good or service. The current base for most categories is 1982-84, which is normalized as 100. Each subsequent period's index value is calculated by determining the ratio of the cost of a period's market basket to the cost of the market basket in the base period. That ratio is then scaled by a factor of 100. For instance, the unadjusted CPI-U for all items in May 2024 was 314.069, up from 313.548.[59] The percent change between the two index values (0.2% for May 2024) would reflect the month-over-month inflation.

Because prices typically fluctuate with some seasonality, such as when retailers might adjust prices in anticipation of holiday shopping, the BLS also provides seasonal adjustments for its price measures.[60] OAG Staff did not use these seasonal adjustments in this analysis because such adjustments risked distorting price increases caused by extreme weather events that coincided with the change in the seasons. To the extent this decision made prices more volatile rather than less, it would skew data in the direction of overstating ordinary-course price changes (and thus in favor of a higher threshold to trigger a price gouging analysis).

In addition to the CPI index figures for given products, the BLS also calculates a measure of average price for select utility, automotive fuel, and food items.[61] As opposed to the CPI's measure of price change, measurements of average prices are designed to compare prices between different goods in a single month (e.g., the average price of apples compared to the average price of bananas).

To ensure uniformity of pricing in each month, these average prices are recorded for goods in identical locations. For example, in January, the BLS might collect product prices

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[58] *Handbook of Methods: Consumer Price Index*, BUREAU OF LAB. STATS. (Sept. 6, 2023), https://www.bls.gov/opub/hom/cpi/home.htm.

[59] *Consumer Price Index – May 2024*, BUREAU OF LAB. STATS. (June 12, 2024), https://www.bls.gov/news.release/pdf/cpi.pdf.

[60] *Handbook of Methods: Consumer Price Index*, BUREAU OF LAB. STATS. (Sept. 6, 2023), https://www.bls.gov/opub/hom/cpi/home.htm.

[61] *CPI: Average price data*, BUREAU OF LAB. STATS. (Apr. 15, 2024), https://www.bls.gov/cpi/factsheets/average-prices.htm.

from Store A located in the middle of a city. But in February, the BLS might rotate in Store B located on the outskirts of the same city, where prices could be lower. This might cause the average price for products to reflect a drop in price when compared to the same value from January. The CPI-U would not reflect the same drop because it reflects only price change for items marketed by the same seller in an attempt to measure pure price change.

Because these differences between average prices would usually suggest that changes over time in average price would be *more* volatile, OAG Staff considered the relative lack of fluctuation in average price to be still more supportive of the conclusion that prices do not fluctuate by more than 10% except in the time periods covered by price gouging investigations.

Relevant Time Period

Determining whether a disparity in price between the pre-disruption price and the scrutinized sale price is normal or "gross" requires identifying the time period over which the comparison is to be made—that is, the time period between the moment at which the pre-disruption price is set and the scrutinized sale, which can then be compared to price movements over that time period during normal conditions. Because the price gouging statute applies to *all* sales or offerings for sale of essential products "during any abnormal disruption of the market," this analysis in turn requires some determination of how long an abnormal market disruption lasts in the usual course.

The statute provides that an abnormal market disruption is "any change in the market, whether actual or imminently threatened, resulting from" a list of triggering events.[62] It follows that the disruption ends when the "change in the market . . . resulting from" the triggering event ceases to exist. That moment will vary from disruption to disruption and product to product. For example, in the opinion of some commentators, the disruption to the new and used automobile markets from COVID-19 took as long as a year to end.[63] The disruption to the ground transportation market from past shootings on the subway, by contrast, were arguably over in a matter of hours or at most days.[64]

Any statement about the volatility of prices needs a common time frame to make comparisons meaningful, and so OAG Staff have reviewed all past enforcements and the position the Attorney General took in such enforcements to synthesize a general observation

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[62] G.B.L. § 396-r(2)(a).

[63] See *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).

[64] See Michael R. Sisak, *Prophet of Doom Pleads Guilty in Brooklyn Subway Attack*, AP NEWS (Jan 3, 2023), https://apnews.com/article/brooklyn-crime-indictments-new-york-city-legal-proceedings-8e2dd55704ce84afccbfa1901a46de0a (reviewing 2022 Brooklyn mass shooting incident that caused a disruption in the local transportation market for approximately 48 hours).

that historically OAG has most commonly applied the statute to transactions made within 30 days of OAG's identified onset date for the disruption, and has generally not sought to impose liability for price gouging violations (whether in an Assurance of Discontinuance or special proceeding) for transactions made more than 90 days following OAG's identified disruption start date. Although the time periods of scrutinized sales in OAG's COVID-19 enforcements are somewhat lengthier than prior investigations, they too only scrutinize sales within 90 days of OAG's proposed start date for the disruption.[65]

It must be stressed that Staff has selected these time frames without venturing an opinion as to the legal validity of any of OAG's conclusions in particular enforcement matters. But OAG's own proceedings serve as a solid foundation for determining when the price gouging statute has been even *proposed* to be applied—which, because the AG exclusively enforces the price gouging statute, sets the outer bounds in practical terms for when the statute can be expected to be applied.

Setting aside the generational COVID-19 pandemic (and baby formula, discussed at the end of this report),[66] every enforcement petition in which OAG has applied the price gouging statute has been applied involved sales made over a period of less than 60 days—often *one to two* days—following the disruption's triggering event.[67] Likewise, enforcements

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[65] *See* Record, *Matter of People v. Quality King Distribs., Inc.*, Index No. 2020-04338, NYSCEF Doc. No. 8 (1st Dep't Aug 8, 2021) (record on appeal of *People v. Quality King*, 209 A.D.3d 62 (1st Dep't 2022) (indicating that OAG petition initiating proceeding scrutinized sales from January 31, 2020, OAG's proposed date of disruption onset, to April 28, 2020, or 88 days—notably, the court would go on to reject this onset date, 209 A.D.3d at 76-77, and instead fix the onset date at February 26, 2020, reducing the scrutinized sale time period to 62 days); Petition, *People v. Hillendale*, Index No. 451650/2020, NYSCEF Doc. No. 1 (Sup. Ct., N.Y. County Aug. 11, 2020), *available at* https://ag.ny.gov/sites/default/files/petition_1.pdf (exemplar sales discussed in petition extend from March 12, 2020 to approximately May 1, 2020, a period of 50 days); *Attorney General James Stops Three Amazon Sellers from Price Gouging Hand Sanitizer and Recoups Funds for New Yorkers*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (Nov. 17, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-stops-three-amazon-sellers-price-gouging-hand-sanitizer (gouging sales identified in settlements took place between February 10 and March 11, 2020, within 40 days from OAG's proposed January 31, 2020 onset date).

[66] No court has opined on when, for any essential product, the abnormal disruption of the market resulting from the COVID-19 national emergency concluded. The answer will necessarily vary depending on the essential product; for some products, it may be the case that "the COVID-19 pandemic" might be better understood as a series of abnormal market disruptions caused by distinct national or local emergencies, each of them relatively brief, rather than a single multi-year emergency.

[67] *See People v. Two Wheel Corp.*, 71 N.Y.2d 693, 696 (1988) (scrutinized sales began 1 day before Hurricane Gloria and ended 9 days later); Petition, *People v. Beach Boys Equip. Co.*, Index No. 98-0069, at ¶¶ 4-10 (Sup. Ct., Jefferson County Jan. 19, 1998) (challenged generator sales took place between January 9-20, 1998, following North Country ice storm beginning January 7, 1998, a gap of 13 days), *aff'd*, 273 A.D.2d 850, 851 (4th Dep't 2000); *People v. Dame*, 289 A.D.2d 997 (4th Dep't 2001) (roof repair services delivered over different time periods, none of which extends further than 20 days from 1998 ice storm); *People v. My Serv. Ctr., Inc.*, 14 Misc. 3d 1217(A) (Sup. Ct., Westchester County 2007) (concerns sales taking place within approximately 10 days of Hurricane Katrina); *People v. Wever Petroleum, Inc.*, 14 Misc. 3d 491, 492-93 (Sup. Ct., Albany County 2006) (same); *People v. Chazy Hardware*, 176 Misc. 2d 960, 961-62 (Sup. Ct., Clinton County 1998) (sales made on a single day, two days after ice storm hit).

brought by OAG that did not lead to litigation concerned prices charged within one to three months at most of the day of the triggering event, and often involved prices charged only while the triggering event was ongoing (such as flooding or power losses).[68] Other abnormal disruptions identified as such by the Legislature—the Exxon Valdez spill and Iraq's invasion of Kuwait[69]—likewise resulted in market disruptions measured in months at most.[70] The nature of triggering events is such that it is impossible to say for certain how long a future disaster might abnormally disrupt the market. But if past is prologue, the available evidence suggests that the most reasonable time frame to judge a "gross" disparity is one month with three months as an outer bound.[71]

Selection of Essential Products

Staff were also faced with the difficulty of selecting the products for which the analysis would be conducted. Staff elected to range broadly through those goods and services that seemed most self-evidently essential or that had been subjects of prior OAG price gouging enforcement activity: energy, childcare, medical commodities, shelter, ground transportation, and a wide basket of food products.

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[68] *See, e.g.*, *A.G. Schneiderman Announces Settlement With JFK Airport Hotel That Illegally Price Gouged Hundreds Of Guests Stranded By Jonas Ice Storm*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (Feb. 13, 2017), https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-settlement-jfk-airport-hotel-illegally-price-gouged (four days of hotel room sales *during* 2017 Jonas Ice Storm); *A.G. Schneiderman Announces Two Lawsuits And One Settlement Against Contractors Accused Of Price Gouging During Buffalo Snow Storm*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (March 13, 2015) https://ag.ny.gov/press-release/2015/ag-schneiderman-announces-two-lawsuits-and-one-settlement-against-contractors (describing snow removal services within one week of the Greater Buffalo snowstorm of November 2014); *A.G. Schneiderman Cracks Down On Gas Stations That Engaged In Hurricane Sandy Price Gouging*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (May 2, 2013) https://ag.ny.gov/press-release/2013/ag-schneiderman-cracks-down-gas-stations-engaged-hurricane-sandy-price-gouging (discussing prices charged within 14 days of Hurricane Sandy); *Price Gouging Investigation Leads To Refunds And Penalty*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (Aug 15, 2006), https://ag.ny.gov/press-release/2006/price-gouging-investigation-leads-refunds-and-penalty (prices charged during flooding in Broome County).

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

[70] Studies of the impact of the Exxon Valdez spill on gasoline and oil prices suggest that the abnormal disruption of the market in oil and gasoline resulting from the national or local emergency was pronounced within the two weeks following the spill. *See* Dennis M. Patten & Jon R. Nance, *Regulatory Cost Effects in a Good News Environment: the Intra-Industry Reaction to the Alaskan Oil Spill*, 17 J. ACCT. & PUB. POL'Y 409, 413-15 (1998). The oil shortage triggered by the Iraq invasion of Kuwait substantially influenced prices for approximately three months. *See* COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 80-81 (1991).

[71] There is no consensus among other states as to the length of a disruption. A narrow plurality of states uses a 30-day time limit, *see* AR 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. § 56:8-108; 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, but almost as many states employ a different default time period, *see, e.g.*, Haw. Rev. Stat. § 127A-30 (96 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).

There are three sets of omissions from the analysis of note: ride-hail vehicle trips, electricity prices, pork and eggs, and ride-hailing expenses. The first, a subject of special focus from commentators, is discussed below. The second, wholesale and retail sales of electrical power and natural gas, was excluded because both essential products are subject to a separate retail price-regulation regime maintained by the Public Service Commission. The existence of this regime makes such products inapposite for a price fluctuation analysis.

As one commentator on a prior proposed rule (LAW-12-23-00006-P) observed, the internal wholesale market for electricity in New York includes several inputs whose prices rapidly fluctuate; the commentator pointed to the example of the New York Power Authority's St Lawrence Generator (a hydroelectric power station), providing a chart purporting to show fluctuations of as much as 140% in wholesale prices charged by NYPA from one week to the next.[72] But the wholesale electricity market example is inapposite to the price gouging law because electricity (as well as natural gas) is subject to far more pervasive price regulation than what G.B.L. § 396-r provides.[73]

In New York, and across the United States, *wholesale* electricity prices are allowed to fluctuate under relevant Federal Energy Regulatory Commission ("FERC") orders because state Public Service Commissions impose direct price controls on the *retail* price of electricity, requiring above all that the rates paid by consumers are "just and reasonable."[74] To put it another way, direct price controls seek to accomplish the same goal via different means as that articulated in the price gouging law: preventing unfair pricing.[75]

Direct price controls provide a different means of addressing unfair exploitation of consumers in disasters than price gouging statutes, one that relies on price-by-price evaluation by public officials combined with a flat ban on price changes, even amid abnormal market disruptions, without further examination for fairness. In a price control regime, no unfairness problem is presented by large fluctuations in wholesale markets because the price consumers pay is independently evaluated for fairness, with consumer rates accounting for general price trends rather than daily fluctuations.[76] Retail sellers (here, utilities) are not free to pass on their wholesale costs the instant the market moves as a price gouging law would allow them to do; the passing on of costs occurs only with express

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[72] *See* Comment of American Petroleum Institute, First NPRM Comments at 86.

[73] Indeed, at least one case has held the price gouging statute outright preempted when it conflicted with federal rate regulation. *State v. Strong Oil Co., Inc*., 105 Misc.2d 803, 818 (Sup. Ct., Suffolk County 1980).

[74] Public Service Law § 65(1).

[75] *Compare Gen. Tel. Co. of Upstate New York v. Lundy*, 17 N.Y.2d 373, 384 (1966) (rate inquiry turns in part on "whether profits are fair rather than excessive") *with* G.B.L. § 396-r(1) (purpose of statute "to prevent any party within the chain of distribution of any goods from taking unfair advantage of the public during abnormal disruptions of the market").

[76] Public Service Law §§ 65, 72. *See generally Abrams v. Pub. Serv. Comm'n*, 67 N.Y.2d 205, 212 (1986) (describing considerations in rate-making determinations of the Public Service Commission).

permission of the Public Service Commission in a proceeding where the burden of proof is placed on the utility to prove that their proposed passing on of costs result in a fair rate.[77] To put it another way, it is true that the wholesale electricity market can experience large price increases, and that is one of the reasons why New York imposed direct price controls on the retail electricity market rather than leaving it to the vagaries of the price gouging law.[78]

The presence of a full scheme of rate regulation for electricity complicates any effort to use wholesale electricity prices in an analysis of price disparities for essential products within and without abnormal market disruptions. Where fluctuations in the prices of other essential products further up the supply chain are part of the same pricing continuum as the retail price, the interposition of direct rate regulation breaks those links and creates very different market incentives and dynamics on the wholesale side than exist for the products to which price gouging laws apply.

To make this concrete, suppose a wholesale seller of electricity, Generator A, sells power to Utility 1. If rates were unregulated, when Generator A increased its prices, Utility 1 would be free to either pass on those higher prices to consumers in the form of higher prices of its own, absorb the higher costs without increasing prices, or switch generators. Under rate regulation, Utility 1 has no choice but to either switch generators or absorb the higher costs. This constrains not just Utility 1's behavior but Generator A's behavior: it must sell its electricity but cannot sell electricity at a price its rate-regulated buyers are unable to pay. Thus when an abnormal disruption causes Generator A to suddenly possess what would ordinarily appear to be superior market leverage (e.g. a severe weather event causes the neighboring plant to shut down),[79] its actual leverage is substantially reduced since there is a practical ceiling that a buyer can lawfully pay.

This being so, one cannot identify prices that presumptively take advantage of disruptions in the wholesale electricity market and incidences of price stability because in all cases pricing (wherever in the chain) cannot cause the retail prices to become unfair to consumers. In an environment without unfair end-point pricing, identifying upstream exercises of unfair leverage attributable to disruptions becomes difficult if not possible.

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[77] *See St. Lawrence Gas Co. v. Pub. Serv. Comm'n*, 42 N.Y.2d 461, 464 (1977) ("If a gas utility proposes to increase its rates, the burden is on it to show that the proposed rate is just and reasonable").

[78] *People ex rel. New York Edison Co. v. Willcox*, 207 N.Y. 86, 93-94 (1912) (The Public Service Law "was enacted in response to a pronounced and insistent public opinion and was a radical and important modification of the relations and policy of the people toward the corporations which are its subjects. Its paramount purpose was to protect and enforce the rights of the public. It made the commissions the guardians of the public . . . to prevent, ... unneeded or extortionate competition, or indifferent and unaccommodating methods of operation or oppressive or discriminating charges or rates."); *see also Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n,* 33 N.Y.3d 336, 341-42 (2019) (recapitulating relevant statutory history).

[79] Alberto Sergio & Francesco Pietro Colelli, *Weather-Induced power plant outages: empirical evidence from hydro and thermal generators in Europe*, 148 ENERGY ECON. 108549 (2025).

The third set of exclusions from the basket of goods are eggs (on their own, rather than as part of a regional food average) and pork, notwithstanding prior enforcement proceedings concerning egg and pork price gouging.[80] Both products were excluded owing to substantial evidence that the prices of both were tainted by many years of illegal price-fixing.[81] Price data tainted by price-fixing cannot be reasonably relied upon to determine normal economic activity absent an unacceptable concession that illegal price-fixing is "normal." Eggs and pork have accordingly been removed from the analysis.

Analysis of CPI Price Changes

The principal BLS statistics used to compare changes in prices across time (for brevity, "CPI prices") permit comparison on a month-to-month basis. On that basis, a wide variety of essential products in the Northeast, including apparel,[82] medical care,[83] medical commodities,[84] tuition and childcare,[85] rent,[86] owners' equivalent of rent,[87] new cars,[88] and

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[80] *See* Petition, *People v. Hillendale*, Index No. 451650/2020, NYSCEF Doc. No. 1 (Sup. Ct., N.Y. County Aug. 11, 2020), *available at* https://ag.ny.gov/sites/default/files/petition_1.pdf (exemplar sales discussed in petition extend from March 12, 2020 to approximately May 1, 2020, a period of 50 days).

[81] For egg price fixing, *see, e.g.*, *In re Processed Egg Essential products Antitrust Litig.*, 312 F.R.D. 171, 176 (E.D. Pa. 2015) (describing alleged egg price fixing conspiracy); *Kraft Foods Global v. United Egg Producers*, No. 1:11-cv-08808, Doc #688 (N.D. Ill., Dec. 22, 2023) (closing brief discussing jury finding that there was an antitrust conspiracy to inflate egg prices); Letter from Basel Musharbash, Legal Counsel, Farm Action, to Lina Khan, Chair, Fed. Trade Comm'n (Jan 19, 2023), https://farmaction.us/wp-content/uploads/2023/01/Farm-Action-Letter-to-FTC-Chair-Lina-Khan.pdf. For pork, *see In re Pork Antitrust Litig.*, No. 18-cv-1776 (JRT/JFD), 2024 WL 2060386 (D. Minn. May 8, 2024) (reviewing evidence of pork price fixing); Second Amended Complaint, *United States v. AgriStats*, No. 23-cv-03009 (JRT/JFD), Doc. #50 (D. Minn. Nov. 15, 2023); Mike Scarcella, *Pork consumers' $75 million price-fixing accord with Smithfield approved*, Reuters (Apr. 12, 2023), https://www.reuters.com/legal/pork-consumers-75-million-price-fixing-accord-with-smithfield-approved-2023-04-12/.

[82] *Apparel in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SAA (last accessed January 14, 2026).

[83] *Medical Care in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SAM (last accessed January 14, 2026).

[84] *Medical Care Commodities in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SAM1 (last accessed January 14, 2026).

[85] *Tuition, Other School Fees, and Childcare in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SEEB (last accessed January 14, 2026) (note childcare data is limited to 2017 forward).

[86] *Rent of Primary Residence in New York-Newark-Jersey City, NY-NJ-PA, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUURS12ASEHA (last accessed January 14, 2026).

[87] *Owners' Equivalent Rent of Primary Residence in New York-Newark-Jersey City, NY-NJ-PA, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUURS12ASEHC01 (last accessed January 14, 2026);

[88] *New Cars in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SS45011 (last accessed January 14, 2026);

used cars,[89] seldom if ever experienced >10% fluctuations month-to-month in the last 25 years.[90] Measures of food price inflation in the Northeast (taking food items in various sectors together) also showed no >10% month-to-month fluctuations in the years for which there was data.[91]

It is striking that even the commodity that the BLS found exhibited >10% price increases most frequently month to month—petroleum products like gasoline and diesel—the fluctuations *also* coincided with acknowledged disruptions of the oil or refined products markets:[92]

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[89] *Used Cars and Trucks in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SETA02 (last accessed January 14, 2026).

[90] One interesting case is the used car market, which had the first >10% month-on-month increase in recent decades in May to June 2021, and exhibited an average of 18% price increase on a three-month window between April 2021 and August 2021. The used car market disruption is unusual because the "change in the market" that "resulted from" the onset of the COVID-19 emergency did so because of the shutdown in *new* car sales which took around a year to flow through to the new car market. *See* 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). Curiously, new car sale prices did not experience a >10% increase even during the COVID-19 pandemic according to BLS data. Nonetheless, used car sales experienced >10% increases during a disruption, because the onset date of the used car disruption was *not* the date on which the COVID-19 emergency began but when the "change in the market" for used cars resulting from the emergency became "actual or imminently threatened." The relevant data strongly suggests that date was on or around April 2021, even though that disruption start date is some distance from the triggering event.

[91] *Dairy and Related Products in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SEFJ (last accessed January 14, 2026) (available data is limited to 2017 and forward; note as well that certain dairy products are subject to complex overlapping statutory schemes that limit the usefulness of this product category for comparison; *see generally* G.B.L. § 396-rr); *Fruits and Vegetables in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SAF113 (last accessed January 14, 2026) (available data is limited to 2017 and forward); *Meats, Poultry, Fish, and Eggs in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SAF112 (last accessed January 14, 2026) (available data is limited to 2017 and forward); *Nonalcoholic Beverages and Beverage Materials in Northeast Urban, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0100SAF114 (last accessed January 14, 2026).

[92] For CPI index prices, *see 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). For average prices, *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); *Gasoline, Unleaded Midgrade, per Gallon/3.785 liters in Northeast Urban, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU010074715 (last accessed January 14, 2026); *Gasoline, Unleaded Premium, per Gallon/3.785 Liters in Northeast Urban, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU010074716 (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); *Automotive Diesel Fuel, per Gallon/3.785 Liters in Northeast Urban, Average*

- Rapid increases in price between February and June 2022 coincided with the Russian invasion of Ukraine;[93]
- Price increases in late 2020 to early 2021 coincided with the deepening of the COVID-19 pandemic;[94]
- "Unexpected disruptions" in Canada and Nigeria drove a mild >10% month to month price spike in April 2016;[95]
- Price increases in late 2017 through 2018 coincided with a severe shortage of oil induced by members of the OPEC+ cartel;[96]
- The civil disorder (and subsequent military action in related coups d'état) associated with the Arab Spring coincided with significant price increases in late 2010 and early 2011;[97]
- Price spikes in 2007 through 2009 occurred during, variously, military action by separatists disruption key production facilities in Nigeria, a U.S. attack on Iranian assets, and an imminently threatened Israeli attack on Iran;[98]
- Increases in mid-2006 arose from an abnormal market disruption resuling from the war between Israel and Lebanon;[99]
- Increases in late 2005 and early 2006 coincided with Hurricane Katrina's disruption

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Price, Not Seasonally Adjusted, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU010074717 (last accessed January 14, 2026).

[93] *See* Pat Obi et al., *An Event Study on the Reaction of Equity and Commodity Markets to the Onset of the Russia–Ukraine Conflict*, 16 J. RISK AND FIN. MGMT. 256 (2023) (examining price spikes in both emerging and G7 markets).

[94] *See* Cheima Gharib et al., *Impact of COVID-19 Pandemic on Crude Oil Prices: Evidence from Econophysics Approach*, 74 RES. POL'Y 102392 (2021); *U.S. Gasoline Prices Have Been Rising with Crude Oil Prices*, U.S. ENERGY INFO. ADMIN. (Mar. 30, 2021), https://www.eia.gov/todayinenergy/detail.php?id=47357.

[95] Am. Auto. Ass'n, *Average U.S. Gas Prices Climb to 2016 High* (June 13, 2016), https://gasprices.aaa.com/average-u-s-gas-prices-climb-2016-high/ ("Crude oil prices have increased due to unexpected disruptions in places like Canada and Nigeria").

[96] *See* Denton Cinquegrana, *2018 Oil Price Recap: Looking Back at an Oddball Year*, OIL PRICE INFO. SERV. (Dec. 17, 2018), https://www.opisnet.com/blog/2018-oil-price-recap/.

[97] *2011 Brief: Brent crud oil averages over $100 per barrel in 2011*, U.S. ENERGY INFO. ADMIN. (Jan. 12, 2012), https://www.eia.gov/todayinenergy/detail.php?id=4550.

[98] *See* Graham Bowley, *One Reason Gas Is Emptying Your Wallet: Nigeria*, N.Y. TIMES (June 29, 2008), https://www.nytimes.com/2008/06/29/weekinreview/29bowley.html; James Kanter, *OPEC Chief Warns of 'Unlimited' Oil Prices if Iran Is Attacked*, N.Y. TIMES (July 10, 2008), https://www.nytimes.com/2008/07/10/business/worldbusiness/10iht-opec.3.14397820.html; Michael Grynbaum, *Oil Prices Continue to Rise*, N.Y. TIMES (Oct 26, 2007), https://www.nytimes.com/2007/10/26/business/worldbusiness/26cnd-econ.html; James Smith, *The 2008 Oil Price Shock: Markets or Mayhem?*, Resources.org (Nov. 5, 2009), https://www.resources.org/common-resources/the-2008-oil-price-shock-markets-or-mayhem/ (listing disruptions).

[99] *See* Stephen Weisman, *As the Price of Oil Soars, So Does Its Power to Shape Politics From Washington to Beijing*, N.Y. TIMES (July 25, 2006), https://www.nytimes.com/2006/07/25/world/middleeast/25oil.html.

to the oil and gas market;[100]

- Prices increased amidst the imminent threat of, and further disruption caused by, the 2003 U.S. invasion of Iraq.[101]

In the specific context of energy, particularly petroleum essential products, the price gouging statute is implicated more often because a triggering event for a disruption includes "failure or shortage of electric power or other source of energy." Thus, *any* oil shortage, including one induced by a cartel, is arguably a statutory trigger of an "abnormal market disruption" even if the highly unstable nature of the oil and gas market might lead one to colloquially describe these fluctuations as "normal." Thus the fluctuations of prices for petroleum products are not ordinary-course fluctuations but fluctuations taking place in repeated abnormal market disruptions as that term is defined by statute. That shortages of energy supplies standing alone trigger the statute is unsurprising given that price gouging of refined products was the initial impetus for the statute and one of its most significant amendments.[102]

Although data for food, especially data limited to the Northeast region, were more limited, a wide variety of food staples did not experience >10% price fluctuations outside of abnormal market disruptions between 1998 and the latest year for which there is data, including:

- apples,[103]
- baby food and formula,[104]
- bacon and related products,[105]
- bananas,[106]

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[100] *See* Jad Mouawad & Simon Romero, *Gas Prices Surge as Supply Drops*, N.Y. TIMES (Sept. 1, 2005), https://www.nytimes.com/2005/09/01/business/gas-prices-surge-as-supply-drops.html.

[101] *See* David Leonhardt, *Jump in Price of Oil Puts New Strains on Economy*, N.Y. TIMES (Mar 2, 2003), https://www.nytimes.com/2003/03/02/business/jump-in-price-of-oil-puts-new-strains-on-economy.html

[102] *See* L. 1979, ch. 730 § 1, eff. Nov 5, 1979 (specifically citing heating oil crisis as impetus for law); Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6 (same, Exxon Valdez spill and invasion of Kuwait).

[103] *Apples in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFK01 (last accessed June 28, 2024).

[104] *Baby Food and Formula in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFT05 (last accessed June 28, 2024).

[105] *Bacon and Related Products in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS04011 (last accessed June 28, 2024).

[106] *Bananas in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFK02 (last accessed June 28, 2024).

- bread,[107]
- breakfast cereal,[108]
- canned fruits,[109]
- canned vegetables,[110]
- chicken,[111]
- crackers,[112]
- flour,[113]
- frankfurters,[114]
- fresh fish and seafood,[115]
- frozen and freeze dried prepared foods,[116]
- frozen vegetables,[117]
- ham,[118]
- lunchmeats,[119]

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[107] *Bread in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFB01 (last accessed June 28, 2024).

[108] *Breakfast Cereal in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFA02 (last accessed June 28, 2024).

[109] *Canned Fruits in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS13031 (last accessed June 28, 2024).

[110] *Canned Vegetables in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS14021 (last accessed June 28, 2024).

[111] *Chicken in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFF01 (last accessed June 28, 2024).

[112] *Crackers, Bread, and Cracker Products in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS0206A (last accessed June 28, 2024).

[113] *Flour and Prepared Flour Products in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFA01 (last accessed June 28, 2024).

[114] *Frankfurters in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS05011 (last accessed June 28, 2024).

[115] *Fresh Fish and Seafood in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFG01 (last accessed June 28, 2024).

[116] *Frozen and Freeze Dried Prepared Foods in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFT02 (last accessed June 28, 2024).

[117] *Frozen Vegetables in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS14011 (last accessed June 28, 2024).

[118] *Ham in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFD02 (last accessed June 28, 2024).

[119] *Lunchmeats in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS0501A (last accessed June 28, 2024).

- margarine,[120]
- peanut butter,[121]
- rice,[122]
- instant coffee,[123]
- roasted coffee,[124]
- soups,[125] and
- sugar and sugar substitutes.[126]

There are exceptions: lettuce, tomatoes, and oranges experienced frequent fluctuations in price.[127] But that is to be expected for these highly weather-dependent crops. The price gouging statute defines a disruption as "*any* change in the market . . . resulting from stress of weather." Thus lettuce, which perishes faster than perhaps any other foodstuff of its significance, is particularly "vulnerable to weather-related disruptions" (there are no lettuce granaries) and thus will frequently experience abnormal market disruptions as the statute defines that term.[128] Like oil products, some kinds of food are more prone to statutory triggers. And like oil products, the reservation of these >10% price spikes to food undergoing abnormal market disruptions is still more evidence that gross disparities are >10% price disparities. Even setting aside these products, the overall picture across the vast

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[120] *Margarine in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS16011 (last accessed June 28, 2024).

[121] *Peanut Butter in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS16014 (last accessed June 28, 2024).

[122] *Rice in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS01031 (last accessed June 28, 2024).

[123] *Instant Coffee in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS17032 (last accessed June 28, 2024).

[124] *Roasted Coffee in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS17031 (last accessed June 28, 2024).

[125] *Soups in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFT01 (last accessed June 28, 2024).

[126] *Sugar and Sugar Substitutes in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFR01 (last accessed June 28, 2024).

[127] *Lettuce in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFL02 (last accessed June 28, 2024); *Tomatoes in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFL03 (last accessed June 28, 2024); *Oranges, including Tangerines in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SS11031 (last accessed June 28, 2024).

[128] Richard Sexton & Mingxia Zhang, *Can Retailers Depress Lettuce Prices at Farm Level?* 49 CAL. AGRIC. 14 (1995), https://hilgardia.ucanr.edu/fileaccess.cfm?article=169900&p=HHYWMZ (last accessed July 18, 2024); Greg Johnson, *Bad Weather Causing Lettuce, Leaf Prices to Surge*, PRODUCE BLUE BOOK (Oct 10, 2022), https://www.producebluebook.com/2022/10/10/bad-weather-causing-lettuce-leaf-prices-to-surge/.

generality of food products is one in which price fluctuations of 10% or greater, when they happen at all, occur during abnormal market disruptions. It is this overall picture that informs the rulemaking and supports the creation of a 10% gross disparity threshold.

Even using the average price statistics—which are less readily comparable across time because the sample basket varies with each measurement and are thus more volatile—it was striking that various staples also exhibited the pattern of <10% increases outside abnormal market disruptions and >10% increases within them:[129]

- **Flour** average price increases more than 10% month on month have not occurred since 2008, although two and three-month >10% increases were observed coinciding with the Russian invasion of Ukraine, a major wheat exporter.[130] The four one-month >10% spikes in flour prices in the twenty-first century, observed in January and May of 2001, January 2002, and January 2005, coincided with one of the most severe periods of drought ("stress of weather") observed in U.S. history,[131] combined with historic droughts in Australia, another major U.S. wheat supplier.[132]
- **Rice** average prices have not increased by more than 10% month on month except at the onset of the abnormal market disruption set off in 2008 by a complex mix of civil disorder and government export limitations in India and other major rice-producing countries.[133]
- The average price of **sugar** has not risen over 10% month on month since 1998.[134]

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[129] BLS often only provided monthly food prices data on a nationwide basis rather than a census region basis. Nonetheless, because it is relative fluctuations in price rather than absolute prices that are the focus of the analysis, OAG Staff found this data to be at least suggestive.

[130] *See Flour, White, All Purpose, per lb. (453.6 gm) in U.S. City Average, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU0000701111 (last accessed January 14, 2026).

[131] *See* Richard R. Heim Jr., *A Comparison of the Early Twenty-First Century Drought in the United States to the 1930s and 1950s Drought Episodes*, 98 BULL. AM. METEOROLOGICAL SOC'Y 2579 (2017); *see also* JOSEPH P. JANZEN, ET AL., DECONSTRUCTING WHEAT PRICE SPIKES: A MODEL OF SUPPLY AND DEMAND, FINANCIAL SPECULATION 35 (2014), https://www.ers.usda.gov/webdocs/publications/45199/46439_err165.pdf?v=0 (concluding that "[w]heat price spikes are fundamentally driven and strongly associated with shocks to current supply" and that "[a]gricultural essential production remains susceptible to weather-related risk and other factors that cause unexpected variation in available supply").

[132] *See* Albert I. J. M. van Dijk et al., *The Millennium Drought in Southeast Australia (2001-2009): Natural and Human Causes and Implications for Water Resources, Ecosystems, Economy, and Society*, 49 WATER RES. RSCH. 1040 (2013).

[133] *Rice, White, Long Grain, Uncooked, per lb. (453.6 gm) in U.S. City Average, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU0000701312 (last accessed January 14, 2026); TOM SLAYTON, RICE CRISIS FORENSICS: HOW ASIAN GOVERNMENTS CARELESSLY SET THE WORLD RICE MARKET ON FIRE (2009), https://www.cgdev.org/sites/default/files/1421260_file_Slayton_Rice_Crisis_Forensics_FINAL.pdf

[134] *Sugar, White, All Sizes, per lb. (453.6 gm) in U.S. City Average, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU0000715211 (last accessed January 14, 2026).

- For a final example, consider the most essential energy commodity in the New York economy: **coffee**. This life-sustaining staple has also exhibited minimal average price variation except during disruptions: in 25 years, the only period in which coffee experienced a month-on-month increase of over 10% (10.05%, to be precise), was March 2011[135] after severe coffee bean crop failures caused by stress of weather.[136]

In addition, in connection with OAG's ongoing investigation into the price gouging of baby formula in the wake of the Abbott Laboratories Sturgis formula plant shutdown of February 17, 2022, Staff examined baby formula price changes.[137] OAG's baby formula investigation differs from other investigations discussed earlier in this report in that it examined prices charged as late as eight months following OAG's proposed onset date of February 17, 2022. But it is the exception that proves the rule: broadening the time frame of analysis to price changes encountered over a *12* month period, baby formula prices did not exhibit a >10% increase until one month after the Sturgis plant shutdown.[138] In other words, even over the extended time period used in the investigation, >10% price increases from pre-disruption prices occurred only during an abnormal market disruption where 1/5th of domestic baby formula production was suddenly taken offline.

The above figures all come from surveys and averages and so it is possible that these measures of central tendency obscure individual merchant-level pricing changes that would exceed 10% in the usual course. But such a conclusion would rest on the premise that individual merchants are rapidly fluctuating their *non-cost-justified* prices in such a way they cancel each other out, with deep rivers of sudden >10% month-on-month price cuts cancelled out by high mountains of sudden >10% month-on-month price increases. Such a conclusion requires both ignoring extensive evidence for "price stickiness"[139] (that is, the tendency of prices outside disruptions to remain firm even when it would be economically rational for a business to increase or decrease them) and conceding that the relevant increases were substantial deviations from the market—because market participants of

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[135] *Coffee, 100%, Ground Roast, All Sizes, per lb. (453.6 gm) in U.S. City Average, Average Price, Not Seasonally Adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/APU0000717311 (last visited January 14, 2026).

[136] Elizabeth Rosenthal, *Heat Damages Colombia Coffee, Raising Prices*, N.Y. TIMES (Mar. 9, 2011), https://www.nytimes.com/2011/03/10/science/earth/10coffee.html. Notably, the only sustained period of >10% price increases on a two- or three-month lookback basis also coincided with this string of crop failures.

[137] *See Matter of James v Walgreen Co.*, Assurance of Discontinuance, No. 24-022 (Mar. 7, 2024), https://ag.ny.gov/sites/default/files/settlements-agreements/walgreens-aod-fully-executed.pdf.

[138] *Baby Food and Formula in U.S. city average, all urban consumers, not seasonally adjusted*, BUREAU OF LAB. STATS., https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SEFT05 (last visited January 14, 2026).

[139] *See* Andres Blanco, Corina Boar, Callum J. Jones & Virgiliu Midrigan, *Non-Linear Inflation Dynamics in Menu Cost Economies* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32094, 2024), https://www.nber.org/papers/w32094 (discussing how price rigidity is higher during small macroeconomic shocks); Mikhail Golosov & Robert E. Lucas, Jr., *Menu Costs and Phillips Curves*, 115 J. POL. ECON. 171 (2007).

equal economic weight not only did not increase prices but lowered them to cancel out the increases.

For-Hire Ground Transportation ("Ride Hailing")

As the previous section discussed, across a very wide basket of goods and services a >10% price fluctuation is a distinctive characteristic of price movement in the short term associated with statutory abnormal market disruptions.

Uber and Lyft, in comments to the proposed rules, argue that this is not true of their products, pointing to fluctuations inherent to their dynamic pricing model. To evaluate these claims, OAG conducted an analysis of taxi ride data for the reasons set out in the Regulatory Impact Statement and Assessment of Public Comment.

To do this examination, Staff used the published taxicab fare schedule,[140] excluding direct taxation or government fees which are not relevant to a price fluctuation analysis as they remain constant or increase directly with price.

OAG examined TLC data for taxis (using Rate Code 1, the dominant taxi pricing scheme)during Hurricane Ida.[141] OAG attempted to match each taxi ride during the hurricane with the ride in the 30 days prior to the hurricane that most nearly resembled the hurricane-period ride as a matter of length of ride time, day of the week the ride took place, time of day the ride took place, and distance of ride.

The method the Staff used proceeds in two steps. First, after identifying the ride to scrutinize for potential price gouging, Staff created a pool of "relevant rides." That pool is populated by all rides that took place in the 30 days prior to the disruption that departed: (1) From the same locality—either New York City or, outside the city, the same county, (2) within one hour of the same time of day, and (3) on the same day of week—allowing the "same day" to be the next or previous day for rides close to midnight. Second, Staff compared all the relevant rides against the scrutinized ride and ranked them twice: first for closeness in absolute distance (to the nearest 0.1 of a mile); next, in closeness of time (to the nearest second). The relevant ride with the highest combined rank was the chosen comparator.

For example, the relevant ride that will be highest ranked against a scrutinized 6.13 mile ride that took 15 minutes and 11 seconds would be a ride that took 6.13 miles (rank #1 in distance) and took 15 minutes and 11 seconds (rank #1 in time). The two rankings are weighed equally, so if relevant ride A took 6.12 miles and 15 minutes and 11 seconds it would have the same combined ranking as ride B that took 6.13 miles and took 15 minutes and 12 seconds. Ties go to the taxi, that is, of two tied rides, the ride that was more

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

[141] *See Post Tropical Depression Ida: Summary of Ida, September 1st-2nd, 2021*, NAT'L WEATHER SERVICE, https://storymaps.arcgis.com/stories/2bb3162ec37e43e791020d9d8f093bbf.

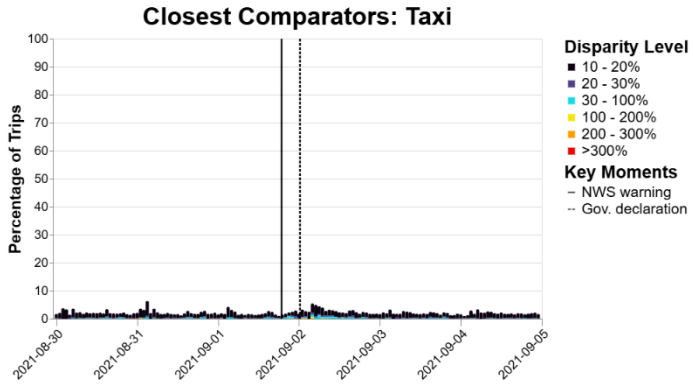
expensive was identified as the Closest Comparator (the higher the price of the Closest Comparator, the higher the price that the scrutinized ride may be).

All data was public data supplied by the NYC Taxi & Limousine Commission.[142] Taxi trips analyzed were "standard city rate" yellow taxi trips that charge the standard time-and-distance metered fare. Standard city rate trips make up around 90% of yellow taxi trips recorded during the time periods analyzed for this report.

Staff only considered trips whose recorded distance, duration, and price were all greater than 0; Staff did not consider trips with distances greater than 100 miles or durations greater than 4 hours, considering these to be statistical anomalies. For price, Staff used the base fare before taxes, tolls, tips, and fees (field "fare_amount" for yellow taxis). For each trip, Staff found its Closest Comparator in the 30 days prior to the onset date.

To decrease the computational time involved in ranking, those who wish to replicate Staff's analysis may find it helpful to utilize a near-neighbor search prior to ranking. Due to the additive nature of the ranking method, any such near-neighbor search must be performed disjunctively in each ranked variable (i.e., distance and duration) to ensure that the ranking of trips is consistent.

Once this matching has been done, taxi prices remain stable once time and distance are adjusted for:



[142] NYCTLC, *TLC Trip Record Data*, https://www.nyc.gov/site/tlc/about/tlc-trip-record-data.page (last accessed Dec. 16, 2025).

Conclusion

A review of BLS CPI data and ride-hail specific data indicates that over the more usual 30-day-or-less window in which price gouging investigations are conducted, for a wide variety of essential products, 10% or greater price changes occur overwhelmingly during times of abnormal market disruption and not in the ordinary course of business.